IN THE SUPREME COURT OF FLORIDA

BRYAN PERRY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO.: 97,119

DCA case no.: 99-320

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

# -JURISDICTIONAL BRIEF OF RESPONDENT

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## STATEMENT OF CASE AND FACTS

The Fifth District Court of Appeals affirmed the Petitioner's judgment and sentence citing the case Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA), rev. uranted, 718 So. 2d 169 (Fla. 1998).

## 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.

## SUMMARY OF ARGUMENT

This Court does have the discretion to accept jurisdiction of this case. As a practical matter, however, it may be more prudent to hold this petition for review in abeyance until this same issue is resolved in other pending cases.

## ARGUMENT

### THIS COURT DOES HAVE THE DISCRETION TO ACCEPT JURISDICTION OF 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. Where the district court's decision is a per curiam opinion which cites as controlling law a decision that is either pending review in or has been reversed by this Court, this Court has the discretion to accept jurisdiction. Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981).

The State acknowledges that this Court has the authority to accept jurisdiction of this case in light of the district court's citation to Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA), rev. granted, 718 So. 2d 169 (Fla. 1998). However, the State notes that this same issue -- whether sentencing errors must be preserved -- is presently pending review in numerous other cases in this Court. Accordingly, the State submits that the interests of judicial economy, as well as fairness to this Petitioner, can best be served by holding this petition for review in abeyance pending resolution

of this issue in the other cases[1]. Numerous cases involving this issue will be ripe for review by this Court in the near future, and little purpose would be served by full briefing in all of them.

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[1] In fact, this Court has already issued recent changes to the procedural rules in connection with the Maddox issue. See, Amends to la. FRules of Crim. Pro. 3.111(e) & 3.800 & Fla. Rules of ADD. Pro. 9.010(h) 9.140, & 9.600, 24 Fla. L. Weekly 5530 (Fla. Nov. 12, 1999).

## CONCLUSION

Based on the arguments and authorities presented herein, the Respondent respectfully acknowledges that this Court does have the discretion 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 delivery via the basket of the Office of the Public Defender at the Fifth District Court of Appeal to Noel A. Pelella, counsel for the Petitioner, 112 Orange Ave. Ste. A., Daytona Beach, FL 32114, this 6th day of December 1999.

Wesley Heidt

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL

99-213 JVF

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1999

BRYAN PERRY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

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

CASE NO. 99-320

Opinion filed November 5, 1999



Appeal from the Circuit Court
for Orange County,
Frank N. Kaney, Judge.

James B. Gibson, Public Defender, and
Noel A. Pelella, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Maximillian J. Changus,
Assistant Attorney General, Daytona Beach,
for Appellee.

SHARP, W., J.

Perry appeals from the court's determination that he violated his probation from his life sentence. We affirm.

In 1987, Perry was indicted for first degree murder and later entered a plea to second degree murder. Perry was adjudicated guilty and sentenced to "life imprisonment in the Department of Corrections, with credit for 247 days time served, all except 27 years is suspended, if completes life probation."

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In March 1997, after serving a little more than nine years in prison, Perry was placed on probation. In March 1998, he was charged with violating numerous conditions of his probation.

Perry first contends that the evidence was insufficient to support revocation of his probation. We think the evidence adduced at the hearing was sufficient to **support** the trial court's finding that Perry violated his probation by failing to file his required written monthly reports and by moving from his residence without his probation officer's consent. See *Diller v. State,* 711 So.2d 54 (Fla. 5th DCA), *rev. denied,* 719 So.2d 892 (Fla. *1998); Edwards v. State, 444* So.2d 581 (Fla. 5th DCA 1984); *Chappell v. State, 429* So.2d 84 (Fla. 5th DCA 1983).

Next Perry argues that his life sentence must be reversed, Perry contends that he agreed to a two-cell upward departure sentence (a range of 22-27 years in prison) when he entered into his plea agreement. Following the revocation of probation, Perry argues that the court was limited to a one-cell bump up from that level (a range of 27 to 40 years). Thus the life sentence he received was a departure which must be reversed because no written reasons for departure were given.

The state argues this issue was not preserved because defense counsel did not object on the ground raised on appeal. *Maddox v. State,* 708 So.2d 617 (Fla. 5th DCA 1998), *rev. granted, 728* So.2d 203 (Fla. 1999). Since we are bound by *Maddox,* we cannot review the sentencing issue as part of the direct appeal. Nor should we consider this issue on appeal in the guise of ineffective assistance of counsel. *See Seccia v. State, 720* So.2d 580 (Fla. 1st DCA 1998), *rev. granted, 727* So.2d 9 10 (Fla. 1999).

AFFIRMED.

COBB and GRIFFIN, JJ., concur.



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