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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 93, 942

WILLIE JAMES BROWN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

* *

RESPONDENT'S BRIEF ON JURISDICTION

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INTRODUCTION

The Respondent, the State of Florida, was the appellee in the Fourth District Court of Appeal and the prosecution in the trial court of the Nineteenth Judicial Circuit, in and for St. Lucie County. The Petitioner was the appellant and the defendant, respectively in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" refers to Petitioner's Appendix attached to his jurisdictional brief, which includes a conformed copy of the district court's opinion. Unless otherwise indicated, all emphasis has been supplied by Respondent.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Respondent hereby certifies that 12 point Courier New is used in this brief.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts appearing on page 2 of his jurisdictional brief to the extent that it is accurate and nonargumentative.

SUMMARY OF THE ARGUMENT

Respondent respectfully requests this Court, in its discretion, to decline to accept jurisdiction in this case. Petitioner has failed to demonstrate that the decision of the Fourth District Court of Appeal expressly and directly conflicts with a decision of another district court of appeal on the same question of law, or that it falls under any of the subdivisions provided in Fla. R. App. P. 9.030(a)(2), or Art. V, Section 3(b)(3), Fla. Const. (1980). Express and direct conflict simply does not appear within the four corners of the Fourth District's decision.

ARGUMENT

THIS COURT SHOULD DECLINE DISCRETIONARY JURISDICTION IN THIS CAUSE SINCE THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE THIRD DISTRICT IN *EVANS V. STATE,* 546 SO. 2d 1125 (FLA. 3d DCA 1989) OR THE DECISION OF THE FIRST DISTRICT IN *JOHNSON V. STATE,* 610 SO. 2d 581 (FLA. 1st DCA 1992), ON THE SAME QUESTION OF LAW. (Restated).

Petitioner seeks review through conflict jurisdiction pursuant to Article V, Section 3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv), which provides that the discretionary jurisdiction of the Supreme Court may be sought to review a decision of a district court of appeal which **expressly and directly conflicts** with a decision of another district court of appeal or of the Supreme Court on the **same question of law**. Respondent respectfully requests this Honorable Court to decline to accept jurisdiction in this case, since Petitioner presents no legitimate basis for the invocation of this Court's discretionary jurisdiction.

Petitioner's allegation that the district court's decision below expressly and directly conflicts with the decision of the Third District in *Evans v. State,* 546 so. 2d 1125 (Fla. 3d DCA 1989) or the decision of the First District in *Johnson v. State,* 610 so. 2d 581 (Fla. 1st DCA 1992) is without merit. The Fourth District's opinion *sub judice* did not even refer to these

decisions, let alone expressly and directly create conflict with the Third or First Districts on the same question of law.

First, the scant facts set forth in *Evans v. State,* 546 so. 2d 1125 (Fla. 3d DCA 1989)clearly indicate that the officer's request to have the defendant take his hands out of his pocket was "unjustified," as the Third District held. Indeed, in *Evans,* the justification for the officer's request was the mere fact that the defendant was seen sitting on a park bench at 4 o'clock in the morning. Here, in stark contrast however, the facts reveal that the officer's request for Petitioner to remove his hands from his pockets *was* justified. As the Fourth District set forth in its opinion, Officer Hall knew Petitioner from prior contacts and knew of some other officers' arrests of Petitioner, one of which, not insignificantly, was for *battery on a law enforcement officer* and resisting arrest *with violence.* (A 1). Moreover, during the encounter Petitioner gave the officer a fictitious name. (A 2). Hence, considering these circumstances as well as the officer's experience in this high crime area, unlike the officer in *Evans* Officer Hall was more than justified in asking Petitioner to take his hands out of his pockets. In short, given the realities of the situation facing Officer Hall in the instant case, the officer's noncompulsory request here simply cannot be properly construed to be a "constitutionally unjustified police order," as was found by the Third District in *Evans. Id.*, 546 So. 2d at 1125.

Similarly, the case of *Johnson v. State,* 610 so. 2d 581 (Fla. 1st DCA 1992) is factually distinguishable from the instant case and, thus, presents no express and direct conflict with the decision of the Fourth District. In contrast to the present case, the defendant in *Johnson v. State*, 610 So. 2d 581 (Fla. 1st DCA 1992), was instructed to remove his hands from his pockets ***and*** to face the officer so that the officer could get a good look at the defendant. *Id.,* 610 So. 2d at 583. The only justification for this instruction was the fact that the officer had seen the defendant quickly place his hand in his pocket as if to conceal something. *Id.,* 610 So. 2d at 583. Unlike the case *sub judice*, there is nothing in *Johnson* suggesting that the officer had prior knowledge about any prior violent contacts the defendant had with the police and, hence, the defendant's potential for posing a threat to the officer.

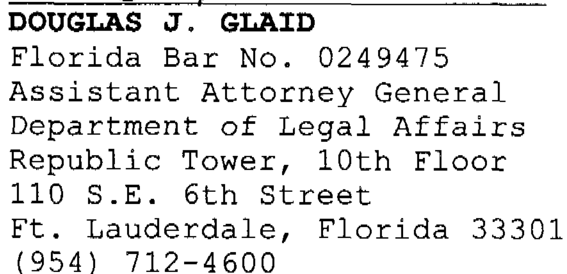
Consequently, since Petitioner has not shown any **express and direct conflict** within the four corners of the district court's opinion, this Court's jurisdiction has not been established. *Jenkins v. State,* 385 So. 2d 1356, 1359 (Fla. 1980); *Reaves v. State,* 485 So. 2d 829 (Fla. 1986). Moreover, it is well established that inherent or "implied" conflict cannot serve as a basis for the discretionary jurisdiction of this Court. *Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc.,* 498 So. 2d 888, 889 (Fla. 1986).

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Honorable Court DECLINE to accept discretionary jurisdiction in this cause.

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 Respondent's Brief on Jurisdiction was furnished by U.S. Mail to Marcy K. Allen, Asst. Public Defender, Counsel for Petitioner, Third Street, 6th Floor, West Palm Beach, Florida 33401, on this 21st day of September, 1998.

DOUGLAS J. GLAID
Assistant Attorney General