

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC09-664

**GERALD PETION,**

Petitioner,

- versus -

**STATE OF FLORIDA,**

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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## **Preliminary Statement**

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was Appellant and Respondent was Appellee in the District Court of Appeal of Florida, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

**Statement Of The Case And Facts**  
(limited to the issue of jurisdiction)

Noting that in determining jurisdiction, this Court is limited to the facts apparent on the face of the opinion, Hardee v. State, 534 So. 2d 706, 708 n.1 (Fla. 1988), Respondent will present the facts as they appear in the opinion below:

“At the defendant's non-jury trial, Deputy Dennis Conway testified that a local resident told him that he was walking down the street when he was flagged down by a man driving a white Toyota Camry with dark window tint. The driver asked him if he was straight or looking to party. He handed him a piece of paper with the initials "G.P." and a phone number to call if he should decide to party. The resident showed the deputy the piece of paper.

“A few days later, Deputy Conway spotted a white Camry with dark tinted windows and followed the vehicle. The driver of the vehicle made a left turn without signaling and then accelerated above the speed limit. After making several turns, the driver pulled into a driveway. He opened the driver's side door. Observing what appeared to be a window tint violation, the deputy pulled beside the Camry on the driver's side. He approached the driver and requested his driver's license, registration, and proof of insurance.

“The defendant handed the deputy a driver's license. However, the

photograph on the license was not the defendant's, and the defendant was unable to recite the date of birth and address listed on the license. At that point the deputy asked the defendant to exit the vehicle and placed him under arrest for giving false identification to a law enforcement officer. He searched the defendant and found crack cocaine and powder cocaine in his pants pockets.

“While the defendant was being searched outside the car, three other occupants of the vehicle remained inside. They were ordered to either place their hands on the headrest in front of them or on the dashboard. After the defendant was searched, the passengers were ordered to exit the vehicle and produce identification. A search of the vehicle revealed twelve bags of marijuana underneath a jacket located on the driver's seat. In addition, clear plastic bags were discovered in the front console. The officer testified as follows:

Q. Now . . . when you have him out of the car and he is back like this standing at the back of the car while you are searching him, where are the other three occupants of the car?

A. They are still inside the vehicle, sir.

Q. So they are still inside the vehicle?

A. Yes, sir.

Q. And you're concentrating on, obviously, Mr. Petion, is that correct?

A. That's correct, sir.

Q. And you're depending on whatever officer is there to monitor the other three guys?

A. Yes, sir.

“The only other officer at the scene, Sergeant Morse, testified that while the defendant was being searched, he was also at the back of the car and concentrating on the search of the defendant. He did not testify that anyone was monitoring the actions of the other occupants of the vehicle and checking to see if they were complying with directions to keep their hands on the headrest or dashboard in front of them. The vehicle was not registered to the defendant or any of the other occupants of the vehicle.

“Sergeant Morse testified that he observed several slips of paper with the initials ‘G.P.’ and a telephone number on them inside a cup in the center console of the vehicle. Over defense objection, Sergeant Morse was allowed to testify that it was common for street level narcotics dealers to hand out contact references similar to those on the slips of paper to potential buyers. Deputy Conway was recalled to corroborate Morse's testimony about finding the slips of paper in the cup. He testified that there were between thirty and fifty slips in the cup and that he had seen one of these slips before.

“The defendant took the stand and testified that he was not driving the Camry and that another person named ‘Ricardo’ was driving. The defendant testified that he was in the back seat. The officers stopped the car and made all four men get out of the car and put each of them in handcuffs. The officers asked for their names, but the defendant refused to give his name, explaining that he had not done anything. The officer said, ‘Oh, you want to be a smart ass,’ and then searched the defendant. According to the defendant, the officer found three ‘reefer bags.’ The defendant admitted that he had three baggies of marijuana in his pants pocket. The defendant testified that when the officers searched the car, they found a bag full of cocaine rocks and a bag full of cocaine powder. The officers asked who owned these drugs. No one confessed. The defendant again refused to give his name, so the officers said they were going to charge him with everything. The defendant said he did not know about the slips of paper with his initials.” Petition v. State, 34 Fla. L. Weekly D499 (Fla. 4th DCA March 4, 2009).

