

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-573  
Lower Tribunal No. 3D10-2415

ANTHONY MACKEY,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

---

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

---

**BRIEF OF RESPONDENT ON JURISDICTION**

PAMELA JO BONDI  
Attorney General  
Tallahassee, Florida

RICHARD L. POLIN  
Bureau Chief  
Florida Bar No. 0230987

SHAYNE R. BURNHAM  
Assistant Attorney General  
Florida Bar No. 0085757  
Office of the Attorney General  
Criminal Appeals  
444 Brickell Avenue, Suite 650  
Miami, FL 33131  
Telephone: (305) 377-5441  
Facsimile: (305) 377-5655

**TABLE OF CONTENTS**

TABLE OF CITATIONS ..... ii

STATEMENT OF THE CASE AND FACTS ..... 1

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 4

    THIS COURT SHOULD DENY DISCRETIONARY  
    JURISDICTION SINCE THE THIRD DISTRICT COURT OF  
    APPEAL’S DECISION DOES NOT DIRECTLY AND EXPRESSLY  
    CONFLICT WITH *REGALADO v. STATE*, 25 So. 3d 600 (Fla. 4th  
    DCA 2010). ..... 4

CONCLUSION ..... 10

CERTIFICATE OF SERVICE ..... 10

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS ..... 11

## TABLE OF CITATIONS

<b>Cases</b>	<b>Page(s)</b>
<i>Baptise v. State</i> , 995 So. 2d 285 (Fla. 2008) .....	6, 7
<i>Reaves v. State</i> , 485 So. 2d 829 (Fla. 1986) .....	9
<i>Regalado v. State</i> , 25 So. 3d 600 (Fla. 4th DCA 2010).....	5, 6, 7
<i>United States v. Montague</i> , 437 Fed. Appx. 833 (11th Cir. 2011) .....	9
<i>United States v. Montague</i> , No. 10-20638-CR, 2010 WL 3294289 (S.D. Fla. July 27, 2010) .....	9
<b>FLORIDA RULES OF APPELLATE PROCEDURE</b>	
Fla. R. App. P. 9.030(a)(2)(A)(iv) (2012) .....	9
<b>FLORIDA CONSTITUTION</b>	
Article V, § 3(b)(3), Fla. Const. (2012) .....	9

## **INTRODUCTION**

Petitioner, Anthony Mackey, was the Defendant in the trial court and the Appellant in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the Appellee in the Third District. The parties shall be referred to as they stand in this Court.

## **STATEMENT OF THE CASE AND FACTS**

Petitioner currently appeals his convictions for carrying a concealed firearm and possession of a firearm by a convicted felon, contending that the trial court erred in denying his motion to suppress. (A. 2, 3). The facts adduced from the hearing were as follows:

Officer May was driving a marked patrol car when he saw Petitioner standing alone on one side of a fence by an apartment complex. (A. 2). As the officer approached, he slowed down and observed a solid object inside of Petitioner's pocket. (A. 2). As he drew closer, Officer May saw a "piece of the handle sticking out. Not much, but a piece enough for me to identify a firearm." (A. 2). Officer May exited his vehicle, approached Petitioner and asked Petitioner if he had anything on him. (A. 2). Petitioner replied, "No." (A. 2). The officer then asked if he could pat him down. (A. 2). The officer proceeded to conduct a pat down search of Petitioner's pocket, felt the firearm he had seen earlier, retrieved it, and subsequently inquired whether Petitioner had a permit to carry a

concealed firearm. (A. 3). After Petitioner indicated that he did not, he was arrested and charged with carrying a concealed firearm. (A. 3).

Petitioner filed a motion to suppress the firearm on the basis that the arresting officer lacked the necessary reasonable suspicion to initiate the investigatory stop which led to the pat down and discovery of the firearm. (A. 3). The trial court denied the motion. (A. 3).

On direct appeal, Petitioner relied on the decision in *Regalado*, arguing that the firearm should be suppressed since it is legal to carry a concealed firearm in Florida, so long as you have a permit to do so, and the officer did not have reasonable suspicion unless he had reason to believe that the defendant did not have a permit. (A. 4).

On March 14, 2012, the Third District Court of Appeal affirmed the denial of the motion to suppress and certified express and direct conflict with the decision in *Regalado*. (A. 11). The court first noted that the precedent as established by *State v. Navarro*, 464 So. 2d 137 (Fla. 3d DCA 1984) (holding that a police officer's observation of a bulge under the clothing of an individual, which the officer in his training and experience determined to be "the outline of a firearm[,] amounted to probable cause to believe that the individual was carrying a concealed weapon, justifying not merely a pat-down, but a search.") and *Hernandez v. State*, 289 So. 2d 16 (Fla. 3d DCA 1974) (holding that both the arrest for carrying a

concealed firearm and the seizure of the firearm were proper where an officer saw a portion of a firearm partially protruding from the pocket of his trousers) required affirmance. (A. 6). The court further explained that the crime of carrying a concealed firearm is complete upon proof that the defendant knowingly carried a firearm that was concealed from the ordinary sight of another person and does not require knowledge of an absence of a license since possessing a license is not an element, but an affirmative defense. (A. 9-10).

