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SID J. WHITE

APR 9 1993

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :  
 :  
 Petitioner, :  
 :  
 vs. :  
 :  
 RICKEY FAYE SANDERSON, :  
 :  
 Respondent. :  
 :  
 \_\_\_\_\_ :

Case No. 91-03055

DISCRETIONARY REVIEW OF DECISION OF THE  
DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

CECILIA A. TRAINA  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NUMBER 865729

Public Defender's Office  
Polk County Courthouse  
P. O. Box 9000--Drawer PD  
Bartow, FL 33830  
(813) 534-4200

ATTORNEYS FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, RICKEY FAYE SANDERSON, was the Appellee in the Second District Court of Appeal and the defendant in the trial court. Petitioner, the State of Florida, was the Appellant in the Second District Court of Appeal. The appendix to this brief contains a copy of the order granting Petitioner's motion for rehearing and the substituted opinion rendered on March 12, 1993.

STATEMENT OF THE CASE AND FACTS

On May 16, 1991, the Respondent was charged by information with grand theft (R31). On May 17, 1991, the respondent was arraigned (R34). He pled no contest to the crime charged, judgment was entered, and the sentence was imposed (R34,35). The respondent's sentence was imprisonment for a period of six months to be followed by a probationary period of one year (R36,37). The court also ordered the respondent to pay restitution and reserved jurisdiction for sixty days (R37).

The Petitioner filed a notice of hearing on May 20, 1991 (R38). The hearing on the Petitioner's motion for restitution was set for June 20, 1991 (R38). On that date, however, the victim was unable to attend the hearing due to a family emergency (R9). The respondent did not consent to the payment of the restitution figure given by the victim. As a result the state requested a continuance (R9). The trial court granted the continuance on the condition that the state reset the restitution hearing within sixty days of the date the appellee's judgment and sentence were entered (R10,11).

The state filed its second notice of hearing on June 25, 1991 (R40). The continued restitution hearing was set for August 8, 1991 (R40). On August 8, 1991 the trial court, sua sponte, determined that it had lost jurisdiction to impose restitution (R15). Nevertheless, the parties held the hearing to perfect the record for purposes of appeal (R16). At the end of the hearing the trial court determined that restitution could not be ordered. The

court interpreted State v. Martin, 577 So. 2d 689 (Fla. 1st DCA 1991) and McLaughlin v. State, 573 So. 2d 419 (Fla. 2d DCA 1991) as requiring the restitution hearing itself be held and restitution ordered within sixty days of sentencing (R24,25).

The trial court entered its order on August 13, 1991 (R42).

The Petitioner requested in its Motion to Treat Notice of Appeal as Petition for Writ of Certiorari and Petition for Writ of Common Law Certiorari that the trial court's order denying the state's motion for restitution be quashed and to reconsider the motion. On May 27, 1992, the Second District Court of Appeal entered an order denying the petition for writ of certiorari on the authority of McLaughlin and Martin. On March 12, 1993, in response to Petitioner's motion for rehearing, the district court granted the motion and withdrew its opinion of May 27, 1992. A substituted opinion denied the petition for writ of certiorari but acknowledged conflict with Savory v. State, 600 So. 2d 1 (Fla. 4th DCA 1992) and Smith v. State, 589 So. 2d 387 (Fla. 1st DCA 1991).

Petitioner now requests that this Court invoke its jurisdiction for discretionary of this issue.  
review of this issue.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal denied Petitioner's Motion for Writ of Certiorari to review the trial court's refusal to order respondent to pay restitution because it had lost jurisdiction to impose restitution. The Second District acknowledged conflict with the decisions of two other districts; however, the decision consistent with this Court's decision in McGurn v. Scott, 596 So. 2d 1042 (Fla. 1992) and is not grounds for discretionary review.

## ARGUMENT

### ISSUE

WHETHER THIS COURT SHOULD INVOKE ITS  
JURISDICTION FOR DISCRETIONARY  
REVIEW IN THE INSTANT CASE?

The trial court lacked jurisdiction to impose restitution in this case. McGurn v. Scott, 596 So. 2d 1042 (Fla. 1992), held that a trial court could not reserve jurisdiction to impose prejudgment interest. Prejudgment interest is like restitution because it "is awarded as just compensation to those who are damaged by having their property withheld from them or destroyed." Id. at 1044. If a trial court cannot reserve jurisdiction to impose restitution in the civil context, then it also cannot reserve jurisdiction to impose restitution in the criminal context.

While the Second District's decision is in conflict with Savory and Smith, which both held that the trial court may reserve jurisdiction for as long as two years to impose restitution, McGurn thus is squarely inconsistent. The Second District's decision in the instant case is therefore consistent with McGurn and this Court should not invoke its jurisdiction for discretionary review.



CONCLUSION

In light of the foregoing reasons, argument and authorities, this Court should not invoke jurisdiction for discretionary review.

APPENDIX

PAGE NO.

1. Order granting motion for rehearing and substituted opinion of March 12, 1993.

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IN THE SECOND-DISTRICT COURT OF APPEAL, LAKE LAND, FLORIDA

MARCH 12, 1993

STATE OF FLORIDA, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 RICKEY FAYE SANDERSON, )  
 )  
 Respondent. )

CASE NO. 91-03055

BY ORDER OF THE COURT:

Upon consideration of the petitioner's motion for rehearing, clarification, or certification of conflict between District Courts of Appeal filed on June 5, 1992, it is

ORDERED that the motion for rehearing is granted. The opinion filed on May 27, 1992, is withdrawn, and the attached opinion is substituted therefor.

Received By  
 MAR 12 1993  
 Appellate Division  
 Public Defenders Office

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

*William A. Haddad*  
 WILLIAM A HADDAD, CLERK *by cs*

c: Dale E. Tarpley, Assistant Attorney General, Tampa  
 Cecilia A. Traina, Assistant Public Defender, Bartow

A1

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

STATE OF FLORIDA,

Petitioner,

v.

RICKEY FAYE SANDERSON

Respondent.

CASE NO. 91-03055

Opinion filed March 12, 1993.

Petition for Writ of  
Certiorari to the Circuit  
Court for Sarasota County;  
James W. Whatley, Judge.

Robert A. Butterworth, Attorney  
General, Tallahassee, and Dale  
E. Tarpley, Assistant Attorney  
General, Tampa, for Petitioner.

James Marion Moorman, Public  
Defender, and Cecilia A. Traina,  
Assistant Public Defender,  
Bartow, for Respondent.

PER CURIAM.

We deny the petition for writ of certiorari. In so  
doing, we acknowledge conflict with Savory v. State, 600 So. 2d 1  
(Fla. 4th DCA 1992) and Smith v. State, 589 So. 2d 387 (Fla. 1st  
DCA 1991).

CAMPBELL, A.C.J., HALL and BLUE, JJ., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Dale E. Tarpley,  
Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on  
this 7<sup>th</sup> day of April, 1993.

Respectfully submitted,

*Cecilia A. Traina*

JAMES MARION MOORMAN  
Public Defender  
Tenth Judicial Circuit  
(813) 534-4200

CECILIA A. TRAINA  
Assistant Public Defender  
Florida Bar Number 865729  
P. O. Box 9000 - Drawer PD  
Bartow, FL 33830

CAT/mlm