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CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DERRICK ACKERS,
a/k/a DERICK ACRES,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

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)
)
)
)
)
)
)
)
)
)

S.C.T. CASE NO.

80037

DCA CASE NO. 91-735

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

PAOLO G. ANNINO
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0379166
112-A Orange Avenue
Daytona Beach, FL 32114
Phone: 904-252-3367

COUNSEL FOR PETITIONER

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DCA Case Number 91-735 (Fla. 5th DCA May 15, 1992)

5

Williams v. State

110 So.2d 654 (Fla.)

3,6-7

OTHER AUTHORITIES:

Amendment IV, United States Constitution

7

Section 812.13(2)(a), Florida Statutes (1990)

1

Rule 9.140(c)(1)(b), Florida Rule of Appellate Procedure

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STATEMENT OF THE CASE

In **Case** Number **CR90-10093**, the State charged Petitioner, Mr. Ackers, with Robbery With a Firearm, in violation of Section 812.13(2) (a), Florida Statutes (1990). (R409)

On March **5**, 1991, the State filed "**Notice** of Intention to Use Similar Fact Evidence." (R451) The State attached the Information in Case No. **CR90-9660/a**, as the subject of this Notice. See Appendix B.

On March 22, 1991, the Honorable Gary L. Formet, Sr. held a pretrial hearing on the Defense's Motion in Limine, seeking to exclude the alleged similar fact evidence, the Kentucky Fried Chicken Robbery, Case Number **CR90-9660/a**, which was the subject of the State's Notice. Judge Formet granted the Defense's Motion in Limine, and issued an order which reads: "Ordered and adjudged that the Defense Motion in Limine is granted, and all evidence pertaining to the robbery of the Kentucky Fried Chicken charged in Case Number **CR90-9660/a** is hereby excluded from the trial of the above-styled **cause**." (R455) See Appendix C.

The State filed an appeal from this pretrial, non-final order. (R457)

On December **9**, 1991, Mr. **Ackers** filed in the Fifth District Court of Appeal, a Motion to Dismiss the State's appeal for lack of jurisdiction. See Appendix D.

On February 18, 1992, the Fifth District Court of Appeal in DCA Case Number 91-735, denied Mr. Ackers' Motion to Dismiss. See Appendix E.

On May 15, 1992, the Fifth District Court of Appeal agreed with the State and reversed the trial court's order excluding similar fact evidence of the Kentucky Fried Chicken robbery. See Appendix A.

Petitioner filed timely Notice of Appeal to this Honorable Court.

STATEMENT OF THE FACTS

The State appealed a pretrial, non-final order to the Fifth District Court of Appeal. The State filed its appeal prior to the selection of a jury. Hence, the facts in the instant case have not been heard by a jury.

In summary fashion, Mr. Ackers is accused of robbing a Popeye's Fried Chicken Restaurant. In a prior case, which is the subject of the State's Williams Rule notice, Mr. Ackers was convicted of robbing a Kentucky Fried Chicken Restaurant.

SUMMARY OF THE ARGUMENT

This Honorable Court should accept jurisdiction, because the instant decision conflicts with McPhadder v. State, 475 So.2d 1215 (Fla. 1985), and because the Fifth District Court of Appeal lacked jurisdiction to rule on the State's pretrial appeal of a non-final order.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN STATE V. ACKERS, DCA CASE NUMBER **91-735 (FLA. 5TH DCA MAY 15, 1992), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS HONORABLE COURT IN McPHADDER V. STATE, **475 SO.2D 1215 (FLA. 1985)**.**

This Honorable Court should accept jurisdiction in the instant case, because the instant decision expressly and directly conflicts with McPhadder v. State, **475 So.2d 1215 (Fla. 1985)**.

The Fifth District Court of Appeal decision reads in part:

The State appeals the trial court's order which granted Defense counsel's motion in limine to exclude similar fact evidence concerning Ackers' commission of another crime in order to **prove** his identity in connection with the robbery with a firearm charge being prosecuted in this case. The trial court ruled that the facts and circumstances of the other robbery, with which Ackers had been convicted, were not sufficiently similar to allow admission pursuant to the Williams Rule.

See Appendix A.

