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IN THE FLORIDA SUPREME COURT

CASE Nº

92,844

DANTE RUBIO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

**AMENDED PETITIONER'S BRIEF ON JURISDICTION**

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**STATEMENT OF THE CASE AND FACTS**

The opinion in this cause states in its entirety:

Affirmed. *Peart v. State*, 23 Fla. L. Weekly D514 (Fla. 3d DCA Feb. 18, 1998).

(A. 1).

In *Peart*, the case cited as controlling authority, the Third District certified that its decision expressly and directly conflicted with the decision of the Fourth District in *Marriott v. State*, 605 So. 2d 985 (Fla. 4<sup>th</sup> DCA 1992) and the decision of the First District in *Wood v. State*, 698 So. 2d 293 (Fla. 1st DCA 1997), review granted, Case No. 91,333 (Fla. Jan. 12, 1998). *Peart*, 23 Fla. L. Weekly at D516. *Peart* is currently pending in this Court as Case No. 92,629.

**SUMMARY OF ARGUMENT**

A per curiam decision without opinion of a district court of appeal which cites as controlling authority a decision that is pending review in this Court constitutes prima facie express conflict for purposes of jurisdiction. The decision at bar cites as controlling authority *Peart*, a decision that is currently pending review in this Court. Accordingly, conflict jurisdiction over the case *sub judice* exists.

## ARGUMENT

This Court held in *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981) that " a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction." In accord with this holding, this Court has routinely accepted jurisdiction over per curiam affirmances with citations to prior decisions that were pending review in this Court at that time. See, e.g., *Russo v. Sera-Tec Biologicals, Inc.*, 657 So. 2d 1159 (Fla. 1995); *N. H. v. State*, 646 So. 2d 195 (Fla. 1994); *Roberts v. State*, 644 So.2d 84 (Fla. 1994); *Steele v. State*, 626 So. 2d 653 (Fla. 1993); *State v. Lofton*, 534 So. 2d 1148 (Fla. 1988).

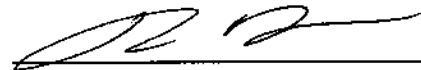
The opinion sub judice cited as controlling authority *Peart*, supra, a decision which is pending review in this Court - in *Peart*, the Third District certified that its decision expressly and directly conflicted with decisions of other district courts of appeal. Pursuant to *Jollie*, this citation to *Peart* prima facie establishes that the decision at bar also expressly and directly conflicts with decisions of other district courts and provides this Court with jurisdiction over this cause.

**CONCLUSION**

Based on the authorities set forth above, it is respectfully submitted that express and direct conflict exists and that this Court should accept jurisdiction over this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4<sup>th</sup> day of May, 1998, a true and correct copy of the foregoing Amended Petitioner's Brief on Jurisdiction and Appendix was furnished to:

Office of the State Attorney  
1350 Northwest 12th Avenue  
Miami, Florida 33136

  
RICHARD HERSCH

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

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
THIRD DISTRICT  
JANUARY TERM, 1998

DANTE RUBIO,

\*\*

Appellant,

\*\*

vs.

\*\*

CASE NO. 97-3107

THE STATE OF FLORIDA,

\*\*

LOWER

Appellee.

\*\*

TRIBUNAL NO. 82-16537

Opinion filed March 18, 1998.

An Appeal under Fla. R. App. P. 9.140(i) from the Circuit  
Court for Dade County, Maxine Cohen Lando, Judge.

Richard Hersch, for appellant.

Robert A. Butterworth, Attorney General, and Lara J.  
Edelstein, Assistant Attorney General, for appellee.

Before JORGENSEN, GODERICH and SHEVIN, JJ.

PER CURIAM.

Affirmed. Peart v. State, 23 Fla. L. Weekly D514 (Fla. 3d  
DCA Feb. 18, 1998).