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IN THE SUPREME COURT OF FLORIDA

CARL HOLLINGER,

Petitioner,

v. CASE NO. 79,800

STATE OF FLORIDA,

Respondent.
_____/

# JURISDICTIONAL BRIEF OF RESPONDENT

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## STATEMENT OF CASE AND FACTS

The state disagrees with the petitioner's statement. Although the defense is seeking the exercise of conflict jurisdiction by this court, it includes facts beyond the four corners of the decision rendered below. "[F]or purposes of determining conflict jurisdiction, this Court is limited to the facts which appear on the face of the opinion." *Hardee v. State*, 534 So.2d 706, 708, n. * (Fla. 1988). "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." Neither a dissenting opinion nor the record itself can be used to establish jurisdiction." *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986). The facts underlying the decision below are:

> On February 20, 1991, at approximately 9:45 p.m., the drug unit of the Orange County Sheriff's Office was conducting a drug sweep. The sweep consisted of seven or eight drug unit officers who wore outfits consisting of a black mask, sheriff's office smock, gun belt and flashlight. An unmarked automobile containing Deputy Hanton and three other officers pulled into a grocery parking lot. Appellee was standing alone in the middle of the lot while other persons were located on the front porch of the grocery store and another group was situated at the north end of the lot.
>
> After Hanton's vehicle stopped within ten feet of appellee, Hanton exited and announced that he was a deputy sheriff. Hanton then proceeded to walk toward appellee, who was standing about three feet from the group of individuals located at the north end of the lot. The other officers proceeded toward the other individuals located in that area with the exception of an officer who remained in an automobile at the time. Hanton observed appellee place one of his hands behind his back and drop a white tissue. Hanton initially said nothing to appellee other than identifying himself - he neither ordered appellee to drop the tissue nor to drop whatever was in appellee's hand. Hanton then asked appellee to place his hands in front of himself. Hanton retrieved the tissue which contained six rocks of a substance which field-tested positively as cocaine.

*State v. Hollinger*, 596 So.2d 521, 522 (Fla. 5th DCA 1992).

## SUMMARY OF ARGUMENT

There is no conflict established between the cases relied upon by the petitioner and this case under the differing material facts. All of the earlier cases involved an illegal stop which led to the suspects either discarding or revealing contraband. Police officers in two of the cases directed the suspects to take some action which led to the revealing of the contraband. In this case the defendant had neither been stopped nor directed to do anything by the officer, who had merely announced as he got out of the car that he was a deputy. The differing facts between the cases do not provide conflict upon which this court may exercise jurisdiction under Article V, Section 3(b)(3), of the Florida Constitution.

## ARGUMENT

THERE IS NO CONFLICT BETWEEN THE INSTANT CASE AND THOSE CITED BY THE DEFENSE WHICH WOULD INVEST THIS COURT WITH JURISDICTION UNDER ARTICLE V, SECTION 3(b)(3), OF THE FLORIDA CONSTITUTION.

"[F]or purposes of determining conflict jurisdiction, this Court is limited to the facts which appear on the face of the opinion." *Hardee v. State*, 534 So.2d 706, 708, n. * (Fla. 1988). "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986). There is no conflict between the instant case and those pointed by the defense. The earlier cases all involved illegal stops. The instant case, on the other hand, does not involve any stop prior to the abandonment of the drugs by the defendant. Moreover, the officer in this case did not direct the defendant to do anything. Rather, the officer merely identified himself as a deputy sheriff as he exited the police car.

The material facts were stated in the following manner in the decision below:

> On February 20, 1991, at approximately 9:45 p.m., the drug unit of the Orange County Sheriff's Office was conducting a drug sweep. The sweep consisted of seven or eight drug unit officers who wore outfits consisting of a black mask, sheriff's office smock, gun belt and flashlight. An unmarked automobile containing Deputy Hanton and three other officers pulled into a grocery parking lot. Appellee was standing alone in the middle of the lot while other persons were located on the front porch of the grocery store and another group was situated at the north end of the lot.
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> appellee, who was standing about three feet from the group of individuals located at the north end of the lot. The other officers proceeded toward the other individuals located in that area with the exception of an officer who remained in an automobile at the time. Hanton observed appellee place one of his hands behind his back and drop a white tissue. Hanton initially said nothing to appellee other than identifying himself - he neither ordered appellee to drop the tissue nor to drop whatever was in appellee's hand. Hanton then asked appellee to place his hands in front of himself. Hanton retrieved the tissue which contained six rocks of a substance which field-tested positively as cocaine.

*State v. Hollinger*, 596 So.2d 521, 522 (Fla. 5th DCA 1992).

