

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-2470

**TONY BROWN,**

Petitioner,

vs.

**STATE OF FLORIDA,**

Respondent.

\* \* \* \* \*

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

\* \* \* \* \*

**RESPONDENT'S BRIEF ON JURISDICTION**

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## INTRODUCTION

The Respondent, the State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the trial court of the Eleventh Judicial Circuit, in and for Miami-Dade County. The Petitioner was the appellant and the defendant, respectively in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" refers to the Appendix attached to this jurisdictional brief, which solely includes a conformed copy of the district court's opinion. "PJB" refers to the Petitioner's jurisdictional brief. Unless otherwise indicated, all emphasis has been supplied by Respondent.

**STATEMENT OF THE CASE AND FACTS**

Respondent accepts Petitioner's Statement of the Case and Facts appearing on pages 1 through 3 of his jurisdictional brief to the extent that it is accurate and nonargumentative.

### SUMMARY OF THE ARGUMENT

This Court should decline discretionary jurisdiction in this cause since the decision below does not expressly and directly conflict with this Court's holdings in Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), and Petion v. State, 48 So. 3d 726 (Fla. 2010). The district court's conclusion that the trial court was influenced by the polygraphs was based on undisputable record evidence, to-wit: that the trial court had requested the polygraphs and reviewed the results before ruling on the motion for new trial, not as a result of any independent "weighing" of the evidence by the court. Consistent with Petion, the initial presumption that the trial court disregarded the inadmissible polygraph evidence was rebutted by the trial court's acts and statements in the record indicating that the court was influenced by the polygraph evidence in making its ruling. Furthermore, because the facts involved in the instant case are clearly not "substantially the same controlling facts" as those involved in the Tibbs or Petion cases, this Court's discretionary jurisdiction based on alleged conflict should not be invoked.

ARGUMENT

THIS COURT SHOULD DECLINE DISCRETIONARY JURISDICTION IN THIS CAUSE SINCE THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT'S HOLDINGS IN TIBBS v. STATE, 397 So. 2d 1120 (Fla. 1981), AND PETION v. STATE, 48 So. 3d 726 (Fla. 2010).

Petitioner seeks review through alleged decisional conflict pursuant to Article V, Section 3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv), which provide that the discretionary jurisdiction of the Supreme Court may be sought to review a decision of a district court of appeal which expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. Specifically, Petitioner claims that the decision of the district court below expressly and directly conflicts with this Court's decisions in Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), and Petion v. State, 48 So. 3d 726 (Fla. 2010).

In arguing conflict with this Court's decision in Tibbs, Petitioner boldly asserts that the district court "reweighed" the evidence adduced at trial in reviewing the trial court's granting of his motion for new trial. (PJB 4). However, it is clear from the Third District's opinion that the appellate court based its decision on the acts and statements of the trial court

contained in the record on appeal, not by any "re-weighing" of the evidence on its part. Indeed, in concluding that the trial court was impermissibly influenced by the polygraph results in granting the new trial, the Third District opined that, "It is entirely clear from the record that the trial court requested the polygraphs, reviewed the results, and was, at least, minimally influenced by the polygraphs in arriving at its decision." (A. 9-10). Thus, the district court's conclusion that the trial court was influenced by the polygraphs was based on undisputable evidence in the record, to-wit: that the trial court had requested the polygraphs and reviewed the results before ruling on the motion for new trial, not as a result of any independent "weighing" of the evidence by the court.

In this regard, Petitioner's additional allegation of conflict with this Court's decision in Petion v. State, 48 So. 3d 726 (Fla. 2010), is also incorrect. In Petion, this Court instructed that the presumption that a trial judge disregards inadmissible evidence can be rebutted through a trial court's express and specific finding of admissibility on the record or a statement on the record which discloses that the trial judge has actually relied upon the erroneous evidence to support the verdict or result. Id. at 730. Here, as is evident by the



Third District's decision, the initial presumption that the trial court disregarded the inadmissible polygraph evidence was rebutted by the trial court's statements on the record indicating that the court was influenced by the polygraph evidence in making its ruling. Indeed, the review of the record conducted by the district court showed that the trial judge *sua sponte* insisted on having polygraph examinations conducted of State and defense witnesses. (A. 6). The record shows that the trial judge not only requested the polygraph examinations, but he also read the results *prior* to making his ruling on the new trial motion. (A. 10). That the polygraph results had an impact on the trial court's order is further evidenced by the fact that before the results were received, the trial court expressly stated on the record, three times, that it was "inclined to deny the motion for new trial." (A. 7). Therefore, contrary to Petitioner's argument, the Third District's decision is entirely consistent with this Court's decision in Petion. Certainly, no express or direct conflict between these decisions exists. See Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986) (inherent or "implied" conflict cannot serve as a basis for supreme court's discretionary jurisdiction).

Furthermore, because the facts involved in the instant case are clearly not "substantially the same controlling facts" as those involved in the Tibbs or Petion cases, this Court's discretionary jurisdiction based on alleged conflict should not be invoked. See Wilson v. Southern Bell Telephone and Telegraph Co., 327 So. 2d 220, 221 (Fla. 1976) (where there was no direct conflict between decision of district court of appeal and any other appellate decision since same principles were applied to reach different results on different facts, the supreme court lacked jurisdiction to proceed on certiorari basis); Nielson v. City of Sarasota, 117 So. 2d 731, 734-35 (Fla. 1960) (stating that the principal situations justifying the invocation of discretionary jurisdiction because of alleged conflicts are (1) the announcement of a rule of law which conflicts with a rule previously announced by the court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case), accord Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). Indeed, it is indisputable that the facts involved in these two cases are completely distinct and different from those involved in the instant case. Thus, since Petitioner has not demonstrated any express and direct conflict of decisions within

the four corners of the district court's opinion, this Court's jurisdiction has not been established. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986); Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980).

**CONCLUSION**

Wherefore, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Honorable Court **DECLINE** to accept discretionary jurisdiction of this cause.

Respectfully submitted,

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**CERTIFICATE OF SERVICE AND FONT COMPLIANCE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction was furnished by U.S. Mail to Howard K. Blumberg, Assistant Public Defender, Counsel for Petitioner, 1320 NW 14<sup>th</sup> Street, Miami, FL 33125, on this \_\_\_\_ day of February, 2012, and that the 12 point Courier New font used in this brief complies with the requirements of Fla. R. App. P. 9.210(a)(2).

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**DOUGLAS J. GLAID**

Senior Assistant Attorney General

**APPENDIX**