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IN THE SUPREME COURT OF FLORIDA

STANLEY RIDER,

Petitioner,

v. CASE NO. 95,060

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER:

CERTIFICATE OF FONT AND TYPE SIZE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF FACTS

The facts of this case were set forth in the opinion below as follows:

> Appellant was visiting in the home of Andrew Nichols, a friend. Residing with Nichols at the time was a woman and her two children, and another male houseguest. The adults spent the evening visiting some bars and drinking, then returned home and drank some more. The children had been in bed and asleep when the adults returned home. The twelve year old child victim testified that appellant came into her room, got into her bed and started touching her. She stated that he took off his pants and underwear, took off her clothes, laid on top of her and put his penis in her vagina. He then left the room, but shortly returned, and as the child was trying to get up, made her get back into the bed, rolled her over onto her stomach and 'put his penis into [her] butt.' The child told no one about this until the next day when she told it to Nichols' other friend who convinced her to tell her mother.
>
> Appellant admitted to 'crashing' in the bed in which the child slept, but testified that he was fully clothed and never touched the child. A physician who examined the child the day the alleged attack was reported, testified that there was a two inch tear in the child's vagina, the area was bloody and tender, and there was evidence of dried secretions. The outside area of the thighs and buttocks showed a lot of redness and irritation. The doctor testified that these findings were of rather recent origin, within the past twenty-four hours.

Rider v. State, 24 Fla. L. Wkly. D50 (Fla. 5th DCA Dec. 23, 1998).

Rider was convicted of two counts of lewd and lascivious assault on a child. On appeal, the district court rejected his claims of insufficient evidence and error in witness sequestration,

and found that his claim of an over-broad probation condition was not properly preserved for appeal. Id.

SUMMARY OF ARGUMENT

The opinion of the district court does not expressly and directly conflict with any other decision. While the district court did cite a case which is pending review in this Court, that case was not cited as controlling authority but was only cited in a string citation for a general principle of law. The issue pending review in the cited case is wholly unrelated to the issue ruled upon in this case. Accordingly, jurisdiction is not warranted here.

ARGUMENT

THIS COURT SHOULD NOT ACCEPT JURISDICTION IN THIS CASE.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

Here, Rider contends that the decision of the district court conflicts with several other opinions in finding that his challenge to the probation condition was not preserved for appeal. The decisions cited by Rider hold that a statute may be challenged as facially unconstitutional, on First Amendment grounds, even where such a challenge was never raised below.

Contrary to Rider's argument, the opinion below does not conflict with these cases. The district court here never mentions a First Amendment challenge, not does the court reject the basic principle that a challenge to the facial constitutionality of a statute may be raised for the first time on appeal. Rather, the court simply rejects as unpreserved Rider's argument that the probation condition is "overly broad and could result in violation of probation for nonsubstantial and unintentional activities." Rider, 24 Fla. L. Wkly. at D50. This ruling has nothing to do with

the cases cited by Rider, and certainly does not conflict with them.

In reaching its conclusion that Rider's argument was not preserved for appeal, the district court cited its prior opinion in Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), which is presently pending review in this Court -- 718 So. 2d 169 (Fla. 1998) (case # 92,805).

Where the district court's decision is a per curiam opinion which cites as controlling law a decision that is pending review in this Court, this Court has the discretion to accept jurisdiction. Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981). Rider relies on this decision in arguing that this Court should exercise jurisdiction here, based on the district court's cite to Maddox.

The State acknowledges that this Court arguably has the authority to accept jurisdiction of this case in light of the district court's citation to Maddox. Given the circumstances of the instant case, however, the State submits that this Court should decline to exercise jurisdiction here.

The district court's decision in Maddox is a far-ranging discussion of the effect of the Criminal Appeal Reform Act, in which the court concluded that under the Reform Act there is no longer fundamental error in sentencing -- *all* sentencing error must be preserved below. 708 So. 2d 617. It is this issue -- the ramifications of the Reform Act -- which is pending before this Court in Maddox.

Here, however, the court's decision had nothing to do with the implications of the Reform Act. It was established well before the Reform Act was ever passed that a defendant must object to probation conditions in order to complain about such conditions on appeal, as recognized in Maxlow v. State, 636 So. 2d 548 (Fla. 2d DCA 1994), which was cited by the court below.

Because the district court did not actually rely upon Maddox as controlling authority on the issue presented on appeal, but only used Maddox in a string citation for a general proposition of law, Jollie should not form a basis for jurisdiction here.

There is no express and direct conflict between this case and any other case, and this Court should therefore decline to accept jurisdiction.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable Court decline to accept jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished by hand delivery to Rosemarie Farrell, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 5th day of April, 1999.

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