

**ORIGINAL**  
IN THE SUPREME COURT OF FLORIDA

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CASE NO. 96,794

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DAVID HERNANDEZ RODRIGUEZ,

*Defendant/Petitioner,*

vs.

THE STATE OF FLORIDA,

*Plaintiff/Respondent.*

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On Petition For Discretionary Review From  
The Second District Court of Appeal

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PETITIONER'S AMENDED BRIEF ON JURISDICTION

LAW OFFICE OF MICHAEL D. RAY  
By: NEIL D. KOLNER, ESQ.  
Attorney for Petitioner,  
DAVID HERNANDEZ RODRIGUEZ  
Liberty Building  
124 South Miami Avenue  
Miami, Florida 33130-1605  
(305) 377-9000  
Florida Bar No. 747335

FILED  
DEBBIE CAUSSEAU

NOV 01 1999

CLERK, SUPREME COURT  
BY 

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## SUMMARY OF ARGUMENT

Petitioner seeks discretionary review in the Supreme Court of Florida because the decision of the Second District Court of Appeal cites as controlling authority a decision that is pending review in the Florida Supreme Court: *Peart v. State*, 705 So.2d 1059 (Fla. 3d DCA), *rev. granted*, 722 So.2d 193 (Fla. 1998).

Accordingly, there is a prima facie express conflict which allows this Court to exercise jurisdiction because *Peart v. State* is now pending in this Court. See: Art.V. §3(b)(3) Fla. Const. and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

## ARGUMENT

### **JURISDICTION PERMITTED:**

#### **DCA Cited as Authority Case Pending in Supreme Court**

Petitioner, DAVID **HERNANDEZ RODRIGUEZ**, seeks review of the September 10, 1999 decision of the Second District Court of Appeal because the District Court of Appeal decision expressly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. The Second District's decision in its entirety reads: "PER CURIAM. Affirmed. *See Peart v. State*, 705 So.2d 1059 (Fla. 3d DCA), *rev. granted*, 722 So.2d 193 (Fla. 1998)(pending on certified conflict)." (See Appendix).

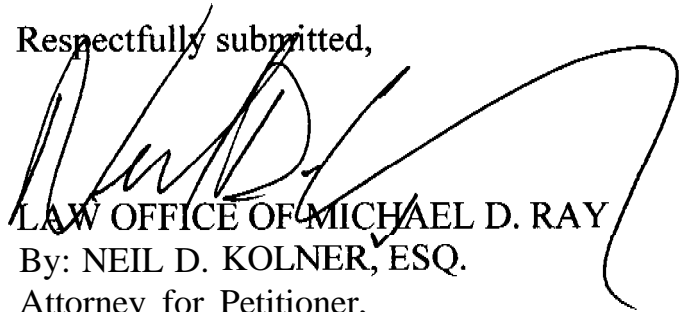
Accordingly, because the decision is based upon the Third District's decision in *Peart*, which has been briefed on the merits, is pending on the merits and awaiting decision of this Court, the precedents of this Court hold that there is jurisdiction to review the underlying decision. "[A] district court 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 jurisdiction." *Jollie v. State*, 405 So.2d 418, 420 (Fla. 1981)(emphasis added). *See also: State v. Sims*, 720 So.2d 213 (Fla. 1998); *Newell v. State*, 714 So.2d 434 (Fla. 1998); *Petit v. State*, 646 So.2d 196 (Fla. 1994).

Jurisdiction is also based upon Art.V, § 3(b)(3) Fla. Const. and Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(iv).

**CONCLUSION**

WHEREFORE, because the decision of the Second District Court of Appeal is expressly based on the decision of the Third District Court of Appeal in *Peart v. State*, which is pending on the merits, there is prima facie express conflict for this Court to exercise its jurisdiction to review this case, and in the interest of uniformity of decisions it is appropriate for this Court to do so.

Respectfully submitted,



LAW OFFICE OF MICHAEL D. RAY

By: NEIL D. KOLNER, ESQ.

