IN THE SUPREME COURT OF THE STATE OF FLORIDA

BRYAN PERRY,

Appellant/Petitioner,

vs.

STATE OF FLORIDA,

Appellee/Respondent.

5th DCA Case No. 99-320

Supreme Court Case No.
#97119

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONERS' BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

In 1987, The Petitioner was convicted, in the Orange County Circuit Court, of second degree murder.' (A 1) The conviction arose from a plea agreement in which he agreed to a maximum 27 year prison term, with a probationary term of a length to be determined by the trial court. (A 1,2,4) The actual sentence imposed by the trial court was life imprisonment, suspended after 27 years, on the condition that the Petitioner successfully complete a life term of probation. (A 1,4) Mr. Perry served the prison term, and in 1998, he was found to have violated his probation. (A 4) Probation was revoked, and Mr. Perry was sentenced to life

[1] In this brief, references to the Appendix will be designated by the symbol "A" in a parenthetical, with the page number (s) to which reference is made. The Appendix contains the Petitioner's original, (1987), plea agreement, and the Opinion of the District Court.

imprisonment. (A 4)

In his direct appeal to the Fifth District Court, Mr. Perry argued that his life sentence should be reversed, because it exceeded the one cell "bump" permitted after revocation of probation under the guidelines in effect at the time of his original sentence. (A 3) The Fifth District Court refused to consider the aforesaid argument, on the grounds that it had not been raised in the trial court, at the imposition of sentence after the revocation of probation. (A 3) The district court, in its' Opinion, cited the following cases as controlling authority:

> Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), rev. granted 728 So. 2d 203 (Fla. 1999), and Seccia v. State, 720 So. 2d 580 (Fla. 1st DCA 1999), rev. granted 727 So. 2d 910 (Fla. 1999).
> (A 3,4)

Both Maddox and Seccia are presently pending for review in this Court. (A 3)

Petitioner timely filed a Notice to Invoke this Court's jurisdiction, and this Petition follows.

SUMMARY OF ARGUMENT

Petitioner invokes the discretionary jurisdiction of this Court to review the decision of the Fifth District Court of Appeal in the above-styled cause, rendered November 5, 1999. Jurisdiction of the Florida Supreme Court is invoked pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 198 1); which states that when the a per *curium* decision of the district court cites as authority a case which is pending for review in this Court, the jurisdiction of this Court may be invoked to review the per *curium* decision of the district court.

The district court in this case would not consider the Petitioner's appeal of his sentence, because, according to the district court, the lack of preservation in the trial court precluded review of that issue. As authority for this ruling, the district court cited one of its own decisions, and a decision of the First District Court. Both cases are also now pending for review in this Court.

ARGUMENT

THE FLORIDA SUPREME COURT HAS DISCRETIONARY JURISDICTION TO ACCEPT THE INSTANT CASE FOR REVIEW, BECAUSE THE CASES CITED AS CONTROLLING IN THE OPINION AT ISSUE ARE PENDING FOR REVIEW IN THE FLORIDA SUPREME COURT.

The District Court's Opinion cited one of its own decisions, and a decision of the First District Court, as authority for the decision to decline review of the Petitioner's sentence[2]. Both cases involve the issue of fundamental error; i.e., what errors may be corrected by the appellate court despite the lack of preservation in the trial court. Both cases are also now pending for review in this Court.

In Jollie v. State, 405 So, 2d 4 18 (Fla. 198 1), this Court ruled:

> Common sense dictates that this Court must acknowledge its own public record actions in dispensing with cases before it. We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction. Jollie, at 420.

Petitioner therefore submits that this Court may now exercise jurisdiction to

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[2] Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), rev. granted 728 So. 2d 203 (Fla. 1999), and Seccia v. State, 720 So. 2d 580 (Fla. 1st DCA 1999), rev. granted 727 So. 2d 9 10 (Fla. 1999).

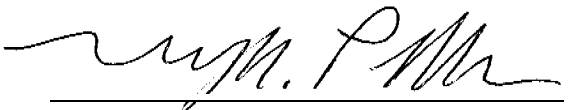
review the decision of the Fifth District Court in the instant case.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, Appellant respectfully requests that the Florida Supreme Court accept jurisdiction to review the ruling of the District Court in this case.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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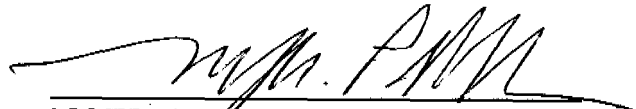
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to: Bryan Perry, DOC # 109552, Liberty Correctional Institution, H.C. 2, Box 144 Bristol, FL 32321-9711, on this 15TH day of November, 1999.

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.



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