In the instant case, the State filed a "**Notice** of Intention to Use Similar Fact **Evidence**." See Appendix B. This Notice **ex-**presses the State's intent to introduce into evidence facts of a prior robbery, the Kentucky Fried Chicken robbery. In this Notice, the State attached the Information of the Kentucky Fried Chicken **robbery**, as the subject of the Notice. See Appendix B. The trial court's pretrial order excludes all evidence pertaining to the robbery of the Kentucky Fried Chicken **robbery**. See Appendix C. The State appealed this pretrial, non-final order to the Fifth District Court of Appeal.

The issue on this appeal is whether the Fifth District Court of Appeal had jurisdiction to entertain the State appeal from a non-final order, which excludes Williams Rule evidence. Petitioner submits that this is not an appealable order, because it is not authorized by the appellate rules, in specific, Rule 9.140(c)(1)(B), Florida Rules of Appellate Procedure. In McPhadder v. State, 475 So.2d 1215 (Fla. 1875), this Honorable Court stated:

The rule provides, in pertinent part, that the State may appeal an order suppressing before trial confessions, admissions or evidence obtained by search and seizure ... The evidence at issue consisted of statements made by an informant on electronic recorded tapes which were suppressed because the informant was unavailable and could not be called at trial. We see no search and seizure issue.

Id. 1216.

The McPhadder decision stands for the proposition that under Rule 9.140(c)(1)(B), Florida Rules of Appellate Procedure, the State may only appeal a pretrial, non-final order which directly addresses a "search and seizure issue." Id. Based on McPhadder, the fact that the evidence was "obtained by search and seizure" is not sufficient grounds for a State pretrial appeal. The trial court's order must directly address "trial confessions, admissions or evidence obtained by search and seizure." Rule 9.140(c)(1)(B), Florida Rule of Appellate Procedure.

The pretrial order in this case did not directly address a "search and seizure issue." In the instant case, the trial court did not face a Fourth Amendment issue, but the issue of whether

or not a prior robbery should be allowed into evidence based on Williams Rule. The issue on pretrial was whether the prior crime was similar or dissimilar to the instant crime. The Fifth District Court of Appeal's decision in this case is instructive on this very point, i.e. it does not address in its written decision any search or seizure issues. It addresses only the Williams Rule evidence.

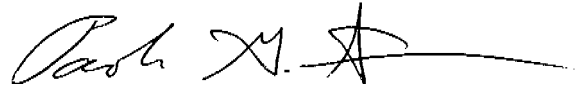
In conclusion, based on the expressed and direct conflict with McPhadder, Petitioner requests this Honorable Court to accept jurisdiction.

CONCLUSION

BASED ON the argument contained herein, and authorities cited in support thereof, Petitioner requests that this Honorable Court accept jurisdiction.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER

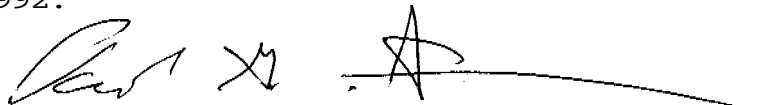


PAOLO G. ANNINO
ASSISTANT **PUBLIC** DEFENDER
Florida Bar No. 0379166
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: **904/ 252-3367**

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Florida 32114, in **his** basket at the Fifth District Court of Appeal; and mailed to Derrick Ackers, Inmate No. A-334558, #217L, Jackson Corr. Inst., P.O. Box 4900, Malone, Fla. 32445, on this 19th day of June, 1992.



PAOLO G. ANNINO
ASSISTANT **PUBLIC** DEFENDER

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 1992

91-697
PA

STATE OF FLORIDA,
Appellant,

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

v.
DERRICK ACKERS,

CASE NO. 91-735

Appellee.

RECEIVED

MAY 15 1992

PUBLIC DEFENDER'S OFFICE
7th CIR. APP. DIV.

Opinion filed May 15, 1992

Appeal from the Circuit Court
for Orange County,
Gary L. Formet, Sr., Judge.

Robert A. Butterworth,
Attorney General, Tallahassee, and
Nancy Ryan, Assistant Attorney General,
Daytona Beach, for Appellant.

James B. Gibson, Public Defender,
and Paolo G. Annino, Assistant Public
Defender, Daytona Beach, for Appellee.

SHARP, W., J.

The state appeals from the trial court's order which granted defense counsel's motion *in limine* to exclude similar fact evidence concerning Acker's commission of another crime in order to prove his identity and connection with the robbery with a firearm charge being prosecuted in this case. The trial court ruled that the facts and circumstances of the other robbery for which Ackers had been convicted were not 'sufficiently similar to allow admission pursuant to the *Williams*' rule. We disagree and reverse.

