IN THE SUPREME COURT OF FLORIDA

GERALD PETION,	)	
	)	
Petitioner/Appellant,	)	
	)	
vs.	)	CASE No. _____
	)	
	)	DCA Case No. 4D06-3888
STATE OF FLORIDA,	)	
	)	
Respondent/Appellee.	)	

PETITIONER'S BRIEF ON JURISDICTION

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INTRODUCTION

Pursuant to Fla. R. App. P. 9.120(d) and 9.210(a) and (b), Petitioner-Appellant, GERALD PETION, files this Brief on Jurisdiction. Petitioner will be referred to throughout this brief as defendant or petitioner and the State of Florida will be referred to as the respondent or the state. All emphasis has been added unless otherwise indicated. The following symbols will be used:

"R" - Pleadings filed as of record

"T" - Transcript of Testimony

STATEMENT OF THE CASE AND FACTS

Defendant was charged by information with Trafficking in Cocaine (Count I), Possession of Cannabis with Intent to Sell (Count II), Giving a False Identification to a Police Officer (Count III) and Possession of Drug Paraphernalia (Count IV). (R 3-4) Defendant waived trial by jury. (T 3-6, 9-12, R 5) Non-jury trial commenced on September 6, 2006. (T 1-95)

BSO Deputies Conway and Sergeant Morse effected a traffic stop of the vehicle which defendant was driving, but did not own. There were three other black male passengers in the vehicle, one in the front passenger seat and two in the back. (T 31, 48, 49) Deputy Conway requested to see defendant's driver's license, registration, etc. (T 31) Defendant produced a driver's license; however the photograph on the license was not the defendant's. (T 32, 52, 66) The deputy then asked the defendant to give him the date of birth and address on the license, but defendant was unable to do so. (T 32, 52-53, 67) A check on the driver's license reflected that it did not match the defendant. (T 33) Thereupon, Deputy Conway had the defendant step out of the vehicle and placed him under arrest for giving a false identification to a law enforcement officer. (T 33, 54, 67) He handcuffed the defendant behind his back and then did a pat down search. (T 34, 54-55) The deputy found in the right front pocket of defendant's pants suspect crack cocaine in

an orange M&M mini container and recovered from his left front pocket 26 bags of suspect powder cocaine. (T 35, 68, 69) The crack and powder cocaine field tested positive for cocaine. (T 35) BSO Sergeant Morse, a 13 year veteran, who has had special narcotics training and made many narcotics arrests, testified that the container and baggies are indicative of, or consistent with, street level narcotics transactions. (T 69-70)

After the defendant was searched, the passengers were ordered to exit the vehicle and produce identification. (T 79) A search of the vehicle revealed that underneath a jacket located on the driver's seat were 12 bags of suspect marijuana, which field tested positive. In addition, clear plastic bags were discovered in the front console. (T 36-37, 38, 43, 57, 70) Sergeant Morse testified the packaging was also consistent with the sale and delivery of narcotics. (T 71). $183 was also found in the defendant's possession. (T 39, 71)

The car was not registered to the defendant or any of the other occupants. (T 57) No one claimed ownership of the jacket of which there was no indicia that it belonged to defendant. (T 58) Nobody claimed ownership of the marijuana or any of the other narcotics. (T 40,58, 71) The lid of the center console was closed at the time the deputy opened it and discovered the plastic bags. (T 58-59) Also found in a glass cup in the center console of the vehicle were 30-50 pieces of paper with the

initials “GP” and a telephone number written on them. (T 90-91, 93-94) Over objection of defense counsel, Sergeant Morse testified that it is common for street level narcotics dealers to hand out contact references for potential buyers to contact them. (T 91)The cocaine and marijuana tested positive. (T 16)

At the conclusion of the non jury trial, the trial court found defendant guilty of the lesser included offense of possession of cocaine with intent to sell on Count I, guilty as charged of possession of marijuana with intent to sell and giving false information to a police officer and not guilty of possession of drug paraphernalia. (T 118, R 35) He was sentenced to 46 months incarceration on Counts I and II and to time served on Count III; all sentences were ordered to be served concurrently. (T 121, R 39-49) A timely notice of appeal was filed. (R 50)

On appeal, the Fourth District reversed defendant’s conviction for possession of marijuana with intent to sell because the state failed to prove that defendant possessed the marijuana found inside the jointly occupied vehicle. (See attached appendix.) The defendant also raised a second issue on appeal that the court over defense counsel’s objection abused its discretion 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. The district court agreed with the defendant that

such testimony about generalized common practices of dug dealers is inadmissible as substantive proof of a particular defendant's guilt. However, in light of the fact that the trial was non jury, the court held:

> We, find, however, that any error in admitting this testimony was *harmless* in this case, which was tried without a jury. When a trial judge, sitting as the trier of fact, erroneously admits evidence, the trial judge is presumed to have disregarded that evidence. *C.W. v. State*, 793 So. 2d 74 (Fla. 4th DCA 2001). Although this presumption is rebuttable, nothing in the record suggests that the trial judge relied upon this inadmissible evidence.

