IN THE SUPREME COURT OF FLORIDA

BRIAN MCLEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 95,949

ORIGINAL

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent State of Florida was the appellee in the District Court of Appeal (DCA) and will be referred to as the state or respondent. Petitioner McLEAN was the appellant in the DCA and will be referred to as petitioner or by proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

This brief was prepared using New Court 12.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, which is attached in slip opinion form. The decision can also be found at 24 Fla. L. Weekly 1315. For convenience, and because of its brevity, it is quoted in full.

> Appellant argues that failure to announce imposition of restitution at sentencing or give appellant notice of the intent to impose restitution and the right to have a hearing thereon was reversible error. This issue was not, however, preserved for appeal. Locke v. State, 719 So.2d 1249 (Fla. 1st DCA 1998); Lorenzana v. State, 717 So.2d 119 (Fla. 4th DCA 1998). The remaining issues raised on appeal are without merit.

Petitioner is apparently unfamiliar with the proper procedures for seeking discretionary review based on direct and express conflict of decisions and has improperly given a statement of the case and facts based on the record on appeal in the district court. That record is, of course, not before this Court. The only relevant facts are those contained within the four corners of the

decision below. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves. Thus, petitoner's statement of the case and facts must be rejected in its entirety as outside the scope of discretionary conflict of decisions review.

SUMMARY OF ARGUMENT

A summary is omitted because of the brevity of the argument.

ARGUMENT

ISSUE

SHOULD THIS COURT EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT BELOW WHICH RELIES ON AN EARLIER DECISION OF THE DISTRICT COURT WHICH IS NOW UNDER REVIEW IN THIS COURT? (Restated)

Petitioner has improperly relied upon the record on appeal in the district court. Thus, his entire argument on conflict is the fruit of the poisoned tree and should be disregarded in its entirety. Even if considered, he has failed to show direct and express conflict of decisions.

Nevertheless, although not relied on by petitioner, the district court decision is grounded on Locke v. State, which is currently under review in this Court under a certified question along with numerous other cases presenting the same issue[1]. Accordingly, this Court does have discretionary jurisdiction to review the decision below if it wishes as part of its review of Locke and progeny. Jollie v. State, 405 So.2d 418 (Fla. 1981). However, because reviewing still another of these insignificant cases where no sentencing issue was preserved in the trial court would not

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[1] Locke v. State, case no. 94,396; Engeseth v. State, case no. 95,003; Heird v. State, case no. 94,348; Wright v. State, case no. 94,541; McCray v. State, 94,640; Sassnett v. State, case no. 94,812; Burch v. State, case no. 94,956. In addition, three earlier cases involving the same issue but not the certified question are also before the Court. State v. Dodson, case no. 93,077; State v. Mike, case no. 93,163; State v. Matke, case no. 92,476. These three earlier cases were issued before the 1st DCA reversed its field and started enforcing the preservation requirement as in Locke v. State.

contribute to the case law of the state, the state urges the court to deny discretionary review, also on the authority of Jollie. Instead, petitioner should be instructed to familiarize himself with the proper procedures for seeking discretionary review in this Court and the case law of this Court which holds that his remedy in such instances as here is to seek a stay of the mandate in the district court pursuant to the procedures prescribed by this Court in Jollie. In relevant part, Jollie holds that:

> The situation presented in this cause ordinarily applies only to a limited class of cases. The problem arises from the practical situation which faces all appellate courts at one time or another-that is, how to dispose conveniently of multiple cases involving a single legal issue without disparately affecting the various litigants. Traditional practice in dealing with a common legal issue in multiple cases, both in district courts and here, has been to author an opinion for one case and summarily reference that opinion on all the others. Being time- and laborsaving for a court, that practice should not be discouraged.
>
> [2] We believe, however, that there can be improvement in the procedure through which district courts can isolate for possible review in this Court those decisions which merely reference to a lead opinion, as we now have for review, as distinguished from those per curiam opinions which merely cite counsel-advising cases such as in Dodi Publishing. There are two prongs to the problem, and we believe each can be treated by the judges of the district courts without undue problems.
>
> First, we suggest the district courts add an additional sentence in each citation PCA which references a controlling contemporaneous or companion case, stating that the mandate will be withheld pending final disposition of the petition for review, if any, filed in the controlling decision. In essence, this will "pair" the citation PCA with the referenced decision in the district court until it is final without review, or if review is sought, until that review is denied or otherwise acted upon by this Court. If review of the referenced decision is requested, the parties may seek consolidation here. In any event, the district courts' withholding of the mandates will dispose of the need for separate motions to stay mandates in those courts. This simple process, moreover, can be accomplished administratively in the

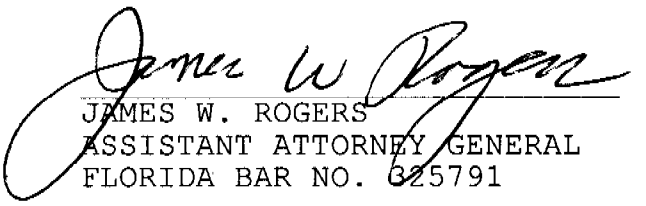
district courts, in the clerks' offices, without significant activity by the judges either before or after the controlling decision is filed with or acted upon by this Court. Jollie, 405 So.2d at 420.

CONCLUSION

The state urges the Court to decline to exercise its discretionary jurisdiction.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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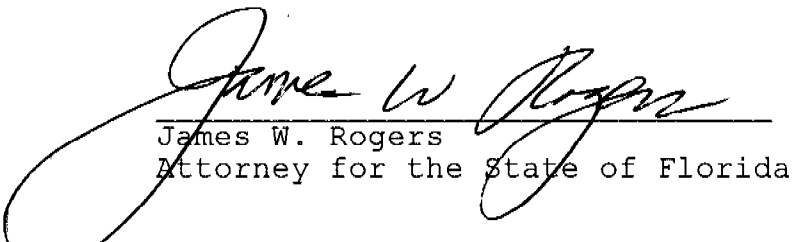
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF RESPONDENT has been furnished by U.S. Mail to Fred Parker Bingham, II, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 16th day of July 1999.



James W. Rogers
Attorney for the State of Florida

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