IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-368

**DALE JOHNSON**,
Petitioner,

- versus -

**STATE OF FLORIDA**,
Respondent.

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ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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# RESPONDENT'S BRIEF ON JURISDICTION


BILL McCOLLUM
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
SUE-ELLEN KENNY
Assistant Attorney General
Florida Bar No. 961183
1515 North Flagler Drive , Suite 900
West Palm Beach, FL 33401
Telephone: (561) 837-5000

DCAFilings_4th@OAG.state.fl.us and
SueEllen.Kenny@myfloridalegal.com

Counsel for Respondent

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## TABLE OF AUTHORITIES



## FLORIDA CONSTITUTION

## Preliminary Statement

Petitioner was the Defendant in the trial court and the Appellant in the Fourth District Court of Appeal, and will be referred to herein as "Petitioner" and "Johnson." Respondent, the State of Florida, was the prosecution in the trial court and the Appellee in the Fourth District Court of Appeal and will be referred to herein as "Respondent" or "the State."

Reference to Petitioner's brief shall be (PB), followed by the appropriate page number.

A copy of the order issued by the Fourth District Court of Appeal is attached as an Appendix.

## Statement Of The Case and Facts

Noting that in determining jurisdiction, this Court is limited to the facts apparent of the face of the opinion, Hardee v. State, 534 So. 2d 706, 708 n.1 (Fla. 1998), Respondent will set out the facts as they appear in the opinion below:

> The State charged Johnson with, inter alia, felony DUI. The information alleged that Johnson's faculties were impaired and that he had three prior DUI convictions. The trial court conducted a jury trial on the single, present incident of DUI at issue without allowing the jury to learn of the alleged prior misdemeanor DUI offenses. After the jury returned a guilty verdict as to the present incident, it was excused and, based on the parties' previous stipulation, the trial court proceeded without a jury to determine whether Johnson had been convicted of DUI on three or more prior occasions.
>
> The trial court ascertained that Johnson had three previous DUI convictions from his Florida Department of Highway Safety and Motor Vehicle Division of Driver's Licenses Transcript of Driver Record. Based on Johnson's prior convictions and the verdict of the jury, the court adjudicated Johnson guilty of felony DUI.

Johnson v. State, 944 So.2d 474, 476 (Fla. 4th DCA 2006). The District Court acknowledging a waiver colloquy was not conducted, held

> Johnson's counsel had previously stipulated to a second phase bench trial and affirmed this stipulation at trial, in Johnson's presence, per the court's request. We therefore hold that the stipulation of Johnson's counsel affected a valid waiver of Johnson's right to a second phase jury determination of his prior DUI convictions, and affirm on

this issue.

Id., at 476-477.

Petitioner seeks review of this decision, alleging conflict jurisdiction.

## Summary of the Argument

This Court does not have jurisdiction to review the instant case. The decision of the Fourth District Court of Appeal in the instant case does not expressly and directly conflict with Tucker v. State, 559 So. 2d 218 (Fla. 1990) and State v. Upton, 658 So. 2d 86 (Fla. 1995). Therefore, this Court may not review the case at bar and should dismiss the Petitioner's case.

## Argument

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS NOT IN CONFLICT WITH TUCKER v. STATE, 559 So. 2d 218 (Fla. 1990) or STATE v. UPTON, 658 So. 2d 86 (Fla. 1995). (Restated).

Petitioner alleges that the Fourth District Court of Appeal's decision in the present case expressly and directly conflicts with Tucker v. State, 559 So. 2d 218 (Fla. 1990) and State v. Upton, 658 So. 2d 86 (Fla. 1995). (PB 6-8).

Article V, § 3(b)(3) of the Florida Constitution restricts this Court's review of a district court of appeal's decision only if it expressly conflicts with a decision of this Court or of another district court of appeal. It is not enough to show that the district court's decision is effectively in conflict with other appellate decisions. However, this Court's jurisdiction to review the Fourth District's decision in this case may be invoked by either the announcement of a rule of law which conflicts with a law previously announced by this Court or another district court of appeal or by the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975).

