IN THE SUPREME COURT OF FLORIDA

GERALD PETION,	)	
	)	
Petitioner/Appellant,	)	
	)	
vs.	)	CASE NO: SC09-664
	)	Lower Tribunal No: 4D06-3888
	)	
STATE OF FLORIDA,	)	
	)	
Respondent/Appellee	)	
	)	

PETITIONER'S REPLY BRIEF

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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 Reply Brief. Petitioner will be referred to throughout this brief as defendant, appellant 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 of Trial

"RB" - Respondent's Brief on the Merits

ARGUMENT

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN HOLDING THAT WHEN A TRIAL JUDGE, SITTING AS THE TRIER OF THE FACT, ERRONEOUSLY ADMITS EVIDENCE A PRESUMPTION (WHICH IS REBUTTAL) ARISES THAT THE TRIAL JUDGE DISREGARDED THAT EVIDENCE.

Standard of Review

The issue raised herein is one of law which is subject to de novo review. Insko v. State, 969 So. 2d 992, 997 (Fla. 2007).

Argument

Respondent claims that the Third District has somehow tacitly receded from its holding in J.D. v. State, 553 So. 2d 1317 (Fla. 3rd DCA 1989) by virtue of its opinion in Daniels v. State, 634 So. 2d 187 (Fla. 3rd DCA 1994). The facts in the Daniels case and holding clearly indicate to the contrary. Daniels and his co-defendants, charged with several armed robberies, waived jury trial. Following opening argument, the trial judge ruled that only the Bruening and Watson robberies would be admissible as *Williams* rule evidence. After closing argument, the judge, finding the evidence of guilt overwhelming, announced she was excluding the Bruening and Watson evidence. On appeal, the defendants argued that the trial court erred in admitting the *Williams* rule evidence. Finding no error, the Third District Court held:

> In the instant case, the trial judge explained to the defendants that evidence of two of the four robberies referred to during opening statements was inadmissible under *Williams v. State,* 68 So.2d 583 (Fla.1954) and then she gave the defendants the option of moving for mistrial and having the case heard by a jury or proceeding with her sitting as the trier of fact. The defendants chose to rely on the judge's ability to disregard the inadmissible evidence. *Moreover, because the trial judge expressly stated that she was excluding evidence of the non-charged crimes and that the evidence of guilt in the charged crimes was overwhelming without the excluded evidence*, the defendants have failed to overcome the presumption that the court's verdict was based solely upon admissible evidence. *See Arroyo,* 422 So.2d at 51.634 So.2d at 190-191.

This conclusion is based upon the fact that the trial judge stated for the record that in determining defendants' guilt, she had excluded the inadmissible *Williams* rule evidence.

In contrast, in J.D. v. State, supra, like the instant case, there is absolutely no indication from the record or otherwise that the trial judge excluded from consideration the erroneously admitted evidence.

Appellant respectfully argues that the standard of review with respect to preserved errors should be same whether the trial was by jury or non-jury. Once a defendant, has satisfied the burden of demonstrating that error has occurred, the harmless analysis should be employed by the appellate court even though the trial was non-jury. Accordingly, the Fourth District applied the wrong standard of

review in affirming appellant's conviction for possession of cocaine with intent to sell.

CONCLUSION

Based upon the foregoing arguments and citations of authority, Petitioner-Appellant, GERALD PETION, respectfully requests this Honorable Court to enter an order vacating that part of the opinion of the district court affirming his conviction and sentence for possession of cocaine with intent to sell and remand the cause to the court to review the complained of error under the harmless error analysis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF has been furnished by courier to Heidi L. Bettendorf, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401 by courier this 21st day of December, 2009.

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

Attorney for Petitioner, Gerald Petion

CERTIFICATE OF COMPLIANCE

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

_____

ALAN T. LIPSON

Attorney for Petitioner, Gerald Petion