Accordingly, defendant's conviction for possession of cocaine with intent to sell was affirmed.

SUMMARY OF ARGUMENT

This Honorable Court has authority pursuant to Article V, Section 3(b)(3) of the Florida Constitution to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same issue of law. The holding of the district court in this case directly and expressly conflicts with the holding of the Third District in J.D. v. State, 553 So. 2d 1317, 1319 (Fla. 3rd DCA 1989) that when a judge in a non jury trial in overruling the objection of defense counsel erroneously admits otherwise inadmissible evidence, it follows that the trial judge, sitting as the trier-of-fact, considers the evidence along with other evidence presented during trial in reaching the judgment rendered in the case.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN PETION V. STATE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT ON THE SAME QUESTION OF LAW.

This Honorable Court has authority pursuant to Article V, Section 3(b)(3) of the Florida Constitution to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another District Court on the same question of law. The holding of the district court in the present case directly and expressly conflicts on the same question of law with the decision of the Third District Court of Appeal in J.D. v. State, 553 So. 2d 1317, 1319 (Fla. 3rd DCA 1989).

In J.D. v. State, Id., the Third District was confronted with the same issue of legally inadmissible evidence being admitted into evidence over the objection of defense counsel in a non jury trial. In that case, over objection of defense counsel (and motion for mistrial which was denied), testimony constituting a comment on appellant's post arrest silence was admitted into evidence. In reversing J.D.'s adjudication of delinquency, the court held:

> We understand the State's position to be that, inasmuch as the trial which we review here was a non-jury trial, the trial judge certainly knew to disregard the comment and, accordingly, we can rest assured that he has done so. The standard which the State urges would, then,

> be nothing more than one which requires this court's *subjective* interpretation of what the trial judge did or did not consider, inasmuch as the record presented for review is silent on this point. We respectfully decline the State's invitation, and prefer, as indicated above, instead to hold to an *objective* interpretation of the evidence presented in the record on review. When the record is examined in this light, two facts are clear: first, the quoted comment was, in fact, made; and, second, this court cannot find beyond a reasonable doubt *from the record* as *DiGuilio* requires, that the error complained of did not contribute to the adjudication of delinquency. Accordingly, the adjudication must be reversed and the matter remanded for a new trial. 553 So. 2d at 1319.

In contrast, the Fourth District in holding in the present case that the trial judge, when sitting as the trier of the fact, is presumed to have disregarded erroneously admitted evidence, has adopted the *subjective* interpretation of the evidence which was rejected by the Third District in the J.D. case. Moreover, as a matter of common sense and logic, if a trial judge, sitting as the trier of the fact, erroneously admits evidence over the objection of counsel, the presumption would be that the judge considered or relied upon such evidence in reaching his or her decision. The position of the Third District that admission of erroneous evidence in a non jury trial should be *objectively* reviewed under the *DiGuilio* standard comports with fairness and as well as common sense.

Thus, the present case in adopting a *subjective* standard of review directly and expressly conflict with the decision Third District in J.D. v. State, supra, which adopts an *objective* standard of review under those same circumstances.

CONCLUSION

Based upon the foregoing arguments and authorities cited herein above, Petitioner-Appellant, GERALD PETION, respectfully requests this Honorable Court to accept jurisdiction and to review this cause on the merits.

Respectfully submitted,

CAREY HAUGHWOUT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF ON JURISDICTION has been furnished to Heidi L. Bettendorf, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, FL 33401-3432, by courier and by U. S. Mail to Mr. Gerald Petion, DC #L33001, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026-1000 this 2nd day of April, 2009.

_____

ALAN T. LIPSON
Assistant Public Defender
Florida Bar No. 151810

Attorney for Gerald Petion

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing BRIEF ON JURISDICTION complies with the font requirements of Fla. R. App. 9.210(a)(2).

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ALAN T. LIPSON

Attorney for Gerald Petion