Attorney for Petitioner,

DAVID HERNANDEZ RODRIGUEZ

Liberty Building

124 South Miami Avenue

Miami, Florida 33130-1605

(305) 377-9000

Florida Bar No. 747335

**CERTIFICATE OF FONT SIZE**

Counsel hereby certifies that the size and style of type used in this brief is 14 point proportionately spaced Times New Roman.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing (including Appendix) was caused to be mailed this 29<sup>th</sup> day of October, 1999, to: WILLIAM I. MUNSEY, JR.,<sup>✓</sup> ESQ., OFFICE OF THE FLORIDA ATTORNEY GENERAL, CRIMINAL APPEALS SECTION, 2002 N LOIS AVE #700, TAMPA FL 33607-2366.

  
NEIL D. KOLNER, ESQ.

APPENDIX

A-1



IN THE SECOND DISTRICT COURT OF APPEAL, LAKE LAND, FLORIDA

September 10, 1999

DAVID HERNANDEZ RODRIGUEZ, )

Appellant, )

v. )

STATE OF FLORIDA, )

Appellee. )

CASE NO. 98-02185

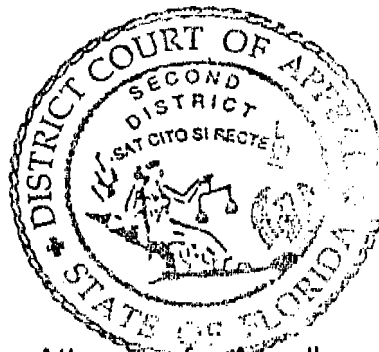
BY ORDER OF THE COURT:

Upon consideration of the appellant's motion for rehearing, clarification or certification and the appellee's response, it is hereby

ORDERED that the motion for clarification is hereby granted to the extent that we withdraw our opinion dated March 19, 1999, and substitute the attached opinion. In all other respects, the motion is denied.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

  
JAMES BIRK HOLD, CLERK



cc: Neil D. Kolner, Attorney for Appellant  
Robert A. Butterworth and William I. Munsey, Jr., Attorneys for Appellee

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

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

DAVID HERNANDEZ RODRIGUEZ, )

Appellant, )

v. )

STATE OF FLORIDA, )

Appellee. )

CASE NO. 98-02185

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Opinion filed September 10, 1999.

Appeal from the Circuit Court for Collier  
County; William L. Blackwell, Judge.

Neil D. Kolner of Law Office of Michael D.  
Ray, Miami, for Appellant.

Robert A. **Butterworth**, Attorney General,  
Tallahassee, and William I. Munsey, Jr.,  
Assistant Attorney General, Tampa, for  
Appellee.

PER CURIAM.

Affirmed. See Peart v. State, 705 So. 2d 1059 (Fla. 3d DCA), rev.  
granted, 722 So. 2d 193 (Fla. 1998) (pending on certified conflict).

PARKER, C.J., THREADGILL and WHATLEY, JJ., Concur.

**MICHAEL D. RAY**  
**LAWYER**

**LIBERTY BUILDING**  
**124 SOUTH MIAMI AVENUE**  
**MIAMI, FLORIDA 33130**  
**TELEPHONE (305) 377-9000**  
**FAX (305) 377-9100**

October 29, 1999

The Supreme Court of Florida  
Debbie Causseaux, Acting Clerk  
Office of the Clerk  
500 South Duval Street  
Tallahassee FL 32399-1927

**FILED**  
**DEBBIE CAUSSEAU**  
**NOV 01 1999**  
**CLERK, SUPREME COURT**  
**BY \_\_\_\_\_**

Re: **DAVID HERNANDEZ RODRIGUEZ v. THE STATE OF FLORIDA,**  
Case No. 96,794

Dear Ms. Causseaux:

Enclosed please find an original and five copies of an Amended Petitioner's Brief on Jurisdiction with Appendix.

As requested in your October 26, 1999 transmittal to me which was received today, this Amended Brief contains Summary of the Argument; Argument; and a Certificate of Font Size. These were omitted from the Petitioner's Jurisdictional Brief filed in your office on October 25, 1999.

Would you please file stamp the enclosed extra copy with a self-addressed postage paid envelope and return same to me.

Thank you for your cooperation and assistance.

Sincerely,

  
LAW OFFICE OF MICHAEL D. RAY  
By: NEIL D. KOLNER, ESQ.

NDK/car  
enclosures:  
copy: William I. Munsey, Jr., Esq.