IN THE SUPREME COURT OF FLORIDA

DARRYLE T. COOK,	)	
	)	
Petitioner/Appellant,	)	
	)	
versus	)	S.CT. CASE NO. 93,781
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 97-2923
	)	
Respondent/Appellee.	)	
	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERIT BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

At the motion to suppress hearing on August 4, 1997, Sgt. Robert Manley with Apopka Police Department went to the front door of a residence and was invited in when they asked for appellant, Darryl Cook. (Supplemental Volume, page 179-180) Chief Joseph Brown and Commander Call entered the residence at the same time. Sgt. Manley explained that Darryl Cook's name came up involving a robbery with a shooting. (Supplemental Volume, pages 180-182) Prior to leaving with the police officers, appellant wanted to speak with his brother and went in the laundry room so that they could speak in private. The door was left open to keep Darryl Cook in view. (Supplemental Volume, page 184) Mr. Cook asked to be handcuffed outside because he didn't want his family to view his being handcuffed. (Supplemental Volume, pages 186-187) Appellant was informed that Stacy Taylor (co-defendant) was in custody and had told the police everything about the robbery. At the police station, Robert Reilly - a member of Darryl Cook's family - was present throughout

the interview. (Supplemental Volume, page 189) On cross-examination, testimony was that no promises were made to the effect that appellant could go home if he made a statement consistent with that of Stacy Taylor's. (Supplemental Volume, page 192)

Commander David Call testified that on October 28, 1996, he was part of a criminal investigation division that went to a residence to collect a suspect, Darryl Cook. As Mr. Cook was getting ready to go to the station, Mr. Reilly wanted to have a discussion with Mr. Cook and they went into the laundry room. (Supplemental Volume, pages 195,198) Darryl Cook was handcuffed outside his residence, next to the patrol car. (Supplemental Volume, page 200) On cross-examination testimony was that this witness made no guarantees for Mr. Cook's cooperation. (Supplemental Volume, page 203)

Detective Sean Peters stated that appellant was a suspect in an attempted murder and armed robbery at the Recipe House and another armed robbery at the Pizza Hut. He identified a Miranda warnings waiver form

signed by appellant, prior to the interview. (Supplemental Volume, pages 205-206) Detective Peters was not aware of any promises made to Mr. Cook in exchange for his statement. Appellant's brother, Robert Reilly, was present during the interview. (Supplemental Volume, page 209) On cross-examination, Detective Peters testified that he was not at the house nor did he know what was said to Darryl Cook at the house regarding Stacy Taylor's statement. (Supplemental Volume, page 213) The state had no further witnesses. (Supplemental Volume, page 217)

Sara Tollar, mother of appellant, testified that she was present when the police officers came into her house. Detective Manley told Darryl that if he would give a statement, he would get out the next day. He also said Stacy gave a statement and was already back home. (Supplemental Volume, pages 218-219)

Darryle Cook testified that he had never been in trouble with the law before. Sgt. Robert Manley told appellant if he said the same thing that Stacy Taylor said, that he could go home. [Just like] Stacy who was

already at home. (Supplemental Volume, page 224) Detective Peters was not present when appellant gave his taped statement. Appellant did not initial each of his constitutional rights nor did he really understand those constitutional rights. (Supplemental Volume, page 225) Detective Peters did not explain each and every one of his constitutional rights, as he testified. Appellant gave the statement because they said if he said what Stacy Taylor said, that he could go home. (Supplemental Volume, page 226) On cross-examination, appellant stated he had completed the 10th grade. Appellant did not check off anything on his waiver of rights form. The only thing appellant was told was to sign at the numbers. Officer Manley told appellant most everything that Stacy Taylor had said. (Supplemental Volume, page 230) On redirect examination, appellant testified that he signed the paper after he had given the taped statement. (Supplemental Volume, page 231)

The court ruled that based upon the Miranda form introduced as an exhibit, coupled with the testimony of

Detective Peters, coupled with the affirmation by Mr. Cook on page 15 of his transcript that the Miranda warnings were appropriately given, and that Mr. Cook was advised of his rights, understood his rights, and waived those rights; the court concluded that the statement was voluntary. For the aforementioned reasons, the court denied the motion to suppress. (Supplemental Volume, pages 241-244)

