IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1554

DCA NO. 3D09-380

GREGORY PONTON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

The Petitioner, Gregory Ponton, was the Appellant in the district court of appeal, and the Defendant in the Circuit Court. Respondent, the State of Florida, was the Appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS Petitioner filed a motion to correct illegal sentence under Florida Rule of Criminal Procedure 3.800(a). The trial court entered an order which denied the motion, in part. Petitioner appealed the denial to the lower court. On appeal, the lower court's opinion affirmed the trial court's denial. The court noted that, in connection with point three, the Petitioner relied on Rutherford v. State, 820 So.2d 407 (Fla. 2d DCA 2002). As to Rutherford, the lower court's opinion stated "we have previously explained that the Second District apparently has an internal conflict of decisions. There is no sequential conviction requirement for an adjudication as an HVFO." The lower court then cited to Williams v. State, 898 So.2d 966 (Fla. 3d DCA 2005) and affirmed on point three based on Williams. Petitioner sought rehearing below, which was denied, and now seeks discretionary review in this Court.**SUMMARY OF**

THE ARGUMENT

The Supreme Court of Florida does not have jurisdiction to review the Third District Court of Appeals' decision in the instant case.

The lower court's opinion does not expressly and directly conflict with Rutherford v. State, 820 So.2d 407 (Fla. 2d DCA 2002).Rutherford was not decided on the merits, has been criticized by Williams v. State, 898 So. 2d 966 (Fla. 3d DCA 2005) and when the second district did decide the same issue on the merits in subsequent cases, it relied upon the authority set forth in Williams and acknowledged that in the case of a habitual violent felony offender sentence, where only one prior qualifying offense is required, it does not matter if the qualifying felony was sentenced together with, or separate from, other qualifying felonies. Thus, there is not express or direct conflict to invoke this Court's jurisdiction.

ARGUMENTTHE DECISION OF THE LOWER COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH Rutherford v. State, 820 So. 2d 407 (Fla. 2d DCA 2002).(REPHRASED). Petitioner argues that the Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv),Fla. R. App. P., which provides for this Court's discretionary review of decisions of district court's of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. Respondent maintains that the Court is without jurisdiction to review this decision, as no such conflict exists. The Court has explained express and direct conflict as appearing within the four corners of the majority decision. Reaves v. State, 485 So.2d 829 (Fla. 1986). The State maintains that the Court is without jurisdiction to review this decision on the grounds set forth in Ponton's brief, as no such express and direct conflict exists. Petitioner relies on Rutherford v. State, 820 So.2d 407 (Fla. 2d DCA 2002) to argue that he does not qualify for sentencing as an habitual violent felony offender (HVFO) because his prior convictions were not sequential. In response to Petitioner's argument, the lower court's opinion stated "we have previously explained that the Second District apparently has an internal conflict of decisions. There is no sequential conviction requirement for an adjudication as an HVFO." However, in addition to an internal conflict within the Second District Court of Appeal, based on the dicta and mere suggestion that if the defendant in Rutherford

was correct, he would be entitled to relief, Rutherford is procedurally distinguishable from the case at bar. In Rutherford, the second district court of appeal reversed the summary denial of defendant's 3.800(a) motion to correct illegal sentence because the trial court failed to address his claim that the predicate offenses used to qualify him as a habitual violent felony offender did not satisfy the sequential convictions requirement of section 775.084(5), Florida Statutes (Supp. 1996), as the predicate convictions used to enhance his sentences were all entered on the same date pursuant to a single plea agreement. There is no direct and express conflict with Rutherford because it was a procedural question which did not address the issue on the merits. Furthermore, the authority of Rutherford, as suggested by Petitioner, is nullified by later decisions. Subsequent to Rutherford, when the second district did in fact address the claim on the merits, they realized that the claim was in fact without merit and held that "[a] defendant needs only one qualifying prior conviction in order to be sentenced as a habitual violent felony offender." Hall v. State, 821 So. 2d 1154 (Fla. 2d DCA 2002). Several subsequent cases from the Second District have cited to Williams v. State, 898 So. 2d 966 (Fla. 3d DCA 2005), the case cited to and relied upon in the opinion below, which held that because only one qualifying felony is necessary for a habitual violent felony offender (HVFO) adjudication, it does not matter if the qualifying felony was sentenced together with, or separate from,

other qualifying felonies. See Horne v. State, 954 So. 2d 33 (Fla. 2nd DCA. 2007), Nealy v. State, 956 So. 2d 1191 (Fla. 2nd DCA 2007) and Rutledge v. State, 969 So. 2d 381 (Fla. 2nd DCA 2007). As Rutherford did not address the issue on the merits and subsequent cases from the second district which did address the claim relied upon Williams, and thus clearly acknowledge that in the case of a habitual violent felony offender sentence, where only one prior qualifying offense is required, it does not matter if the qualifying felony was sentenced together with, or separate from, other qualifying felonies, Petitioner has failed to show the existence of a direct and express conflict with Rutherford.**CONCLUSION** As indicated by the foregoing facts, authorities and reasoning, the Third District's opinion does not directly and expressly conflict with Rutherford. Thus, the State respectfully maintains that this Court lacks jurisdiction for any proceedings and the petition to invoke discretionary jurisdiction should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Brief of Respondent On Jurisdiction was mailed to GREGORY PONTON, DC#067776, Avon Correctional Institution, P.O. Box 1100, Avon Park, Florida 33826-1100, on this 13th of November, 2009.

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Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was typed in font Courier New, 12 point, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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