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IN THE SUPREME COURT OF FLORIDA

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CHARLES ARTHUR JERRY,)
)
Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
Respondent,)
_____)

DCA CASE NO. 97-2308
CASE NO. 93,828

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S JURISDICTIONAL BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

After a jury trial, the Petitioner, CHARLES ARTHUR JERRY was convicted of robbery with a firearm, and sentenced as a habitual felony offender to life in prison. The petitioner presented an unrefuted alibi for the day, date and time during which the information alleged the crime had occurred. However, without any previous discussion, agreement or notice to the defense, the trial judge instructed the jury that the state's burden of proof would be met if the crime were determined to have been committed "on February 14, 1997, or twenty four hours either side thereof." However, defense counsel did not object below. In addition, during his closing argument the prosecutor testified that he had personal, superior knowledge based upon his contact with the alibi witness which convinced him that she was lying. Following the overruling of a defense objection to the prosecutor's mischaracterization of the sole defense witness's testimony, the defense made no further objections. On appeal, the petitioner presented to the district court the fundamental errors apparent from the record. However, the district court issued a per curiam affirmance citing the case of *Maddox v. State*, 708 So.2d 617 (Fla. 5th DCA 1998) (discretionary review pending in this Court),

as controlling authority for the affirmance. *Jerry v. State*, 23 Fla. L. Weekly D1974 (Fla. 5th DCA August 21, 1998). *Maddox* holds that the Criminal Appeal Reform Act as codified in Section 924.051, Florida Statutes (1996) has eliminated the concept of fundamental error at least as it had been previously applied to the sentencing context. *Id* at 619.

The defendant, relying on *Jollie v. State*, 405 So.2d 418 (Fla. 1981) (conflict jurisdiction lies where the district court has issued a per curiam affirmance citing, as controlling authority, a case pending discretionary review before the Supreme Court), filed his Notice to Invoke the Discretionary Jurisdiction of this Court on August 26, 1998. This brief on jurisdiction follows.

SUMMARY OF ARGUMENT

The decision of the district court, by citing as controlling authority a case pending review in this Court; directly and expressly conflicts with decisions of this Court or other district courts of appeal on the same issue of law.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT, IN **JERRY v. STATE**, 23 Fla. L.
Weekly D1974 (Fla. 5th DCA August 21, 1998),
EXPRESSLY AND DIRECTLY CONFLICTS WITH
DECISIONS OF THE SUPREME COURT OF FLORIDA OR
OTHER DISTRICT COURTS OF APPEAL.

On appeal, the petitioner raised two issues, each alleging fundamental error at trial. The opinion of the Fifth District in the instant case cited as controlling authority the case **Maddox v. State**, 708 So.2d 617 (Fla. 5th DCA 1998), which case is currently pending review by this Court. In **Maddox**, in an en banc opinion, the Fifth District Court of Appeal held that The Criminal Appeal Reform Act abolished the concept of fundamental error in the sentencing context. *Id.*; Fla. Stat. Section 924.051 (1996). Although the issues in the instant case do not concern the sentence, by affirming on the authority of **Maddox**, the Fifth District Court of Appeal has now apparently held that there is no longer any fundamental error either in trial or sentencing contexts. **Maddox v. State, supra**, is currently pending review by this Court. Therein, the petitioner has argued that that decision conflicts with **State v. Hewitt**, 702 So.2d 633 (Fla. 1st DCA 1977); **Chojnowski v. State**, 705 So.2d 915 (Fla. 2d DCA 1997);

Pryor v. State, 704 So.2d 217 (Fla. 3d DCA 1998) and **Callins v. State**, 698 So.2d 883 (Fla. 4th DCA 1997). More recently, the case also conflicts with **Mizell v. State**, 23 Fla. L. Weekly D1978 (Fla. 3d DCA August 26, 1998).

Pursuant to **Jollie v. State**, 405 So.2d 418 (Fla. 1981), where a case is cited by the district Court as controlling authority and that case is currently pending review by the Supreme Court, conflict jurisdiction will lie.

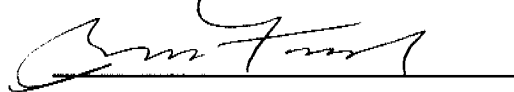
Thus, this Court's discretionary review should be exercised and the decision of the Fifth District Court of Appeal reversed.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court accept jurisdiction of this cause, vacate the decision of the District Court of Appeal, Fifth District, and remand with instructions for the District Court to decide the appeal on the merits.

Respectfully submitted,

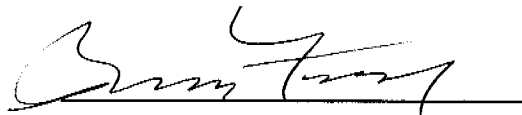
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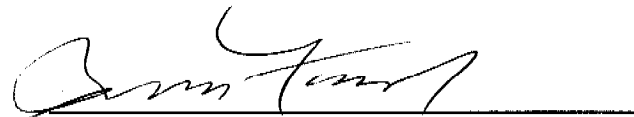
I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Charles Arthur Jerry, this 8th day of September, 1998.



ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER

STATEMENT CERTIFYING FONT

I hereby certify that the size and style of type used in this brief is 12 point Courier New font, a font that is not proportionally spaced.

A handwritten signature in cursive script, appearing to read "Rosemarie Farrell", is written over a solid horizontal line.

ROSEMARIE FARRELL
Assistant Public Defender