

IN THE SUPREME COURT OF FLORIDA

ORIGINAL

**CLAYTON HARRIS,**

Petitioner,

v.

**STATE OF FLORIDA,**

Respondent.

---

CASE NO. SC 08-1871

First DCA No. 1D06-6497

ON DISCRETIONARY REVIEW OF THE DECISION  
OF THE FIRST DISTRICT COURT OF APPEAL

**JURISDICTIONAL BRIEF OF PETITIONER**

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

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**TABLE OF CONTENTS**

	<u>PAGE</u>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF THE ARGUMENT .....	2
ARGUMENT .....	3
THIS COURT SHOULD ACCEPT THIS CASE TO RESOLVE PERSISTENT INTERDISTRICT CONFLICT ON THE NECESSITY OF EVIDENCE OF FIELD PERFORMANCE RECORDS TO PROBABLE CAUSE DETERMINATIONS IN DOG-SNIFF CASES. ....	3
CONCLUSION .....	7
CERTIFICATES OF SERVICE AND FONT SIZE .....	7
APPENDIX	

**TABLE OF AUTHORITIES**

<u>CASES</u>	<u>PAGE(S)</u>
<u>Florida Star v. B.J.F.</u> , 530 So. 2d 286 (Fla. 1988) .....	2, 5
<u>Gibson v. State</u> , 968 So.2d 631 (Fla. 2d DCA 2007), <u>rev. dismissed</u> , 985 So. 2d 1088 (Fla. 2008).....	1, 2, 4, 5
<u>Harris v. State</u> , 33 Fla. L. Weekly D 2128 (Fla. 1st DCA Sept. 4, 2008),.....	1
<u>Matheson v. State</u> , 870 So.2d 8 (Fla. 2d DCA 2003), <u>rev. dismissed</u> , 896 So. 2d 748 (Fla. 2005).....	1, 3, 4, 5
<u>State v. Coleman</u> , 911 So.2d 259 (Fla. 5th DCA 2005).....	1, 2, 4, 5
<u>State v. Laveroni</u> , 910 So.2d 333 (Fla. 4th DCA 2005).....	passim
<u>Tedder v. State</u> , 33 Fla. L. Weekly D704 (Fla. 2d DCA Mar. 7, 2008) <u>rev. pending</u> , No. SC08-1055.....	5
<u>CONSTITUTIONAL PROVISIONS</u>	<u>PAGE(S)</u>
Article V, Section 3(b)(3), Florida Constitution.....	2, 4

## STATEMENT OF THE CASE AND FACTS

The trial court denied a motion to suppress evidence obtained pursuant to a drug-sniffing dog's alert to a car door. As part of the single issue raised on appeal, Harris asserted that the state's failure to produce evidence of the dog's field accuracy record during the suppression hearing precluded a finding of probable cause for the search. The First District Court of Appeal affirmed the conviction per curiam, as follows:

AFFIRMED. See State v. Laveroni, 910 So.2d 333 (Fla. 4th DCA 2005); State v. Coleman, 911 So.2d 259 (Fla. 5th DCA 2005). Contra Gibson v. State, 968 So.2d 631 (Fla. 2d DCA 2007) (following Matheson v. State, 870 So.2d 8 (Fla. 2d DCA 2003)).

Harris v. State, 33 Fla. L. Weekly D 2128 (Fla. 1st DCA Sept. 4, 2008).

Harris filed timely notice of discretionary review on September 26, 2008.

## **SUMMARY OF THE ARGUMENT**

The First District's citation to Laveroni from the Fourth District and Coleman from the Fifth District, and its *contra* cite to Gibson from the Second District, create express and direct conflict on the issue common to all three cases: whether the state's failure to produce field accuracy records for a drug detection dog precludes a finding that an alert to the exterior of a vehicle by the dog creates probable cause to search the interior of the vehicle. A per curiam affirmance which "explicitly notes a contrary holding of another district court of another district court or of this Court" creates express and direct interdistrict conflict triggering this Court's discretionary review power under article V, section 3(b)(3), Florida Constitution. See Florida Star v. B.J.F., 530 So. 2d 286, 288 n.3 (Fla. 1988).

Discretionary review is warranted. This is the fifth district court decision since 2005 recognizing the conflict. No further review was sought in two cases; this Court dismissed another; the fourth is pending a decision on discretionary review on a different issue. The conflict will persist until this Court resolves it. This is the appropriate vehicle to unify the state's courts on this important issue.

## ARGUMENT

### **THIS COURT SHOULD ACCEPT THIS CASE TO RESOLVE PERSISTENT INTERDISTRICT CONFLICT ON THE NECESSITY OF EVIDENCE OF FIELD PERFORMANCE RECORDS TO PROBABLE CAUSE DETERMINATIONS IN DOG- SNIFF CASES.**

In Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003), the Second District ruled that to establish probable cause for a vehicle search based on an alert to the exterior of the vehicle by a trained drug-detection dog, the state must adduce evidence establishing the dog's performance history. Id. at 15. This Court accepted and then dismissed the case on discretionary review. See State v. Matheson, 896 So. 2d 748 (Fla. 2005).