For the record, defense counsel then stated that Mr. Cook had rejected a plea offer wherein low end guideline exposure would have been 14.2 something years in the Department of Corrections. Alternatively, Mr. Cook could face consecutive life sentences for the two robberies. (Supplemental Volume, page 245) The court also advised appellant that if he were convicted as charged, the scoresheet would exceed 350 points and the court would have the ability to impose a life sentence. (Supplemental Volume, page 247) Robert Power, the assistant state attorney, stated that the offer was now 15 years. (Supplemental Volume, page 249)

At day one of the trial on August 5, 1997,

testimony showed: John Lotti was employed at the Apopka Pizza Hut on October 25, 1996, and was present at 10:45 - washing the dishes. He observed one person standing who was wearing black jeans, a black shirt, and a ski mask or hood. Lotti was grabbed and a handgun was pointed at his right temple. When he said he had no money, he was hit over the head with the gun. Next, shift leader Esther Jones was escorted to the cash register. There were two robbers, both dressed about the same. (Trial Volume 1, pages 38-41) A shot was fired during the robbery, while Ms. Jones was at the register. Lotti was bleeding as a result from being hit in the head and did receive medical attention after the robbery. (Trial Volume 1, pages 42-43) On cross-examination, Lotti could not identify anyone who participated in the robbery. (Trial Volume 1, page 46)

Sharon Martin worked at Pizza Hut as a server on October 25, 1996. Two individuals with guns came in the back and grabbed them [she and Lotti] demanding money. One held his gun on them while the other went in the walk in cooler and got Esther. (Trial Volume 1,

pages 49-52) They demanded money and the taller one fired off a shot in the dining room. (Trial Volume 1, page 54) They were dressed in black and had masks. (Trial Volume 1, page 55) Both of them were also wearing gloves.

Priscilla Crews testified on October 25, 1996, that she was a waitress and cooked at the Recipe House. Four guys came in and fired a shot almost immediately. The guys ordered Ms. Crews and co-worker Mary Mullins to the floor. They had three guns and wanted money. (Trial Volume 1, pages 62-64) They took Mary's tip money, the money from the register, and wanted the money from the safe. One threatened to kill her. (Trial Volume 1, pages 65, 67) Ms. Crews finally got the safe open. Everything was filmed and Ms. Crews held onto the VCR tape until she gave it to the police. Mary had been shot as there was blood on her hands and on the back of her clothing. (Trial Volume 1, pages 68-70)

Esther Jones, shift manager at Pizza Hut, was closing on October 25, 1996, when somebody came up

behind her and grabbed her. She was instructed to open the register and open the safe by a person holding a gun and pointing it to her head. They reached in and took the money from the register. She was not able to open the register. (Trial Volume 1, pages 76-79) From the skin around the eyes, where the masks were, she could tell the assailants were black. (Trial Volume 1, pages 80-81, 88)

Mary Mullins testified on October 25, 1996, she was waiting tables at the Recipe House. The first one who came in had a gun, walked straight up and shot her. There were four young black males. (Trial Volume 1, pages 89-91) They demanded her $27 tip money. Then two of them came around and got her to open the register. Then Priscilla Crews went and opened the safe for them. After the robbery, the bullet had to be surgically removed. (Trial Volume 1, pages 92-97) On cross-examination, the witness could not say which person was holding the rifle. (Trial Volume 1, page 101)

At day two of the trial on August 6, 1997,

testimony showed: Apopka Police Officer Donald Edward Heston, Jr. was on duty on October 25, 1996. He observed a white Lincoln pass him at a high rate of speed. (Trial Volume 2, pages 112, 113) The vehicle drove into a driveway on a dead end street with four black males exiting the vehicle and running. None of them obeyed the command of: "Stop, Police." (Trial Volume 2, pages 114-116)

Officer Kenneth A. Letourneau responded to the Recipe House that evening. He observed one white female crying and kind of hysterical and another white female lying on the ground bleeding. (Trial Volume 2, page 121) He received the VCR tape and turned it over to evidence technician Dan Champion. (Trial Volume 2, pages 120-122)

Crime scene technician Daniel Champion identified the videotape he received from the Recipe House. (Trial Volume 2, pages 126-128)