¹ *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

In this case Ackers and a codefendant, Studstill, were charged with robbing a Popeye's Fried Chicken restaurant on North Orange Blossom Trail in Orlando on September 1, 1991. According to the police reports and charging affidavits, two black males accosted two employees who were emptying a garbage can behind the restaurant at 12:20 a.m. on September 1, 1991. One carried a handgun and the other, a broomstick.

They ordered the employees back into the restaurant, gathered together all the other employees (then present), and forced them to lie on the floor. They made the manager turn over close to \$2,000 in cash from the safe which was then open. One shot a bullet at a camera mounted on the wall. No fingerprints were found but the bullet was recovered and the gun from which it was shot was identified as Studstill's, and was used in the prior robbery. Two other black males waited in a dark-colored Mercury Cougar, which served as the getaway car.

The other robbery, for which Ackers and Studstill had been convicted, took place approximately two weeks before the robbery in this case, at approximately 12:30 a.m. They robbed a Kentucky Fried Chicken restaurant, also located on North Orange Blossom Trail in Orlando. As the manager and another employee were turning off the lights and leaving by the front entrance, three black males met them and forced them back into the restaurant. Two carried guns and the third carried a broomstick. They wore masks.

The robber carrying the broomstick struck the employee. The others with guns forced the manager to open the safe. They then forced him onto the floor. One fired a gun twice; a bullet barely missed the manager's head. The robbers put the employees into the cooler and left with about \$4,000 in cash. Ackers' fingerprints were identified at that robbery.

Due to anonymous tips, Studstill was **stopped** by the police, driving a Mercury Cougar. A dark-colored Mercury Cougar had been seen at both robberies. A handgun was found in the car. It was later proven to have been the gun that fired the bullets at both robberies.

Although there were some differences in the manner in which the two robberies were carried out -- wearing **masks**; two not three robbers -- the similarities of the *modus operandi* are striking. The robberies took place within a two-week time span at fast-food restaurants located near one another on North Orange Blossom Trail in Orlando, just at closing time. Restaurant employees were interrupted just outside **and** forced back in. They were forced to the ground. The safes were robbed. A gun was fired. The robbers fled with cash. The robbers carried one or two guns **and** a broomstick.

These fact similarities are sufficient to establish a unique crime pattern pursuant to *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959) and codified in section 90.404(2)(a), Florida Statutes (1991). Evidence of Acker's participation in the earlier robbery **may** be admitted to establish Acker's identity and participation in the robbery charged in this case. *Duckett v. State*, 568 So.2d 891 (Fla. 1990); *Rogers v. State*, 511 So.2d 526 (Fla. 1987).²

REVERSED **and** REMANDED for further proceedings,

GRIFFIN and DIAMANTIS, JJ., concur.

² The trial court's concern that the earlier robbery **may** become the focal point of this case can **be** prevented by the trial court's limiting the proof of the earlier robbery to its **essential** elements and by giving appropriate jury instructions.

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA

CASE NUMBER: CR90-10093/B

Plaintiff,

vs.

DERRICK ACKERS,

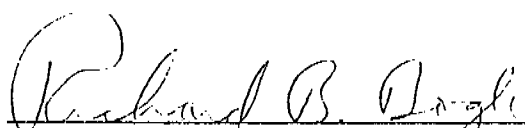
Defendant.

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CLERK OF CIRCUIT
ORANGE COUNTY
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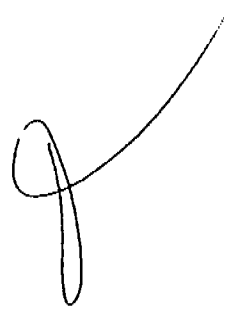
NOTICE OF INTENTION TO USE
SIMILAR FACT EVIDENCE

THE STATE OF FLORIDA, by and through the undersigned pursuant to Florida statute 90.404(2)(b), hereby furnishes Notice that it Intends to Offer Similar Fact Evidence in the trial of the above-styled cause. The State intends to prove that: **SEE ATTACHED INFORMATION CR90-9660/A**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Mark S. Troum, Counsel for Defendant, 2699 L ^{5th} Road, Suite 505, Winter Park, Florida 32789, dated this ____ day of March, 1991.



RICHARD B. BOGLE
Assistant State Attorney
Florida Bar No 363731
250 N. Orange hve., suite 400
Orlando, Florida 32801
(407) 836-2414



APPENDIX B

IN THE CIRCUIT COURT OF ORANGE COUNTY, STATE OF FLORIDA

THE STATE OF FLORIDA

VS.