The term "expressly" requires some written representation or expression of the legal grounds supporting the decision under review. See Jenkins v. State, 385

So. 2d 1356 (Fla. 1980). A decision of a district court of appeal is no longer reviewable on the ground that an examination of the record would show that it is in conflict with another appellate decision; it is reviewable if the conflict can be demonstrated from the district court of appeal's opinion itself. The district court of appeal must at least address the legal principles which were applied as a basis for the decision. See Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981).

When determining whether conflict jurisdiction exists, this Court is limited to the facts which appear on the face of the opinion. Hardee v. State, 534 So. 2d at 708, n.1; White Constr. Co. v. Dupont, 455 So. 2d 1026 (Fla. 1984). "?Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.' In other words, inherent or so called ?implied' conflict may no longer serve as a basis for this Court's jurisdiction." State, Department of Health v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986) (quoting Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986)). See also School Board of Pinellas County v. District Court of Appeal, 467 So. 2d 985, 986 (Fla. 1985).

Petitioner has ignored controlling factual distinctions between the case at bar and Tucker v. State, 559 So. 2d 218 (Fla. 1990) and State v. Upton, 658 So. 2d 86 (Fla. 1995). At bar, the waiver at issue was specific to the issue of Petitioner's

prior DUI convictions in a bifurcated proceeding pursuant to State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991) and State v. Harbaugh, 754 So. 2d 691 (Fla. 2000). Johnson, at 476. Petitioner proceeded to jury trial on the DUI at issue. Id.

The factual scenarios of the cases relied upon by Petitioner are drastically different from the situation at bar. Quite simply, Petitioner is comparing apples to oranges. The waivers at issue in both Tucker and Upton involved a defendants' waiver of trial by jury regarding the entire trial and were not subject to the bifurcated proceedings held in Johnson. In Johnson the Petitioner did not waive his right to a jury trial of the DUI charge, in fact he was found guilty of the charge by the jury. Rather, Petitioner, in accord with this Court's holdings in Rodriguez and Harbaugh stipulated to the judge presiding over the second phase.

The distinction between these two types of proceedings is further illustrated by this Court's different treatment of errors. In Upton, this Court approved the District Court's opinion in Upton v. State, 644 So.2d 181 (Fla. 1st DCA 1994), which remanded for new trial based upon a technical deficiency with the written waiver. In stark contrast, this Court has specifically held that any waiver deficiencies concerning the second phase of a bifurcated DUI proceeding are "subject to harmless error review." Harbaugh, at 694.

Therefore, Petitioner's argument for this Court to accept jurisdiction must fail

as no "direct" conflict exists between Johnson and the cited cases. The facts in the cited cases significantly differ from Johnson, thus the "conflict" requirement for invoking this Court's jurisdiction pursuant to Art. V, § 3(b)(3), Fla. Const., cannot be demonstrated by Petitioner. This Court should reject Petitioner's suggestion that it exercise its discretionary jurisdiction to review the underlying decision of the Fourth District Court of Appeal.

## Conclusion

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully submits that this Court does not have jurisdiction to review the above-styled case.

Respectfully submitted,
BILL McCOLLUM

Attorney General
Tallahassee, Florida

_/s/_____

CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 0656879
1515 N. Flagler Dr., Suite 900
West Palm Beach, FL 33401
Tel: (561) 837-5000
Fax: (561) 837-5099
Counsel for Respondent

_/s/_____

SUE-ELLEN KENNY
Assistant Attorney General
Florida Bar No. 961183
1515 N. Flagler Dr., Suite 900
West Palm Beach, FL 33401
Tel: (561) 837-5000
Fax: (561) 837-5099

Counsel for Respondent

## Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by courier to DAVID JOHN McPHERRIN, ESQUIRE at 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401 and electronically transmitted to Appeals@pd15.state.fl.us, this **19th** day of April, 2007.

_/s/_____
SUE-ELLEN KENNY
Assistant Attorney General

## Certificate of Font Compliance

I HEREBY CERTIFY that this document, in accordance with Rule 9.210 of the Florida Rules of Appellate Procedure, has been prepared with Times New Roman 14-point font.

_/s/_____
SUE-ELLEN KENNY
Assistant Attorney General