Detective Sean Peters testified that he showed the videotape to Ms. Mullins. During the investigation, Darryle Cook became a suspect. Detective Peters

advised appellant of his Miranda rights. (Trial Volume two, pages 131,135) Peters watched appellant sign the waiver of rights form and place his initials at each of the numbers, except No. 2. The officer had no explanation/accounting for the missing initials for paragraph No. 2 (Trial Volume 2, pages 136, 137) Detective Peters made no promises in exchange for Mr. Cook's statement. (Trial Volume 2, page 140) On October 25, 1996, appellant was still a juvenile. (Trial Volume 2, page 143) On cross-examination, testimony was that appellant did not initial the paperwork wherein it indicated: he [appellant] understood everything he was saying could be used as evidence against him. Detective Peters did not know what promises, if any, were made to appellant before he got to the police station. (Trial Volume 2, pages 144, 146)

Watch Commander David Call went to the residence of Darrell Cook to place him under arrest for the armed robbery of the Recipe House. (Trial Volume 2, pages 150, 151) When Commander Call entered the house,

appellant was sitting on the couch engaged in a conversation with Detective Manley and the Chief. Commander Call did not personally promise anything in exchange for Mr. Cook's being arrested. Appellant and a Mr. Reilley proceeded to a laundry room to have a private conversation prior to appellant being transported back to the Apopka Police Department. Mr. Cook was handcuffed at the end of his driveway in the cul de sac area, next to the police car. (Trial Volume 2, pages 152-156)

Apopka Police Officer Robert Manley testified that he knocked on the door of appellant's residence and a younger female opened the door. The officers were invited in. Manley spoke with appellant and his mother or grandmother, but never spoke privately with anyone. (Trial Volume 2, pages 157-161) No promises were made, nor was appellant told that his statement had to match Stacy Taylor's. During appellant's interview which was conducted by Manley, additional people present were Commander Call, Detective Peters, and [appellant's brother] Robert Reilley. (Trial Volume 2, pages

162-169) The transcript of the taped statement of appellant was admitted into evidence over objection. (Trial Volume 2, page 179)

According to Detective Sgt. Manley, Mr. Cook said he was carrying a gun at the Recipe House. Mr. Cook pointed himself out on the video and said the plan was to get the money. Mr. Cook said there were three other people and they went to the Pizza Hut before going to the Recipe House. He stayed in the car during the Pizza Hut robbery. (Trial Volume 2, pages 184-186) Manley identified the tape of the interview he conducted with Darryle Cook and same was played for the jury. (Trial Volume 2, pages 213-214) Prior to taking the statement of appellant, a viewing of the VCR tape from the Recipe House was played and appellant pointed out who he was in the video. (Trial Volume 2, pages 215) On cross- examination, Manley denied having told appellant's mother that if appellant cooperated, that he would be able to come back home. Manley did discuss the gun and banana clip before he started the audio tape. (Trial Volume 2, page 221) The VCR tape from the

Recipe House was played for the jury after which the State rested. (Trial Volume 2, page 224)

Motion for judgment of acquittal was made as to all counts. (Trial Volume 2, page 225) The court only granted the judgment of acquittal as to the attempted first degree murder charge. (Trial Volume 2, page 242)

Defense called Sarah Tollar, mother of appellant. She testified that on October 28, 1996, some police came to her house. She could identify officer Manley and there were two others. Manley stated that if Darryle gave his statement that he would be home the next day because Darryle didn't have a prison record at all. (Trial Volume 2, pages 244-247)

Darryle Cook testified he was at home on October 28, 1996, when the police arrived at his house. At the police station, Manley did a lot of talking with appellant prior to turning on the audio tape. Appellant was told the police already had a statement and they went over most of it with appellant word for word. Manley told appellant that if he said the same thing as Stacy Taylor had said, that appellant could go

home. Appellant signed the waiver of rights form because he was told to do so by one of the Apopka police officers. Appellant did not hardly understand when being read to and did not understand everything on that piece of paper as he had never had a paper like that read to him before at any time in his life. (Trial Volume 2, pages 251-257) Appellant had never before been arrested. Appellant saw the VCR tape before he gave his statement. Appellant had nothing to do with the Pizza Hut robbery. Darryle Cook testified that he did not commit these robberies but that he was just going along with Detective Manley so that he could return home. (Trial Volume 2, pages 257-259) On cross-examination, Mr. Cook said he told the officers he had a gun in his hand at the Recipe House robbery because that was what he was told to say. (Trial Volume 2, pages 262-263) Mr. Cook did not check off the items on the Miranda rights form. (Trial Volume 2, page 270) Defense counsel renewed his judgment of acquittal motion, which was denied. (Trial Volume 2, page 275)

