IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC00-2549
(4th DCA Case No. 4D00-1861)

STATE OF FLORIDA,

Petitioner,

vs.

GWENDA JEAN LEMON,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the movant and Petitioner was the respondent in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the Appellant and Petitioner was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner continues to rely upon the statement of the case and facts in the initial brief on the merits.

SUMMARY OF THE ARGUMENT

Petitioner initially argued only one issue in the initial brief on the merits. Respondent has attempted to create another issue based on Respondent's claim that this Court should reconsider the decision to accept jurisdiction; Respondent has designated this new issue "Point I." Respondent has designated Petitioner's original point as "Point II."

With regard to Point I, Respondent claims that this Court should decline to accept jurisdiction because there is no conflict. However, Respondent is apparently unaware that the Fourth District has certified conflict with the Second District on this very issue. Therefore, Respondent's attempt to claim that this Court should reconsider accepting jurisdiction because there is no conflict is meritless. There is, in fact, an express and direct conflict with a decision of another district court of appeal on the same question of law.

With regard to Point II, Petitioner relies upon the argument it made in the initial brief on the merits.

ARGUMENT

POINT I: REVIEW WAS NOT IMPROVIDENTLY GRANTED HEREIN.

Respondent claims that this Court should decline to accept jurisdiction because the decision of the Fourth District does not conflict with any decision of any other district court of appeal. However, Respondent is apparently unaware that the Fourth District has now certified conflict with the Second District on this very issue. Davis v. State, 791 So. 2d 1137, 1137-1138 (Fla. 4th DCA 2001).

> We grant appellee's motion for certification of conflict. In our original opinion, we reversed and remanded for a determination of whether it could be shown that the trial court would have imposed the same 1995 guidelines departure sentence under the 1994 guidelines. *See Heggs v. State*, 759 So.2d 620 (Fla. 2000); *Lemon v. State*, 769 So.2d 417 (Fla. 4th DCA 2000). In *Ray v. State*, 772 So.2d 18 (Fla. 2d DCA 2000), and *Kwil v. State*, 768 So.2d 502 (Fla. 2d DCA 2000), the Second District found that the defendants were not adversely affected by the unconstitutional amendments to the sentencing guidelines because the records reflected that the trial courts imposed the upward departure sentences based on statutory factors that were equally valid under the 1994 and 1995 sentencing guidelines. The Second District, therefore, does not require a showing that the trial court would have imposed the departure sentence under the 1994 guidelines, but, instead, requires only a showing that the trial court could have imposed the same departure sentence. Thus, we certify conflict with both *Ray* and *Kwil*.

Therefore, Respondent's attempt to claim that this Court should

reconsider accepting jurisdiction because there is no conflict is meritless. There is, as the Fourth District has, albeit belatedly, recognized, a direct conflict with a decision of another district court of appeal on the same question of law; the conflict is embodied in the Lemon and Davis and Kwil and Ray opinions.

Moreover, the State has sought the discretionary jurisdiction of this Court in the Davis case, (SC01-1600), and this Court has stayed the Davis case pending resolution of the instant case. This Court should reject Respondent's attempt to "discharge review as improvidently granted."

POINT II: THE TRIAL COURT WAS CORRECT IN SUMMARILY DENYING APPELLANT'S MOTION TO CORRECT SENTENCE UNDER HEGGS SINCE THE UPWARD DEPARTURE SENTENCE *COULD* HAVE BEEN IMPOSED UNDER THE 1994 GUIDELINES AS WELL AS THE 1995 GUIDELINES AND THE FOURTH DISTRICT ERRONEOUSLY REVERSED AND REMANDED FOR CONSIDERATION OF WHETHER THE TRIAL COURT *WOULD* HAVE IMPOSED THE SAME UPWARD DEPARTURE.

The State continues to rely upon the argument made in the initial brief on the merits.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court QUASH the decision of the district court insofar as it reverses the decision of the trial court denying the motion to correct illegal sentence in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Reply Brief on the Merits," has been furnished by courier to Allen J. DeWeese, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 3rd Street, West Palm Beach, FL 33401, on _____, 2001.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE WITH FONT STANDARDS

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Brief on the Merits" has, in accordance with Rule 9.210 of the Florida Rules of Appellate Procedure, been prepared with 12 point Courier New type.

_____
Of Counsel