

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

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STEPHEN A. ERVIN,

Petitioner,

v.

CASE NO.: 97,135

STATE OF FLORIDA,

DCA case no.: 98-3315

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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TABLE OF AUTHORITIES

CASES:

Amendments to Fla. Rules of Crim. Pro. 3.111(e) & 3.800
& Fla. Rules of App. Pro. 9.010(h) 9,140, & 9.600,
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Jollie v. State,
405 So. 2d 418 (Fla. 1981) 3

Maddox v. State,
708 So. 2d 617 (Fla. 5th DCA),
rev. granted, 718 So. 2d 169 (Fla. 1998) 1,3,4

MISCELLANEOUS:

Article V, section (3)(b)(3), Florida Constitution 3

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. granted~~, 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 cases¹. 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. Each of these cases involves unique sentencing issues which would be best addressed by the district courts once this Court has issued a decision on the general preservation issue.

In fact, this Court has already issued recent changes to the procedural rules in connection with the Maddox issue. See, Amendments to Fla. Rules of Crim. Pro. 3.111(e) & 3.800 & Fla. Rules of App. Pro. 9.010(h) 9.140, & 9.600, 24 Fla. L. Weekly S530 (Fla. Nov. 12, 1999). It is the understanding of the undersigned counsel that a motion for rehearing was filed as to the amendments and oral argument has been scheduled in early January of 2000.

CONCLUSION

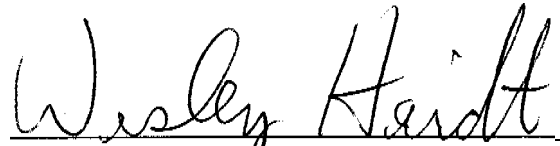
Based on the arguments and authorities presented herein, the Respondent respectfully acknowledges that this Court does have the discretion to accept jurisdiction of this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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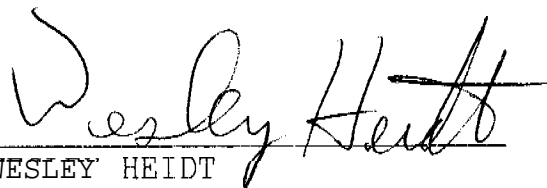


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CERTIFICATE OF SERVICE

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 Lyle Hitchens, counsel for the Petitioner, 112 Orange Ave. Ste. A., Daytona Beach, FL 32114, this 27th o f December 1999.


WESLEY HEIDT
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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

JULY TERM 1999

STEPHEN ERVIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

Case No. 98-3315

L.C.T. 97-12236 CFA

Opinion Filed October 29, 1999

Appeal from the Circuit Court
for Brevard County,
Charles M. Holcomb, Judge.

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

Robert A. Butterworth, Attorney General, Tallahassee,
and Wesley Heidt, Assistant Attorney General, Daytona
Beach, for Appellee.

PER CURIAM.

AFFIRMED. *Thogode v. State*, 731 So. 2d 114 (Fla. 5th DCA 1999), *rev. granted*, No.
95,665 (Fla. Aug. 24, 1999), *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), *rev. granted*,
728 So. 2d 203 (Fla. 1999).

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

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