DERRICK ACKERS

DARRICK STUDSTILL

INFORMATION # CR90-9660
CR90-10094

DIVISION 11

1. ROBBERY WITH A FIREARM
(Minimum Penalty)
2. ROBBERY WITH A FIREARM
(Minimum Manslaughter)
3. AGGRAVATED BATTERY

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that DERRICK ACKERS and DARRICK STUDSTILL, on the 18th day of August, 1990, in said County and State, did, in violation of Florida Statute 812.13(2)(a), by force, violence, assault or putting in fear, take away from the person or custody of RODNEY RODINSON, certain property, to-wit: UNITED STATES MONEY CURRENT, the property of RODNEY RODINSON, as Owner or custodian thereof, with the intent to permanently deprive the said owner or custodian of the property, and in the course of committing the robbery, the said DERRICK ACKERS and DARRICK STUDSTILL did carry a firearm, to-wit: a handgun.

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FRAN CARLTON
CLERK OF CIRCUIT COURT
ORANGE COUNTY, FL.

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COUNT TWO

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that DERRICK ACKERS and DARRICK STUDSTILL, on the 18th day of August, 1990, in said County and State, did, in violation of Florida Statute 812.13(2)(a), by force, violence, assault or putting in fear, take away from the person or custody of TONY KLUGE, certain property, to-wit: UNITED STATES MONEY CURRENT, the property of TONY KLUGE, as owner or custodian thereof, with the intent to permanently deprive the said owner or custodian of the property, and in the course of committing the robbery, the said DERRICK ACKERS and DARRICK STUDSTILL did carry a firearm, to-wit: a handgun.

COUNT THREE

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, OR LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that DERRICK ACKERS and DARRICK STUDSTILL, on the 18th day of August, 1990, in said County and State, did, in violation of Florida Statute 784.045(1)(b), commit a battery upon TONY KLUGE, and in furtherance thereof, did actually and intentionally touch or strike the said TONY KLUGE, against the will of the said TONY KLUGE, and in the commission of said battery did use a firearm or other deadly weapon, to-wit: a club.

"This information encompasses the transaction and all charges listed on Complaint Number, CP90-966 and the bond thereon is hereby superseded. The Orange County Sheriff's Office shall substitute the charges and bond indicated on this information for those on the above cited complaint." CP90-10094

LAWSON LAMAR, State Attorney
Ninth Judicial Circuit of Florida

STATE OF FLORIDA
COUNTY OF Orange

Personally appeared before me PHILIP D. JONES by [Signature]
Assistant State Attorney of the Ninth Judicial
Circuit of Florida, who being first duly sworn, says
that he certifies that he has received testimony
under oath from the material witness or witnesses for
the offense and that he institutes the prosecution in
good faith.

IN WITNESS WHEREOF, I have hereunto set my hand and
seal this 18th day of August, 1990.

[Signature]

Bond \$NONE

Chs. 1 & 2-E1 pb1, Ch. 3-E2 SH/vg

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO CR90-10093/B

STATE OF FLORIDA,

JUDGE GARY L. FORMET, SR.

Plaintiff,

vs

DERRICK ACKERS,

Defendant:.

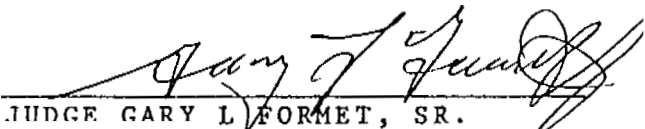
FILED IN OPEN COURT
THIS 25 DAY OF March, 1991
BY Fran Carlton, Clerk
D.G.

ORDER

THIS CAUSE having come on to be heard before this Court on Defendant's Motion in Limine to exclude similar fact evidence and the Court having considered the facts contained in the sworn arrest affidavit filed in this cause as well as the evidence and testimony received in the trial of the case of State of Florida v. Derrick Ackers, CR90-9660/A, and the Court having heard argument of Counsel, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion in Limine is granted and all evidence pertaining to the robbery of the Kentucky Fried Chicken charged in CR90-9660/A is hereby excluded from the trial of the above-styled cause.

DONE AND ORDERED in Chambers at: Orlando, Orange County, Florida this 25 day of March, 1991.