On August 7, 1997, the court directed a judgment acquittal with regard to Count IV in its entirety and submitted Counts I, II, III, V, VI, VII, VIII and IX to the jury. (Trial Volume 3, page 282)

Sentencing took place on October 15, 1997, before The Honorable A. Thomas Mihok. Verdicts entered on August 7, 1977, were as follows: on Count I there was a verdict of guilty of the lesser included offense of robbery, with a special finding that Mr. Cook did not possess a firearm nor did he wear a mask. As for Count II, the verdict what was guilty of the lesser included offense of attempted robbery, again with a special finding that appellant did not possess a firearm nor did he wear a mask. As to Count III, the jury found appellant guilty of the lesser included offense of attempted robbery with a special finding that appellant did not possess a firearm nor did he wear mask. Count IV was not submitted to the jury. As for Count V, Mr. Cook was found guilty of armed robbery with a firearm; with a special finding that he did possess a firearm and did wear a mask. As for Count VI, the jury found

appellant guilty of robbery with a firearm and that he did possess a firearm and wear a mask. On Count VII, found him guilty of possession of a firearm in the commission of a felony, with a special finding that he did use or possess a firearm. On Count VIII, the jury found appellant guilty of possession of a firearm by a minor and that he did possess a firearm. Count IX was resisting an officer without violence. (Sentencing Transcript, page 3-4) The court stated resisting without violence was a first-degree misdemeanor. (Sentencing Transcript, page 14) Count VII, possession of a firearm by a minor was also a first-degree misdemeanor. (Sentencing Transcript, page 15) With a scoresheet total of 188.8, the midrange sentence is 160.8 with 120.6 at the low end and the upper end being 201 [state prison months].

Sarah Toler testified that she did not know what happened that night but that she was sorry, because she brought him up right. She requested the court have mercy on him and give him another chance.

The court considered the pre-sentence investigation

and the report from the Department of Juvenile Justice. Because of the seriousness of the offense, juvenile sanctions were not appropriate. As regards Count I, the sentence was 160.8 months in the Department of Corrections with credit for 351 days time served. On Count II, attempted robbery, the sentence is 60 months with 351 days credit. The sentence on Count III, attempted robbery, was 60 months with 351 days credit. On Count V, robbery with a firearm, the sentence is 160.8 months with 351 days credit, with a three year minimum mandatory. On Count VI, robbery with a firearm, the sentence is 160.8 months with 351 days credit, with a three-year minimum mandatory - consecutive to the three-year minimum mandatory of Count V. On Count VII, possession of a firearm, the sentence is 160.8 months with 351 days credit. On Count VIII and IX, the sentence on each is 351 days with credit for 351 days time served. Mr. Cook was adjudicated guilty for each and every offense for which he was found guilty. All the sentences were to run concurrently, except for the three-year minimum

mandatories on Counts V and VI, which were to run consecutively. (Sentencing Transcript, pages 24-27)

SUMMARY OF THE ARGUMENT

The Criminal Reform Act of 1996 did not abolish appellate courts' ability to review fundamental, serious sentencing errors that are obvious from and supported by the record. If an appellate court has jurisdiction over a case, it has the discretion to address unpreserved issues in order to effect that portion of the Criminal Appeal Reform Act which permits appeals from fundamental errors whether preserved or not.

ARGUMENT

THE CRIMINAL APPEAL REFORM ACT OF 1996 DID NOT ABOLISH THE CONCEPT OF FUNDAMENTAL ERROR WITH REGARD TO SENTENCING ISSUES.

Petitioner appealed his convictions and sentences in the Sumter County Circuit Court to the Fifth District Court of Appeal arguing the trial court erred when imposing consecutive minimum mandatories. *See* Palmer v. State, 438 So. 2d 1 (Fla. 1983), where the holding was:

> We are primarily concerned with the issue of whether the trial court erred in imposing three-year mandatory minimums on each of thirteen consecutive sentences, for a total of thirty-nine years without eligibility for parole. We conclude that this portion of the sentences imposed constitutes reversible error.

