IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC12-657

L.T. CASE NO. 4D10-5014

STATE OF FLORIDA,

Petitioner,

vs.

HARRY JAMES CHUBBUCK,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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STATUTE

Section 921.0026(20(d), Florida Statutes . . . . . *passim*

PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellee, and Respondent was the Appellant in the Fourth District Court of Appeal ("Fourth District").

The parties will be referenced as they appear before this Court. The Petitioner may also be referenced as the "State", and the Respondent may also be referenced as "Chubbuck".

STATEMENT OF THE CASE AND FACTS

The facts appear in the *en banc* decision of the Fourth District Court of Appeal (Fourth District"), State of Florida v. Harry James Chubbuck, Case # 4D10-5014 (Fla. 4th DCA March 7, 2011).

"Pursuant to a plea bargain involving drug related offenses, Chubbuck was adjudicated guilty and placed on five years of probation with a condition that required him to abstain from the consumption of illegal drugs." Slip Opinion, page 1.

"About a year later, the probation officer filed an affidavit alleging that Chubbuck had violated his probation, in that Chubbuck's urine had tested positive for cocaine." Id.

At the hearing on violation of probation, Chubbuck asked the trial court to grant him a downward departure, terminate probation, and sentence him to time served. Id., page 2. In support of a downward departure, Chubbuck relied upon section 921.0026(2)(d), Florida Statutes, which allows a departure when a "defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment." The state responded that there was no evidence to show that the Department of Corrections could not treat his illness. Id.

The trial court then accepted the Respondent's admission of violation of probation and sentenced him to a downward departure sentence of time served. Id., pages 2-3.

The State appealed and argued "that because Chubbuck did not present evidence that the Department of Corrections cannot provide the required specialized treatment, there was no competent, substantial evidence to support the trial court's decision to impose a downward departure sentence under subsection 921.0026(2)(d)." Id., page 3.

The Fourth District acknowledged decisions form other courts of appeal, as well as the Fourth District itself that requires that "if a departure is to be permitted on such ground, the defendant must also establish, by a preponderance of the evidence, that the Department of Corrections cannot provide the required 'specialized treatment'". Id., page 4. The Court also found that "the state correctly asserts that Chubbuck offered no evidence that the Department of Corrections could not provide Chubbuck the required treatment for his mental and physical disorders." Id.

However, the Court held that "the plain language of subsection 921.0026(20(d) does not require the defendant to make such a showing." Id. The Court adopted Judge Warner's concurring opinion in State v. Hunter, 65 So.3d 1123, 1125-28 (Fla. 4th DCA 2011). The Court concluded that the trial court properly imposed a downward departure sentence pursuant to section 921.0026(2)(d), but reversed for a new sentencing hearing "to provide the state another opportunity to present evidence as to whether the Department of Corrections can provide the 'Specialized treatment'". Id., page 8.

The Fourth District receded from a number of its own decisions, and certified direct conflict with decisions of all other district courts of appeal. Id.

The Petitioner then timely invoked the discretionary jurisdiction of this Court pursuant to Rule 9.030(a)(2)(A)(vi), Fla. R. App. P., and Article V, Section 3(b)(4) of the Constitution of the State of Florida.

SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction. The decision of the Fourth District has been certified to be in conflict with the decisions of all other district courts of appeal. This Court should resolve the conflict because the issue presented in the instant case will be reoccurring throughout the State.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION SINCE THE DECISION OF THE FOURTH DISTRICT IS CERTIFIED TO BE IN CONFLICT WITH THE DECISIONS OF ALL OTHER DISTRICT COURTS OF APPEAL

This Court has clear authority to accept discretionary review pursuant to Rule 9.030(a)(2)(A)(vi), Fla. R. App. P., and Article V, Section 3(b)(4) of the Constitution of the State of Florida since the instant decision is certified to be in conflict with the decisions of all other district courts of appeal, namely, State v. Scherber, 918 So.2d 423 (Fla. 2d DCA 2006), State v. Wheeler, 891 So.2d 614 (Fla. 2d DCA 2005), State v. Green, 890 So.2d 1283 (Fla. 2d DCA 2005), State v. Mann, 866 So.2d 179 (Fla. 5th DCA 2004), State v. Tyrell, 807 So.2d 122 (Fla. 5th DCA 2002), State v. Thompson, 754 So.2d 126 (Fla. 5th DCA 2000), State v. Abrams, 706 So.2d 903 (Fla. 2d DCA 1998), State v. Ford, 48 So.3d 948 (Fla. 3d DCA 2010), and State v. Holmes, 909 So.2d 526 (Fla. 1st DCA 2005). The Court has jurisdiction *per se*. See generally, State v. Vickery, 961 So. 2d 309, 311 (Fla. 2007)("a certification of conflict provides us with jurisdiction per se").

The Petitioner submits that this Court should accept review so that this conflict may be resolved. This case presents a sentencing situation which will repeatedly occur throughout the State and it should be addressed in a consistent manner.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests that this Court accept discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Petitioner's Brief on Jurisdiction" has been furnished by U.S. Mail to Paul E. Petillo, Assistant Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, FL 33401, on April 26, 2012.

_____
DANIEL P. HYNDMAN

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

_____
DANIEL P. HYNDMAN