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OCT 5 1992

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

CASE NO. 80508

**CARLA GLADFELTER,**

Petitioner,

vs.

**STATE OF FLORIDA,**

Respondent.

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RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent, the State of Florida, was the Appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The Petitioner was the Appellant and the defendant, respectively in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondent, the State of Florida accepts the statement of the case and facts contained in Petitioner's brief on jurisdiction. Respondent reserves the right to bring out additional facts during the argument portion of its brief.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal's decision in Gladfelter does not expressly and directly conflict with the First District Court's decision in Martin v. State, 577 So.2d 689 (Fla. 1st DCA 1991) where the trial court in Martin reserved jurisdiction not merely to set the amount of jurisdiction, but also to impose jurisdiction as a condition of probation.

## ARGUMENT

THE DECISION BY THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE FIRST DISTRICT COURT.

Petitioner seeks to establish this Court's "conflict" jurisdiction pursuant to Article V, §3(b)(3) Fla. Const. (1980), alleging that the Fourth District Court of Appeal's decision below conflicts with the decision of the First District Court in Martin v. State, 577 So.2d 689 (Fla. 1st DCA 1991). Respondent disagrees as the decision subjudice does not expressly and directly conflict with other State appellate decisions. As a result, this Honorable Court lacks jurisdiction to grant Petitioner's request for discretionary review.

Under Article V, section 3(b)(3) of the Florida Constitution this Court may review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on same question of law. (Emphasis added). Thus, "conflict" jurisdiction is properly invoked when: 1) the district court announces a rule of law which conflicts with a rule previously announced by the Supreme Court or by another district, or 2) the district court applies a rule of law to produce a different result in a case which involves substantially the same facts as another case. Mancini v. State, 312 So.2d 732, 733 (Fla. 1975). Accordingly, discretionary review by this Court arises from conflicts of decisions, not conflicts of opinions or reasons. Jenkins v. State, 385 So.2d 1356 1359 (Fla. 1980); "Obviously, two cases cannot be in conflict if they can be validly distinguished."

Morningstar v. State, 405 So.2d 778, 783 (Fla. 4th DCA 1981) (Anstead, J., concurring), affirmed, 428 So.2d 220 (Fla. 1982), cert. denied, 464 U.S. 821 (1983).

In State v. Martin, 577 So.2d 689 (Fla. 1st DCA 1991) the trial court placed Appellee on probation on November 14, 1989 and reserved jurisdiction to impose restitution as a condition of probation. Then on July 16, 1990, the trial court entered an order requiring Appellee to pay a specified amount of restitution. Appellee argued that the trial court was without jurisdiction to modify the sentence since more than sixty days had run since the sentence was imposed. Id. at 690. The First District Court held that the trial court was without jurisdiction to modify the sentence since modification had to be made within sixty days. Id.

In Gladfelter v. State, Case No. 91-3432 (Fla. 4th DCA September 16, 1992), Appellant was placed on probation; a special condition of probation required that Appellant make restitution to the victim in an "amount to be determined." Fifteen months after the entry of the original sentence, the trial court entered an order of modification of probation requiring Appellant to pay \$5896.71 in restitution. The Fourth District Court of Appeal held that as long as the requirement to pay restitution is included in the sentence, setting the actual amount beyond sixty days from the sentence is permissible.

The Martin decision does not conflict with the Fourth District's decision in Gladfelter to the extent the trial court in Martin reserved jurisdiction not merely to set the amount of



restitution, but to impose restitution as a condition of probation State v. Martin, 577 So.2d at 690, see also Fairweather v. State, 596 So.2d 1276, 1277 (Fla. 1st DCA 1992). In Gladfelter the trial court imposed restitution as a condition of probation at the time it entered the original probation order on August 23, 1990.


Although the trial court orally stated that it reserved jurisdiction to impose restitution at a later date in Martin, the First District Court concluded that it had not in fact imposed restitution and could not reserve jurisdiction to do so. Since this subtle distinction may be the basis for the decision in Martin, there is no direct or express conflict with Gladfelter. Accordingly, this court should deny Petitioner's request for discretionary review in this case.

CONCLUSION

WHEREFORE, Respondent respectfully requests this Court to Deny Petitioner's request for discretionary review in this case.

Respectfully submitted,

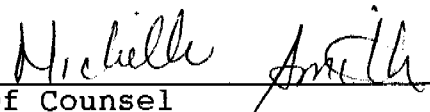
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by courier to: **MALLORYE G. CUNNINGHAM, Assistant Public Defender, 15th Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401, this 2nd day of October, 1992.**

  
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Of Counsel

MS/br