The Fifth District Court of Appeal, per curiam, dismissed his appeal (APPENDIX) on August 7, 1998, citing Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), review pending, Florida Supreme Court Case Number 92,805.

In Maddox, the Fifth District Court of Appeal interpreted the Criminal Appeal Reform Act of 1996 and the 1996 amendments to the appellate and criminal rules as eliminating the concept of fundamental error as it had been previously recognized and applied in the context of sentencing.§924.051, Fla. Stat. (1996); Rule 9.140(d), Fla. R. App. P.; Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800,675 So. 2d 1374 (Fla. 1996). The Maddox decision "served notice" that unless properly preserved by a timely objection or a denied motion to correct a sentence, no issue would be addressed on appeal by the Fifth District. The en banc Maddox Court expressly disagreed with the contrary rulings in their respective districts of the courts in State v. Hewitt, 702 So. 2d 633 (Fla. 1st DCA 1997); Chojnowski v. State, 705 So. 2d 915 (Fla. 2d DCA 1997); Pryor v. State, 704 So. 2d 217 (Fla. 3d DCA 1998); Johnson v. State, 701 So. 2d 382 (Fla. 1st DCA 1997); Cowan v. State, 701 So. 2d 353 (Fla. 1st DCA 1997); Sanders v. State, 698 So. 2d 377 (Fla. 1st DCA 1997);

and Callins v. State, 698 So. 2d 883 (Fla. 4th DCA 1997).

Petitioner asserts that the Criminal Appeal Reform Act did not eliminate the concept of fundamental error. Section 924.051(3) provides:

> An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error. §924.051(3), Fla. Stat. (1996). (Emphasis supplied.)

The Legislature thus specifically recognizes the continued viability of the concept of fundamental error, including sentencing errors. Although the Maddox Court concludes that the 1996 appellate and criminal-rule amendments eliminated appellate review of fundamental sentencing errors, giving such effect would render them improper as "judicial legislation,"

rewriting a specific legislative enactment. See, e. g., Wyche v. State, 619 So. 2d 231, 236 (Fla. 1993) ("Courts may not go so far in their narrowing constructions so as to effectively rewrite legislative enactments").

Petitioner urges this Honorable Court to follow the reasoning and conclusion of Denson v. State, 711 So.2d 1225 (Fla. 2d DCA May 13, 1998), that chose to address two serious sentencing issues that were addressed on appeal but not preserved in the trial court, i. e., that the defendant had been sentenced as an habitual offender for possession of cocaine and that the written sentence increased the sentence that had been orally pronounced. The Denson Court wrote that in some respects the Criminal Appeal Reform Act codified the appellate courts' own restrictions on their standard of review; but the Denson Judges recognized that:

> . . . When this court already has jurisdiction over a criminal appeal because of a properly preserved issue, we do not avoid a frivolous appeal or achieve efficiency by ignoring serious, patent sentencing errors. Limiting our scope or standard of

review in these circumstances is not only inefficient and dilatory, but also risks the possibility that a defendant will be punished in clear violation of the law.

* * *

If the goal of criminal appeal reform is efficiency, we are hard pressed to argue that this court should not order correction of an illegal sentence or a facial conflict between oral and written sentences on a direct appeal when we have jurisdiction over other issues. Although it is preferable for the trial courts to correct their own sentencing errors, little is gained if the appellate courts require prisoners to file, and trial courts to process, more postconviction motions to correct errors that can be safely identified on direct appeal. Both Mr. Denson and the Department of Corrections need legal written sentences that accurately reflect the trial court's oral ruling. We conclude that the scope and standard of review in a criminal case authorizes us to order correction of such a patent error.

Efficiency aside, appellate judges take an oath to uphold the law and the constitution of this state. The citizens of this state properly expect these judges to protect their rights. When reviewing an appeal with a preserved issue, if we discover that a person has been subjected to a patently illegal sentence to which no

> objection was lodged in the trial court, neither the constitution nor our own consciences will allow us to remain silent and hope that the prisoner, untrained in the law, will somehow discover the error and request its correction. If three appellate judges, like a statue of the "see no evil, hear no evil, speak no evil" monkeys, declined to consider such serious, patent errors, we would jeopardize the public's trust and confidence in the institution of courts of law. Under separation of powers, we conclude that the legislature is not authorized to restrict our scope or standard of review in an unreasonable manner that eliminates our judicial discretion to order the correction of illegal sentences and other serious, patent sentencing errors.

