

IN THE SUPREME COURT OF FLORIDA

TERESA SCHLABACH

Petitioner,
vs.

STATE OF FLORIDA

Respondent.
_____ /

F.S. Ct. CASE NO.SC09-223

DCA CASE NO. 4D07-2445

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal,
Fourth District, State of Florida

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit
Criminal Justice Building
421 3rd Street
West Palm Beach, FL 33401
(561) 355-7600

BARBARA J. WOLFE
Assistant Public Defender
Florida Bar No. 0559849
Attorney for Teresa Schlabach

appeals@pd15.state.fl.us

TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|--------------------|
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES | ii |
| PRELIMINARY STATEMENT | 1 |
| STATEMENT OF THE CASE AND FACTS | 2 |
| ARGUMENT | 4 |
| THE DISTRICT COURT’S OPINION HAS CERTIFIED A DIRECT CONFLICT WITH THE OPINION OF ANOTHER DISTRICT COURT..... | 4 |
| CONCLUSION..... | 6 |
| CERTIFICATE OF SERVICE | 6 |
| CERTIFICATE OF COMPLIANCE | 7 |

TABLE OF AUTHORITIES

| <u>CASES</u> | <u>PAGE</u> |
|--|--------------------|
| <i>Childers v. State</i> , 972 So.2d 307 (Fla. 2d DCA 2008) | 5 |
| <i>Kincaid v. World Insurance Co.</i> , 157 So.2d 517 (Fla. 1963) | 4 |
| <u>FLORIDA CONSTITUTION</u> | |
| Article V Section 3(b)(3) | 4 |
| Article V Section 3(b)(4) | 4 |

PRELIMINARY STATEMENT

Petitioner was the defendant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, and the appellee in the Fourth District Court of Appeal. Respondent was the prosecution and the appellant in the lower courts. In this brief, the parties will be referred to as they appear before the Court.

STATEMENT OF THE CASE AND FACTS

On February 14, 2007, petitioner was sentenced to five years imprisonment for a violation of probation. Fifty-four days later, on April 11, 2007, petitioner filed a timely motion to reduce or modify her sentence, under Florida Rule of Criminal Procedure 3.800(c). On May 14, 2007, a notice of hearing was filed, and on May 30, 2007, the trial court heard and granted the motion, terminating the balance of petitioner's sentence.

The State appealed to the Fourth District Court of Appeal.

Because no hearing was set and no action was taken on petitioner's motion within the sixty day period, the Fourth District held that the trial court lacked jurisdiction to modify petitioner's sentence.

The Fourth District treated the appeal as a petition for certiorari, granted the petition, quashed the order of the trial court, and certified direct conflict with *Childers v. State*, 972 So.2d 307 (Fla. 2d DCA 2008). *State v. Schlach*, 34 Fla. L. Weekly D104 (Fla. 4th DCA Jan.5, 2009).

Petitioner filed her Notice of Intent to Invoke Discretionary Jurisdiction on February 3, 2009.

SUMMARY OF THE ARGUMENT

The Fourth District has certified a direct conflict with *Childers v. State*, 972 So.2d 307 (Fla. 2d DCA_2008).

In the instant case, the Fourth District quashed the order of the trial court granting defendant's motion to mitigate sentence, having adopted the view that, where a motion to mitigate is timely filed, but no hearing is scheduled and no action is taken within sixty days after imposition of sentence, the trial court loses jurisdiction to do so.

This decision is in direct conflict with *Childers v. State*, 972 So.2d 307 (Fla. 2d DCA_2008), which held that defendant's failure to schedule a hearing within the sixty day window for the trial court to rule on his motion for modification of sentence, did not warrant denial of the motion.

Because the Fourth District Court of Appeal has certified a direct conflict with another District Court, this Court has jurisdiction. This Court should accept that jurisdiction and review this case.

ARGUMENT

THE DISTRICT COURT'S OPINION HAS CERTIFIED A DIRECT CONFLICT WITH THE OPINION OF ANOTHER DISTRICT COURT.

This Court has two grounds upon which it may exercise discretionary jurisdiction to review this case:

First, this Court has discretionary jurisdiction to review a decision of a District Court of Appeal which expressly and directly conflicts with a decision of this Court or another District Court of Appeal. Art. V, § 3(b)(3), Fla.. Const. “The constitutional standard is whether the decision of the District Court on its face collides with a prior decision of this Court, or another District Court, on the same point of law so as to create an inconsistency or conflict among precedents.” *Kincaid v. World Insurance Co.*, 157 So.2d 517, 518 (Fla. 1963).

Second, pursuant to Art. V, § 3(b)(4), Fla. Const., this Court may review cases in which a District Court has certified a direct conflict with the decision of another District Court, on the same issue of law.

In the instant case, the Fourth District quashed the order of the trial court granting defendant's motion to mitigate her sentence, having adopted the view that, where a motion to mitigate is timely filed, but no hearing is scheduled and no action is taken within sixty days after imposition of sentence, the trial court loses

jurisdiction to do so. This decision is in express and direct conflict with *Childers v. State*, 972 So.2d 307 (Fla. 2d DCA 2008), which holds that defendant's failure to schedule a hearing within the sixty day window for the trial court to rule on his motion for modification of sentence, did not warrant denial of the motion.

In its opinion of January 5, 2009, the Fourth District has certified a direct conflict with the decision of the Second District in *Childers v. State*, 972 So.2d 307 (Fla. 2d DCA 2008).

Because the decision in this case expressly and directly conflicts with *Childers*, and because the Fourth District Court of Appeal certified conflict with *Childers*, this Court has jurisdiction. This Court should accept that jurisdiction and review this case.

CONCLUSION

Petitioner respectfully requests that this Court accept review of the instant case and order briefs on the merits.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit
Criminal Justice Building
421 3rd Street
West Palm Beach, FL 33401
(561) 355-7600

BARBARA J. WOLFE
Assistant Public Defender
Florida Bar No. 0559849
Attorney for Teresa Schlabach

CERTIFICATE OF SERVICE

I certify that a copy of the Jurisdictional Brief has been furnished to James J. Carney, Sr., Assistant Attorney General, 1515 N. Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401, by courier, this 9th day of February, 2009.

BARBARA J. WOLFE
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared in compliance with the font standards required by Florida Fla. R. App. P. 9.210. The font is Times New Roman, 14 point.

BARBARA J. WOLFE
Assistant Pubic Defender