JUDGE GARY L. FORMET, SR.
Circuit Court

@COPIES

TO: Richard B. Bogle, Assistant State Attorney
Mark S. Troum, Counsel for Defendant

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF
THE STATE OF FLORIDA

STATE OF FLORIDA,)
) Appellant,)
vs.))
DERRICK ACKERS,))
) Appellee.)
_____)

DCA CASE NO. 91-735

MOTION TO DISMISS

Pursuant to Rule 9.300, Florida Rules of Appellate Procedure, Appellee, Derrick Ackers, moves this Court to dismiss this State Appeal for lack of jurisdiction. As grounds, Appellee alleges:

1. On March 28, 1991, the State filed a Notice of Appeal. (R457)
2. The State's Notice reads in part: "The nature of the order is that granting Defendant's Motion in Limine and excluding evidence of the robbery of the Kentucky Fried Chicken Restaurant committed August 18, 1990." (R457)
3. The State is attempting to appeal a pretrial order.
4. The judicial authority to entertain appeals from non-final orders is derived from the Rules of Appellate Procedure. See generally, State v. Creighton, 469 So.2d 735 (Fla. 1985).
5. The State cites in its Notice of Appeal Section 924.07(1)(h), Florida Statutes, as the authority of this appeal. However, this provision does not authorize appeals from non-final orders. See State v. Smith, 260 So.2d 489 (Fla. 1972).

6. Rule 9.140, Florida Rules of Appellate Procedure, **lists** exhaustively the authority for a State Appeal on a non-final order. A pretrial Motion in Limine which does not involve a search and seizure, is not included. Hence, the State lacks authority for this appeal.

7. In addition, this Court **should** not treat the State's Notice of Appeal as a writ of certiorari.

8. In State v. Lockman, 522 So.2d 482 (Fla. 5th DCA 1988), this Court stated:

The supreme court has recently stated, and reaffirmed the law of this state, that common law writ of certiorari may be sought for review of non-final orders other than those prescribed in the Florida Rules of Appellate Procedure. State v. Pettis, 520 So.2d 250 (Fla. 1988). The Pettis decision clearly **holds** that where the state's ability to prosecute is effectively negated by the court's order, a petition for certiorari is an appropriate remedy.

Id. at 483. (Emphasis Added).

In the instant case, the trial court never found that the "state's ability to prosecute is effectively negated by the court's order." The trial court did not make a finding that this issue is "dispositive" to the case. (R405) In fact, the trial court suggested that it may reconsider its ruling if the State proceeded to trial and presented additional evidence of the similarity of the two crimes. (R405) In the instant case, the State has two witnesses, Lori Gass **and** Wanda Walton, who have sworn under oath that they may be able to identify the robbers. (R417,418) **Given** the fact that the State has two possible eye

witnesses, the State has not met its burden to show its "ability to prosecute is effectively negated."

WHEREFORE, Appellee requests this Court to dismiss this appeal.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Paolo G. Annino

PAOLO G. ANNINO
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0379166
112 Orange Ave., Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Ste. 447, Daytona Beach, Florida 32114, via his basket at the Fifth District Court of Appeal, and mailed to: Derrick Ackers, Inmate No. 334588, Jackson Corr. Inst., P.O. Box 4900, Malone, Florida 32445, this 9th day of December, 1991.

Paolo G. Annino

PAOLO G. ANNINO
ASSISTANT PUBLIC DEFENDER

91-687
PA

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

STATE OF FLORIDA,
Appellant,

v.

Case no. 91-735 ✓

RECEIVED

FEB 18 1992

PUBLIC DEFENDER'S OFFICE
7th CIR. APP. DIV.

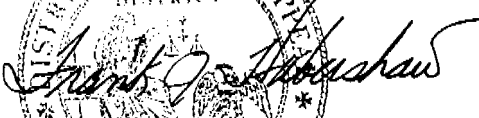
DERRICK ACKERS,
Appellee.

DATE: February 18, 1992 ✓

BY ORDER OF THE COURT:

ORDERED that Appellee's MOTION TO DISMISS, filed December 9, 1991,
is denied. See State v. Palmore, 495 So.2d 1170 (Fla. 1986); State v. Ono,
552 So.2d 234 (Fla. 5th DCA 1989); State v. Katiba, 502 So.2d 1274 (Fla. 5th
DCA 1987). See also §924.071(1), Fla. Stat. (1991).

I hereby certify that the foregoing is
(a true copy of) the original court order.


FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Office of the Public Defender, 7th JC ✓
Office of the Attorney General, Daytona Beach
Derrick Ackers