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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant before the District Court of Appeal. He will be referred to as petitioner herein.

A conformed copy of the decision below is attached.

STATEMENT OF THE CASE AND FACTS

Respondent agrees with the statement of facts recited on pages 2-3 of petitioner's brief, with the following exceptions or clarifications:

In determining whether conflict jurisdiction exists, the only relevant facts are those within the four corners of the decisions allegedly in conflict. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Petitioner states in his brief that he was read his rights only in English. This alleged fact is not part of the opinion and should not be considered in resolving the issue before this Court.

SUMMARY OF THE ARGUMENT

Acosta v. State, 519 So.2d 658 (Fla. 1st DCA 1988), rev. denied 529 So.2d 695 (Fla. 1988), and Balthazar v. State, 533 So.2d 955 (Fla. 4th DCA 1988), are not expressly and directly conflicting decisions. Acosta involved the voluntariness of consent to search. The opinion contained a finding of antecedent police misconduct and therefore the clear and convincing standard was applied in determining the voluntariness of the consent.

Balthazar involved the voluntariness of a defendant's confession. The opinion reveals no indication of any police misconduct. Under those circumstances the fourth district applied the preponderance of the evidence standard in determining whether the confession was voluntary. As the two decisions are factually and thus legally distinguishable, this Court does not have jurisdiction.

ARGUMENT

POINT INVOLVED (Restated)

WHETHER THERE IS AN EXPRESS AND  
DIRECT CONFLICT BETWEEN ACOSTA  
V. STATE, 519 So.2d 658 (Fla.  
1st DCA 1988) AND BALTHAZAR V.  
STATE, 533 So.2d 955 (Fla. 4th  
DCA 1988)?

Petitioner contends that Acosta v. State, 519 So.2d 658 (Fla. 1st DCA 1988), rev. denied 529 So.2d 695 (Fla. 1988), directly and expressly conflicts with Balthazar v. State, 533 So.2d 995 (Fla. 4th DCA 1988). In reviewing such a claim, the only relevant facts are those within the four corners of the decisions allegedly in conflict. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986).

In Acosta, the opinion indicated that the defendant had been in this country for only three years at the time he consented to the search. The arresting officer testified that he had to ask appellant twice for permission to search the vehicle. The first district stated that in a situation where it was obvious to the officer that appellant may not have understood his request, it was incumbent upon the officer to advise the defendant of his right to refuse consent. Id. at 660.

The court in Acosta recognized that if no police misconduct precedes a consent request, the issue of the

voluntariness of the search is judged by the preponderance of the evidence standard. Id. at 660-661. However, the first district found that standard inapplicable because the arresting officer was guilty of antecedent misconduct due to his repeated requests for consent and his failure to advise the defendant of his right to refuse once it became apparent that the defendant may not have understood the requests.

Petitioner also mentions Garcia v. State, 186 So.2d 556 (Fla. 3rd DCA 1966), which was cited in Acosta. In Garcia, the appellant cited to Kovach v. United States, 53 F.2d 639 (6th Cir. 1931), for the proposition that one who does not speak English cannot intelligently waive his constitutional rights. The third district held only that it need not consider the correctness of Kovach because the defendant in Garcia was informed of his rights by a Spanish speaking officer. See also DeConingh v. State, 433 So.2d 501 (Fla. 1983) (decided by this Court after Garcia and holding that when it is not clear the defendant understood her rights the correct standard in determining voluntariness is preponderance of the evidence, while considering the totality of the circumstances).

The facts and law of Balthazar are distinguishable from Acosta and Garcia. Balthazar involved the voluntariness of the defendant's confession, not a consent to search. The opinion indicates only that at some point the defendant alleged to have a limited understanding of English. The circumstances surrounding the confession are not discussed in the opinion. There is no



indication that the person obtaining the confession made repeated requests for a confession or was aware of the defendant's allegedly limited understanding of English. No evidence of any police misconduct is recited in the opinion. Accordingly, the court applied the preponderance standard. Given the above, the decisions in question are not in conflict and do not provide this Court with jurisdiction.

CONCLUSION

The cases cited by petitioner are not in conflict.  
This Court does not have jurisdiction.

Respectfully submitted,

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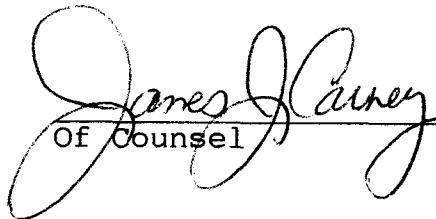


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been  
furnished by courier to Louis G. Carres, Assistant Public  
Defender, 9th Floor, Governmental Center, 301 N. Olive Avenue,  
West Palm Beach, Florida, this 27th day of January, 1988.

  
Of Counsel