The Third District certified conflict with Matheson and held:

We therefore conclude that the state can make a prima facie showing of probable cause based on a narcotic dog's alert by demonstrating that the dog has been properly trained and certified. If the defendant wishes to challenge the reliability of the dog, he can do so by using the performance records of the dog, or other evidence, such as expert testimony. Whether probable cause has been established will then be resolved by the trial court.

State v. Laveroni, 910 So. 2d 333, 336 (Fla. 4th DCA 2005) (citations omitted).

The Fifth District adopted this excerpt from Laveroni and also certified conflict with Matheson. See State v. Coleman, 911 So. 2d 259, 261 (Fla. 5th DCA 2005).

Evidently, neither Laveroni nor Coleman sought this Court's review.

Next, the Second District applied its holding in Matheson in another dog-sniff case to conclude:

Although the officer who handled the dog testified that the dog was certified and had completed 400 hours of training, the State failed to elicit any testimony from him regarding the dog's track record. The officer admitted that drugs are not always found when the dog alerts, but he could not quantify the percentage of false alerts. Under Matheson, the officer's testimony was inadequate to establish the dog's reliability. Thus, the State did not meet its burden to demonstrate that the officers had probable cause to search Gibson's car.

State v. Gibson, 968 So. 2d 631, 632 (Fla. 2d DCA 2007). The court certified conflict with Laveroni and Coleman. As in Matheson, this Court accepted discretionary review but then dismissed the case. State v. Gibson, 985 So. 2d 1088 (Fla. 2008).

In this case, the Court's per curiam affirmance with citations to Laveroni and Coleman balanced by a *contra* cite to Gibson and acknowledgment that Gibson followed Matheson, puts the First District's decision in express and direct conflict with both Gibson and Matheson. Express and direct conflict of district court decisions under article V, section 3(b)(3), Florida Constitution, arises when a citation PCA "explicitly notes a contrary holding of another district court of another district court or of this Court." Florida Star v. B.J.F., 530 So. 2d 286, 288 n.3 (Fla. 1988).

Four of Florida's five district courts have now weighed in on this issue, and are divided three to one. This case presents an opportunity to unify the state's courts on a recurring issue: whether the state must present a drug detecting dog's field record to establish that the dog's alert creates probable cause for a search.

This issue is unlikely to be resolved in Tedder v. State, No. SC08-1055, which is pending a decision on jurisdiction. There the Second District adhered to its holdings in Matheson and Gibson and again certified conflict with Laveroni and Coleman. See Tedder v. State, 33 Fla. L. Weekly D704, D705 (Fla. 2d DCA Mar. 7, 2008). However, Tedder is a two-holding decision. In an opinion by now-Justice Canady, the Second District ordered suppression of the fruits of the search prompted by the dog's alert but rejected Tedder's claim that the officer's retention of Tedder's license converted an encounter into a detention and rendered Tedder's statements suppressible. Id. at D706. The jurisdictional briefs show that it is on the latter issue that Tedder seeks, and the state opposes, discretionary review. Thus, this case, if accepted for discretionary review, will not necessarily be controlled by a decision in Tedder. Briefing on the merits, rather than a stay pending the decision in Tedder, may be warranted.

The persistent interdistrict conflict—recognized in five district court opinions from 2005 through this case--justifies discretionary review. Until the conflict is resolved, the probable cause threshold in dog-sniff cases will remain



different in the Second District than in the First, Fourth, and Fifth Districts. This case is the appropriate vehicle to resolve the conflict and unify the state's courts on this important issue.

**CONCLUSION**

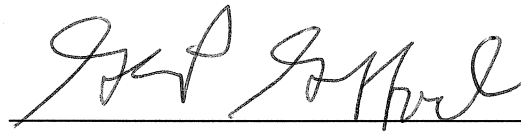
Based on the arguments contained herein and the authorities cited in support thereof, appellant requests that this Honorable Court accept this case for discretionary review and direct briefing on the merits.

**CERTIFICATES OF SERVICE AND FONT SIZE**

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to Philip W. Edwards and Natalie D. Kirk, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399-1050, this 2<sup>nd</sup> day of October, 2008. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

NANCY A. DANIELS  
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**APPENDIX**

	<u>PAGE(S)</u>
Opinion filed September 4, 2008	1

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NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

CASE NO. 1D06-6497

Opinion filed September 4, 2008.

An appeal from the Circuit Court for Liberty County.  
L. Ralph Smith, Jr., Judge.

Nancy A. Daniels, Public Defender, and Judith Hall and G. P. Gifford, Assistant  
Public Defenders, Tallahassee, for Appellant.

Bill McCollum Attorney General, and Philip W. Edwards and Natalie D. Kirk,  
Assistant Attorneys General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED. See State v. Laveroni, 910 So.2d 333 (Fla. 4<sup>th</sup> DCA 2005); State  
v. Coleman, 911 So.2d 259 (Fla. 5<sup>th</sup> DCA 2005). Contra Gibson v. State, 968 So. 2d  
631 (Fla. 2d DCA 2007) (following Matheson v. State, 870 So.2d 8 (Fla. 2d DCA  
2003)).

DAVIS, VAN NORTWICK, AND POLSTON, JJ., CONCUR.

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