The district court found the "abandonment was voluntary because it was not in response to any police request or command." *Id.* The court expressly "reject[ed] the conclusion that appellee was illegally seized. To constitute a seizure there must be either application of physical force by the officer or submission by the suspect to a show of authority." *Id.*, citing *California v. Hodari D*, ___ U.S. ___, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). The court also found that "Hanton applied no physical force on appellee nor did appellee submit to any show of authority." *Id.*

All of the cases which the petitioner contends are in conflict involved illegal seizures. In *Cox v. State*, 586 So.2d 1321 (Fla. 2d DCA 1991), the appellant had been stopped solely on the recollection of the officer that a white Oldsmobile had reportedly been stolen. *Id.*, 1322. "When the appellant stepped out to talk to the officer, he dropped a baggie of marijuana to the ground." *Id.* The district court held: "The description upon which the officer relied in this case was too general to constitute a founded or reasonable suspicion for a stop." *Id.* The court found: "It is clear that the appellant's act of

abandoning or accidently dropping the marijuana was prompted by or the result of the officer's illegal stop." *Id.*

The state conceded that an improper stop had been made in *Wallace v. State*, 540 So.2d 254 (Fla. 4th DCA 1989). The only issue was whether under the facts of the case there had been an abandonment. The relevant facts were stated:

> When the officer here asked the defendant what he had in his hand, he replied: "nothing." He then opened a blue bottle in his hand and threw the contents to the ground. The contents included a cocaine rock.

*Id.*, 254-255.

The court rejected the state's abandonment theory under the facts of the case. *Id.*, 255.

The court held that the observations of the officer in *Spann v. State*, 529 So.2d 825 (Fla. 4th DCA 1988), did not amount to reasonable suspicion of criminal activity which would have justified a stop. The material facts were:

> [T]he police noticed a vehicle with a white female driver, and a white male front seat passenger, and appellant, a black back seat passenger, stop near the intersection of 27th Avenue and North Gifford Road in a black neighborhood. The car pulled off the pavement onto the shoulder and the car lights were turned off. Appellant got out of the car, walked down the street, and entered a nearby restaurant. In a few minutes he returned to the car; whereupon, the white male exited the car and, as the police approached, they ordered appellant to "freeze, stop." Appellant stopped and then dropped an aluminum package near his feet; the officers then told him to put his hands on the hood of his car. The police picked up the package and recognized it as cocaine. They then searched appellant and found a bag of marijuana in his rear pocket.

*Id.*

The court held, "based upon the stipulation of the parties filed in this cause that the defendant dropped the cocaine packet as a

result of the order of the law enforcement officer to stop, . . . the state's abandonment theory is not persuasive." *Id.*, 826.

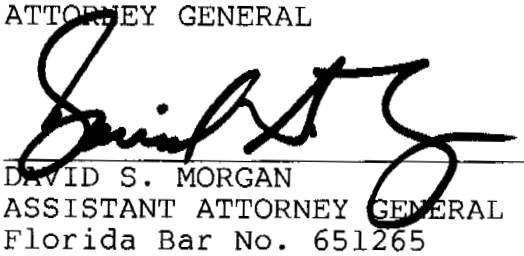
In short, there is no conflict established between the cases relied upon by the petitioner and this case under the differing material facts. All of the earlier cases involved an illegal stop which led to the suspects either discarding or revealing contraband. Police officers in two of the cases directed the suspects to take some action which led to the revealing of the contraband. In this case the defendant had neither been stopped nor directed to do anything by the officer, who had merely announced as he got out of the car that he was a deputy. The differing facts between the cases do not provide conflict upon which this court may exercise jurisdiction under Article V, Section 3(b)(3), of the Florida Constitution.

## CONCLUSION

This court should decline to exercise jurisdiction in this case because no conflict exists between this decision and those decisions relied upon by the petitioner in light of the differing material facts.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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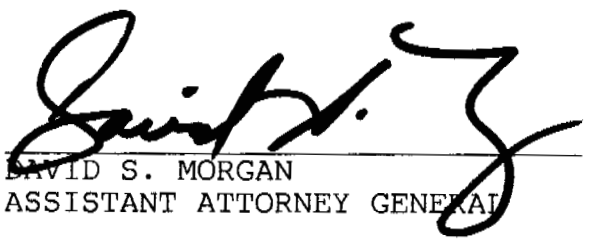
## CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to George D.E. Burden, Assistant Public Defender, 112-A Orange Ave., Daytona Beach, FL 32114, by interoffice delivery on this 29th day of June, 1992.



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