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IN THE SUPREME COURT OF FLORIDA

CHARLES HOWARD GIPSON, :

Petitioner, :

vs. :

Case No. 80,367

STATE OF FLORIDA, :

Respondent. :

\_\_\_\_\_ :

DISCRETIONARY REVIEW OF DECISION OF THE  
DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

AMENDED PETITIONER'S BRIEF ON JURISDICTION

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Trial court case numbers 88-16584, 89-7962, 90-16715, and 90-17327 were appealed together in the instant case.

88-16584

On December 17, 1988, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information charging the Petitioner, CHARLES HOWARD GIPSON, with one count of robbery, contrary to section 812.13, Florida Statutes (1987). (R 9-10) This offense allegedly occurred on October 15, 1988. (R 9)

On December 14, 1988, Mr. Gipson pled guilty to robbery. (R 11-12) The trial court placed Mr. Gipson on five years probation. (R 16-17) The sentencing guidelines recommended a sentence of any nonstate prison sanction. (R 13-14)

On July 31, 1989, the trial court revoked Mr. Gipson's probation (R 27) and sentenced him to 2 1/2 years Florida state prison to be followed by five years probation. (R 24-25)

On March 29, 1991, the trial court revoked Mr. Gipson's probation (R 124-125) and sentenced him to nine years Florida state prison, to run consecutively with the sentence in case number 90-17327. (R 38-39, 290-291) The guideline scoresheet permitted a sentence of 4 1/2 to 9 years imprisonment. (R 117, 288)

89-7962

On June 7, 1989, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an

information charging Mr. Gipson with one count of delivery of cocaine, contrary to section 893.13(1)(a), Florida Statutes (1987). (R 47-48) This alleged offense occurred on May 5, 1989. (R 47)

On June 30, 1989, Mr. Gipson pled guilty as charged. (R 49-50) On July 31, 1989, the trial court placed Mr. Gipson on five years probation, to run concurrently with case number 88-16584. (R 51-52)

On March 29, 1991, the trial court revoked Mr. Gipson's probation (124-125), and sentenced him to nine years Florida state prison, to run concurrently with case number 88-16584. (R 63-64, 290-291) The guideline scoresheet permitted a sentence of 4 1/2 to 9 years imprisonment. (R 117, 288)

90-16715

On November 19, 1990, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information charging Mr. Gipson with one count of delivery of cocaine, contrary to section 893.13(1)(a), Florida Statutes (1989), and one count of possession of cocaine, contrary to section 893.13(1)(f), Florida Statutes (1989). (R 73-74) These alleged offenses occurred on August 3, 1990. (R 73) On November 27, 1990, the trial court signed a notice of intent to treat Mr. Gipson as an habitual felony offender. (R 110) On December 4, 1990, the trial court notified Mr. Gipson that it intended to treat him as an habitual felony offender. (R 111)

On February 26 and 27, 1991, Mr. Gipson was tried before a jury. (R 127-200) On February 27, 1991, the jury convicted Mr. Gipson of both charges. (R 113, 114, 197) On March 29, 1991, the

trial court adjudicated Mr. Gipson guilty and sentenced him to thirty years Florida state prison as an habitual felony offender for delivery of cocaine, and ten years Florida state prison as an habitual felony offender for possession of cocaine, to run consecutively. (R 84-88, 290) The sentencing guidelines scoresheet permitted a sentence of 4 1/2 to 9 years imprisonment. (R 117, 288)

90-17327

On November 29, 1990, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information charging Mr. Gipson with one count of delivery of cocaine, contrary to section 893.13(1)(a), Florida Statutes (1989). (R 94-95) This alleged offense occurred on October 30, 1990. (R 94) On December 4, 1990, the trial court signed and filed a notice of intent to treat Mr. Gipson as an habitual felony offender. (R 111)

On February 26, 1991, Mr. Gipson was tried by a jury. (R 201-285) The jury convicted Mr. Gipson as charged. (R 112, 282) On March 29, 1991, the trial court adjudicated Mr. Gipson guilty (R 106-107, 290), and sentenced him to thirty years Florida state prison as an habitual felony offender, to run consecutively to his case number 90-16715. (R 108-109, 290) The sentencing guideline scoresheet permitted a sentence of 4 1/2 to 9 years imprisonment. (R 117, 288)

On April 4, 1991, Mr. Gipson filed a timely notice of appeal for all four cases. (R 118)

On appeal, Mr. Gipson raised three issues: (1) the sentencing of Mr. Gipson where the trial judge signed and filed notice of intent to treat Mr. Gipson as an habitual felony offender, (2) imposition of consecutive habitualized sentences upon Mr. Gipson, and (3) running Mr. Gipson's guideline sentences consecutive to Mr. Gipson's habitual felony offender sentences scored on the same guideline scoresheet. The Second District Court of Appeal rejected all three arguments in its June 19, 1992, decision. Upon rehearing, the court affirmed the lower court decision, however contrary to a decision in the Fifth District as to the third issue. The Second District Court of Appeal cites a case that is presently before this Court on the same issue and is in conflict with a decision of the Fifth District.