Petitioner appealed his conviction and sentence to the Fourth District Court of Appeal, arguing, inter alia, that the trial court erred in when it permitted Sergeant Morse to testify that it was common for street level narcotics dealers to hand out contact information to potential buyers, such as the initials and phone number on the slips of paper found in the vehicle. Id.



By opinion dated March 4, 2009, the Fourth District agreed that that such testimony about generalized common practices among drug dealers was inadmissible, but found that any error in its admission was harmless. Id. The Court stated that the trial court, when sitting as the trier-of-fact, is presumed to have disregarded erroneously admitted evidence. The Court further stated such presumption is rebuttable, and cited to its prior opinion in C.W. v. State, 793 So. 2d 74 (Fla. 4th DCA 2001), wherein it stated that such a presumption is overcome where the record affirmatively reflects that the trial judge relied on the inadmissible evidence. The Court concluded that nothing in the record suggested that the trial court relied on the inadmissible evidence.

Petitioner now seeks review of the decision of the Fourth District Court of Appeal based on 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 the decision of the Third District Court of Appeal in J.D. v. State, 553 So. 2d 1317 (Fla. 3d DCA 1989). Therefore, this Court should decline to review the decision in the instant case.

## Argument

**THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE DOES NOT CONFLICT WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN J.D. v. STATE, 553 So. 2d 1317 (Fla. 3d DCA 1989).**

Petitioner alleges that the decision of the Fourth District Court of Appeal in Petion v. State, 34 Fla. L. Weekly D499 (Fla. 4th DCA March 4, 2009), expressly and directly conflicts with the decision of the Third District Court of Appeal in J.D. v. State, 553 So. 2d 1317 (Fla. 3d DCA 1989).

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. This Court's jurisdiction to review the Fourth District's decision in this case may only 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). In the past, this Court has held that it would not exercise its discretion where the opinion below established no point of law contrary to the decision of this Court or of another district court of appeal. The Florida Star v. B.J.F., 530 So. 2d 286, 289 (Fla. 1988). "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).

In the case at bar, Petitioner claims that the decision of the Fourth District conflicts with the decision of the Third District in J.D. v. State, 553 So. 2d 1317 (Fla. 3d DCA 1989). In the case at bar, the Fourth District stated that the trial court, when sitting as the trier-of-fact, is presumed to have disregarded erroneously admitted evidence. The Fourth District further stated such presumption is rebuttable, and cited to its prior opinion in C.W. v. State, 793 So. 2d 74 (Fla. 4th DCA 2001), wherein it stated that such a presumption is overcome where the record affirmatively reflects that the trial judge relied on the inadmissible evidence. In the present case, the Fourth District concluded that nothing in the record suggested that the trial court relied on the inadmissible evidence.

In J.D., the Third District applied this Court's ruling in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), to find that it could not necessarily be concluded beyond a reasonable doubt that the trial court's erroneous admission of the evidence did not contribute to the verdict. The Third District based this conclusion upon an examination of the entire record, as instructed by DiGuilio.

Accordingly, since the holdings in both cases require an examination of the entire record to determine whether the trial court's erroneous admission of the evidence contributed to the verdict, there is no express and direct conflict between

the two decisions and this Court should decline review.

**Conclusion**

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully submits that this Court should decline to grant review in the above-styled cause.

Respectfully submitted,

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**Certificate Of Service**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Alan T. Lipson, Esquire, Assistant Public Defender, Criminal Justice Building, Sixth Floor, 421 Third Street, West Palm Beach, Florida, 33401, this \_\_\_\_ day of April, 2009.

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HEIDI L. BETTENDORF  
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**Certificate Of Type Size And Style**

In accordance with Fla. R. App. P. 9.210(a)(2), Respondent hereby certifies that the instant brief has been prepared with Times New Roman 14 point font.

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