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CLERK, SUPREME COURT

By Chief Clerk

IN THE SUPREME COURT OF FLORIDA

RYAN LEE CHEEK,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 83,279

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

✓
DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER
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COUNSEL FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTC	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
<p>THE FLORIDA SUPREME COURT HAS JURISDICTION TO ACCEPT THE INSTANT CASE FOR REVIEW WHERE IT WAS AFFIRMED ON THE AUTHORITY OF A CASE WHICH IS CURRENTLY PENDING REVIEW BEFORE THE COURT.</p>	
CONCLUSION	5
CERTIFICATE OF SERVICE	5

TABLE OF CTTATIONS

PAGE NO.

CASES CITED:

<u>Cheek v. State</u> 19 HW D220 (Fla. 5th DCA January 28, 1994)	2
<u>Jollie v. State</u> 405 So.2d 418 (Fla. 1981)	4
<u>Jones v. State</u> 619 So.2d 418 (Fla. 5th DCA 1993)	2, 4
<u>Jones v. State</u> Florida Supreme Court Case Number 81,970	4

OTHER AUTWORITIEC:

Section 800.04(3), Florida Statutes	1
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IN THE SUPREME COURT OF FLORIDA

RYAN LEE CHEEK,)
)
 Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
 Respondent.)

CASE NO. 83,279

RESPONDENT'S BRIEF ON JURISDICTION

STATEMENT OF THE CASE AND FACTS

On October 7, 1991, an information was filed in Orange County Circuit Court charging Petitioner with ten (10) counts of committing a lewd, lascivious, or indecent act upon a child. (R138-141) All the charges involved the same fourteen (14) year old consenting victim, S T

Petitioner filed a written motion to dismiss the charges on the grounds that Section 800.04(3), Florida Statutes, was unconstitutional as it applied to him. (R188-190) Following a hearing, the motion was denied. (R11-74)

On September 10, 1992, Petitioner agreed to plead no contest to an amended information charging a single count of lewd and lascivious assault and one count of grand theft of a motor vehicle. (R2,210) Petitioner specifically reserved his right to

appeal the denial of his earlier motion to dismiss on constitutional grounds. (R4) At sentencing, the court withheld adjudication and placed Petitioner on probation. (R222-227)

Timely notice of appeal was filed, Petitioner **was** adjudged insolvent and the Office of the Public Defender **was** appointed for appeal. (R229,240)

On appeal the Fifth District Court affirmed. **Cheek v. State**, 19 FLW D220 (Fla. 5th DCA January **28**, 1994). The affirmance was expressly based on the District Court's prior opinion addressing the identical issue, Jones v. State, 619 So.2d 418 (Fla. 5th DCA 1993).

Timely notice to invoke discretionary review was filed.

SUMMARY OF ARGUMENT

Where a district court of appeal affirms a case with a citation to another case which is currently pending review before the Florida Supreme Court, this Court automatically has jurisdiction to review the case.

ARGUMENT

THE FLORIDA **SUPREME COURT HAS**
JURISDICTION TO ACCEPT THE INSTANT CASE
FOR REVIEW WHERE IT **WAS AFFIRMED ON THE**
AUTHORITY OF A CASE WHICH IS CURRENTLY
PENDING REVIEW BEFORE THE COURT.

In the instant case Petitioner's convictions were affirmed by the Fifth District Court of Appeal on the **authority** of *Jonec v. State*, 619 So.2d 418 (Fla. 5th DCA 1993). The decision cited as controlling authority is currently pending review in the Supreme Court of Florida. *Jones v. State*, Florida Supreme Court Case Number 81,970.

In *Jollie v. State*, 405 So.2d 418 (Fla. 1981), this Court held that a district court of appeal per curiam opinion which cites as controlling authority a decision which is pending review in the Supreme Court constitutes a prima facie **express** conflict and allows the Supreme Court to exercise its jurisdiction. Therefore, on the clear authority **of Jollie**, this Court has jurisdiction to review the instant case.

CONCLUSION

BASED UPON the foregoing arguments and authorities, Petitioner requests that this Honorable Court exercise its discretionary jurisdiction and accept the instant case for review.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal, this 7th day of March, 1994.



DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

RYAN LEE CHEEK,)
)
 Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
 Respondent.)

CASE NO. 83,279

A P P E N D I X

Cheek v. State, 19 HW D220 (Fla. 5th DCA January 28, 1994)

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✓ 73-31
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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 1994

NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING MOTION, AND,
IF FILED, DISPOSED OF.

RYAN LEE CHEEK,
Appellant,

v.

CASE NO. 92-3117 ✓

STATE OF FLORIDA,
Appellee.

RECEIVED

JAN 28 1994

**PUBLIC DEFENDER'S OFFICE
7th CIR. APP. DIV.**

Opinion filed January 28, 1994 ✓

Appeal from the Circuit Court
for Brevard County,
Martin Budnick, Judge.

James B. Gibson, Public Defender, and
Daniel J. Schafer, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Anthony J. Golden,
Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED.

See Jones u. State, 619 So. 2d 418 (Fla. 5th DCA 1993).

HARRIS, C. J., DAUKSCH and GOSHORN, JJ., concur.