### SUMMARY OF THE ARGUMENT

There are two grounds upon which jurisdiction can be taken in this case: (1) finding that running a guidelines sentence consecutive to a habitualized sentence illegally exceeds the guidelines; and (2) finding that the trial court can impose a guideline sentence consecutive to a habitualized sentence does not illegally depart from the guidelines not only conflicts with case law of another District Court of Appeal but is also an issue presently pending before this Court on express and direct conflict.



## ARGUMENT

### ISSUE I

WHETHER THE DECISION IN Gipson v. State, Case Number 91-1177 (Fla. 2d DCA July 24, 1992), IS IN CONFLICT WITH A DISTRICT COURT OF APPEAL OPINION HOLDING IT IS ILLEGAL TO IMPOSE A GUIDELINE SENTENCE CONSECUTIVE TO A HABITUAL SENTENCE?

In Wood v. State, 593 So.2d 557 (Fla. 5th DCA 1992), the court held that running the guideline life sentence consecutively with a sixty-year habitual sentence illegally exceeded the guidelines. In Boomer v. State, 17 F.L.W. D774 (Fla. 2d DCA March 20, 1992), the Second District Court of Appeals held that two concurrent nine-year guideline sentences running consecutively with a capital life sentence did not exceed the guidelines. In Boomer, the Second District expressed direct conflict with the Fifth District Court's Wood holding.

In the instant case, the Second District affirmed the running of Petitioner's nine year guideline sentence consecutive to Petitioner's other habitualized sentences scored on the same guideline scoresheet. The Second District noted that it was contrary to the decision in Wood. The Second District Court of Appeal is in direct conflict with the Fifth District Court of Appeals on this issue.

## ISSUE II

WHETHER THE ISSUE IN GIPSON, supra,  
ON ALLOWING THE IMPOSITION OF A  
GUIDELINES SENTENCE CONSECUTIVE TO A  
NONGUIDELINES SENTENCE IS PRESENTLY  
PENDING BEFORE THIS COURT IN ANOTHER  
CASE?

Mr. Gipson contested the imposition of a guidelines sentence consecutive to an habitual sentence, but the Second District Court of Appeal upheld the sentence on the basis of Boomer v. State, 17 F.L.W. D774 (Fla. 2d DCA 1992). The Second District did express direct conflict with the Fifth District's decision in Wood. Inasmuch as this Court has the upward departure issue already before it, this should accept jurisdiction over Mr. Gipson's case. See, Jollie v. State, 405 So.2d 418 (Fla. 1981).

## CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Petitioner has demonstrated that conflict does exist with the instant decision and another District Court of Appeal so as to invoke discretionary review. Petitioner has also demonstrated that one of his issues is also presently pending before the Court so as to invoke discretionary review.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Katherine V. Blanco, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 7<sup>th</sup> day of September, 1992.

Respectfully submitted,



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APPENDIX

PAGE NO.

1. Decision of The District Court of Appeal  
of Florida, Second District in Gipson v. State,  
Case No. 90-1177 (Fla. 2d DCA July 24, 1992) A1

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

CHARLES HOWARD GIPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-01177

Opinion filed July 24, 1992.

Appeal from the Circuit Court  
for Hillsborough County;  
Harry Lee Coe, III, Judge.

James Marion Moorman, Public  
Defender, and Timothy A.  
Hickey, Assistant Public  
Defender, Bartow, for  
Appellant.

Robert A. Butterworth, Attorney  
General, Tallahassee, and  
Katherine V. Blanco, Assistant  
Attorney General, Tampa, for  
Appellee.

PER CURIAM.

Affirmed. See Boomer v. State, 596 So. 2d 730 (Fla. 2d  
DCA 1992); contra Wood v. State, 593 So. 2d 557 (Fla. 5th DCA  
1992).

SCHOONOVER, A.C.J., and HALL and THREADGILL, JJ., Concur.

Received By

JUL 24 1992

Public Defender's Office

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Katherine V. Blanco, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 31<sup>st</sup> day of August, 1992.

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