IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 65,495
	)	
CARL LEE HICKS,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S BRIEF ON JURISDICTION

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Respondent will utilize the references adopted by petitioner in his brief.

STATEMENT OF THE CASE AND FACTS

The procedural history of the case is set forth in the decision of Fourth District Court of Appeal in respondent's case (A-1-2). The facts show that the trial judge asked appellant to admit or deny the violation of probation charges without first advising the respondent of his right to counsel at the probation revocation proceeding.

ISSUE INVOLVED ON APPEAL

WHETHER THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN RESPONDENT'S CASE AND THE DECISION IN THE FIRST DISTRICT COURT OF APPEAL IN SANDERSON v. STATE, 447 So.2d 374 (Fla. 1st DCA 1984)?

ARGUMENT

WHETHER THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN RESPONDENT'S CASE AND THE DECISION IN THE FIRST DISTRICT COURT OF APPEAL IN SANDERSON v. STATE, 447 So.2d 374 (Fla. 1st DCA 1984)?

Petitioner contends that the decision in respondent's case directly and expressly conflicts with the decision in Sanderson v. State, 447 So.2d 374 (Fla. 1st DCA 1984). Respondent contends that no such conflict is created by the decisions.

In Sanderson v. State, supra, the First District Court of Appeal held that it is possible to have a probation revocation case where a defendant is not entitled to counsel. The First District acknowledged that Gagnon v. Scarpelli, 411 U.S. 778 (1973) requires the defendant to be informed of his right to counsel but that a request for counsel after being informed of that right could be denied under special circumstances. 447 So.2d at 376. In respondent's case, the Fourth District Court of Appeal held that the essential issue was whether a trial court could require a defendant to admit or deny a charge of probation violation without advising the defendant of his right to counsel or to have appointed counsel if indigent (A-2).

The judge at respondent's violation of probation hearing did not inform respondent of any right to counsel nor inform respondent of his rights against self-incrimination before calling upon respondent to admit or deny substantive criminal charges. The district court's resolution of the specific issue on the facts of respondent's case does not conflict with the opinion in Sanderson due to a material difference in the facts. Sanderson's trial

judge did inform him of his right to counsel but no request for counsel was made. Also, Sanderson's probation violation charges did not involve allegations of a separate criminal offense. Respondent is entitled to be advised of his right to counsel, and this Court's opinion in State v. Heath, 343 So.2d 13 (Fla. 1977) requires that respondent be given a new probation revocation hearing where his rights against self-incrimination are respected.

The petitioner does not contend that the district court wrongfully decided that respondent was entitled to counsel on the specific facts of this case. Since a number of cases in the Fourth District Court of Appeal have arisen where the trial judges have wholly failed to inform a defendant of his right to counsel or comply with any procedures to determine if the defendant needed or desired counsel, the district court concluded that:

> "[B]efore a trial court can take a plea from a probationer in a proceeding involving a probation violation the probationer must be advised of his right to counsel." (A-5).

Therefore, given the material difference in the facts of the two cases, the decision of the district court in respondent's case requiring that he be advised of his right to counsel does not directly and specifically conflict with the decision in Sanderson v. State, supra.

Even though the decision in respondent's case does not necessarily create direct and express conflict with Sanderson, in subsequent cases the Fourth District Court of Appeal obviously intended to acknowledge that Hicks applies a different rule of

law than Sanderson. See Hooper v. State, ___So.2d___ (Fla. 4th DCA, Case No. 83-2181, Opinion filed June 4, 1984) (9 F.L.W. 1268); Thomas v. State, (Fla. 4th DCA, Case No. 83-1943, Opinion filed June 4, 1984) (9 F.L.W. 1275); Moore v. State, (Fla. 4th DCA, Case No. 83-1164, Opinion filed June 13, 1984) (9 F.L.W. 1304). However, the state has not sought discretionary review of those cases.

CONCLUSION

Based on the foregoing, since petitioner does not contend that the district court wrongfully determined that respondent was entitled to counsel at his revocation of probation hearing, and because no direct and specific conflict exists with the decision in Sanderson v. State, supra, this Court should decline to exercise its discretionary jurisdiction in the instant cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to CAROLYN V. McCANN, Assistant Attorney General, Elisha Newton Dimick Building, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, by courier, this 13th day of July, 1984.

Margaret Good

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