Id., 711 So.2d 1229-1230

By contrast, the Fifth District Court of Appeal finds "little risk" of injustice in the new procedures as interpreted by Maddox:

> if any aspect of a sentencing is "fundamentally" erroneous and if counsel fails to object at sentencing or file a motion within thirty days in accordance with the rule, the Court wrote, the remedy of ineffective assistance of counsel will be available. Id., 708 So.2d at 621.

That is, the Maddox Court finds acceptable an appellate system which requires judges to ignore obvious, demonstrable errors and then leave it to a "prisoner, untrained in the law, [to] somehow discover the error and request its correction." See Denson, supra.

For the Criminal Appeal Reform Act to be constitutional and just, it must be, and Petitioner asks that it be, declared to preserve the appellate courts' discretion to grant relief in cases presenting fundamental or obvious sentencing errors supported by the record. The decisions of the Fifth District Court of Appeal in Maddox, supra, and in the instant case should be reversed and this cause remanded with instructions to consider and grant relief on the grounds presented in this appeal.

CONCLUSION

For the reasons expressed in Issue I herein, Petitioner respectfully requests that this Honorable Court quash the decision of the Fifth District Court of Appeal in Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), review pending, Florida Supreme Court Case Number 92,805; and, for the reasons expressed, direct the Fifth District Court of Appeal to remand this case to the trial court for resentencing so that the mandatory minimum sentences will be served concurrently.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LYLE HITCHENS
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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal, and to Mr. Darryle T. Cook, Inmate No. X-06747, East Unit, Apalachee Correctional Institution, Post Office Box 699, Sneads, Florida 32460-0699, this 10th day of December, 1998.

LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

DARRYLE T. COOK,	)	
	)	
Petitioner/Appellant,	)	S.CT. CASE NO. 93,781
	)	
vs.	)	DCA CASE NO. 97-2923
	)	
STATE OF FLORIDA,	)	
	)	
Respondent/Appellee.	)	
	)	

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT
JULY TERM 1998

98-4
Ly

DARRYLE T. COOK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

Case No. 97-2923

Opinion Filed August 7, 1998

Appeal from the Circuit Court
for Orange County,
A. Thomas Mihok, Judge.

James B. Gibson, Public Defender, and Lyle Hitchens,
Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee,
and Robin A. Compton, Assistant Attorney General,
Daytona Beach, for Appellee.

UPON MOTION FOR REHEARING

PER CURIAM.

We previously dismissed this appeal by order relying on *Maddox v. State*, 23 Fla. Law Weekly D720 (Fla. 5th DCA 1998). The appellant asks that we withdraw that order and issue an opinion so that his appeal may be considered by the Supreme Court of Florida in conjunction with, or in light of *Maddox*, currently before that court for review.

We grant his request, withdraw the previous order and formally dismiss his appeal on the authority of this court's opinion in *Maddox*.

APPEAL DISMISSED.

GRIFFIN, C.J., DAUKSCH and PETERSON, JJ., concur.

IN THE SUPREME COURT OF FLORIDA

DARRYLE T. COOK,	)	
	)	
Petitioner/Appellant,	)	
	)	
versus	)	S.CT. CASE NO. 93,781
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 97-2923
	)	
Respondent/Appellee.	)	
	)	

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 14 point Courier new, a font that is not proportionately spaced.

Respectfully submitted,

JAMES B. GIBSON
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JAMES R. WULCHAK
Chief, Appellate Division

CHRISTOPHER S. QUARLES
Chief, Capital Appeals

MARLEAH K. HILBRANT
Administrative Assistant

December 10, 1998

Honorable Sid J. White
Clerk, Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Darryle T. Cook v. State, Our file No. 98-719, DCA Case No. 97-2923, S.Ct. Case No. 93,781

Dear Mr. White:

Enclosed please find the original and seven copies of the merit brief of the Petitioner. Attached as an appendix is a copy of the Fifth District Court of Appeal opinion on rehearing dated August 7, 1998.

If you have any suggestions or questions, please do not hesitate to let me know.

Sincerely yours,

LYLE HITCHENS
Assistant Public Defender

LH/lbh

Enclosures