### **SUMMARY OF THE ARGUMENT**

This Court should deny Petitioner's petition for discretionary jurisdiction since the decision below is factually distinguishable from the Fourth District Court of Appeal's decision in *Regalado v. State*, 25 So. 3d 600 (Fla. 4th DCA 2009) where the officer's suspicion was based solely on an anonymous tip. Because the sufficiency of an anonymous tip necessarily employs a distinct analysis under the Fourth Amendment, and Officer May's observations in this case rose to the level of reasonable suspicion where Petitioner lied about having a firearm and did not disclose whether he had a permit, *Regalado* is not in express and direct conflict with the decision below.

## ARGUMENT

**THIS COURT SHOULD DENY DISCRETIONARY JURISDICTION SINCE THE THIRD DISTRICT COURT OF APPEAL'S DECISION DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH *REGALADO v. STATE*, 25 So. 3d 600 (Fla. 4th DCA 2010).**

In his brief on jurisdiction, Petitioner asserts that the decision of the Third District Court of Appeal below is in express and direct conflict with the Fourth District's decision in *Regalado v. State*, 25 So. 3d 600 (Fla. 4th DCA 2010). However, the officer's suspicion in *Regalado* was based solely on an anonymous tip, which necessarily employs a distinct analysis under the Fourth Amendment. In addition, Officer May's observations in this case did rise to the level of reasonable suspicion since Petitioner lied about whether he possessed a firearm and did not disclose whether he had a permit.

In the instant case, Officer May was driving a marked patrol car when he saw Petitioner standing alone on one side of a fence by an apartment complex. (A. 2). As the officer approached, he slowed down and observed a solid object inside of Petitioner's pocket. (A. 2). As he drew closer, Officer May saw a "piece of the handle sticking out. Not much, but a piece enough for me to identify a firearm." (A. 2). Officer May exited his vehicle, approached Petitioner, and asked if he had anything on him. (A. 2). Petitioner replied, "No." (A. 2). The officer then asked if he could pat him down. (A. 2). The officer proceeded to conduct the pat down

and retrieved the firearm. (A. 3). He subsequently inquired whether Petitioner had a permit to carry a concealed firearm. (A. 3). After Petitioner indicated that he did not, he was arrested and charged with carrying a concealed firearm. (A. 3). The Third District below held that the officer possessed reasonable suspicion, explaining that the crime of carrying a concealed firearm is complete upon proof that the defendant knowingly carried a firearm that was concealed from the ordinary sight of another person. (A. 9). Importantly, the court declined to require that an officer have knowledge of an absence of a license since possessing a license is not an element, but an affirmative defense, certifying direct and express conflict with *Regalado*. (A. 9-11).

Notwithstanding the Third District's certification, because *Regalado* focuses on the reliability of an anonymous tip to satisfy the reasonable suspicion requirement, it is clear that *Regalado* is not in conflict with this case. In *Regalado v. State*, 25 So. 3d 600, 601 (Fla. 4th DCA 2010), the defendant was convicted of carrying a concealed weapon. There, an informant approached a police officer and explained that a man in the restaurant had raised his shirt, exposing a gun in his waistband to friends at the table. *Id.* at 601. The man did not take the gun out of his waistband. *Id.* The informant gave a description of the man, and as the man walked by, the informant identified the defendant as the man with the gun. *Id.* At that point, the informant refused to give his name and then took off. *Id.* The



defendant started to walk into a crowded area. *Id.* The officer followed him. *Id.* The officer then observed a bulge in the defendant's waistband, which, from his training and experience, he believed was the butt of a handgun. *Id.* For the safety of citizens, the officer pulled out his weapon and ordered the suspect to the ground. *Id.* at 601-602. The officer patted down the defendant, felt the firearm, and took it out. *Id.* at 602. The Fourth District held:

Because it is legal to carry a concealed weapon in Florida, if one has a permit to do so, and no information of suspicious criminal activity was provided to the officer other than appellant's possession of a gun, the mere possession of a weapon, without more, cannot justify a Terry stop.

*Id.* at 601. In so holding, the court relied on the reasoning of the Florida Supreme Court's decision in *Baptiste v. State*, in order to analyze the status of the informant to determine whether the tip, standing alone, would give rise to reasonable suspicion. *Id.* at 602-03; *Baptise v. State*, 995 So. 2d 285, 301 (Fla. 2008) (holding that, "[W]hen investigating an anonymous tip, officers who are unable to independently corroborate criminal activity may not initiate a gunpoint seizure based upon confirmation of only innocent details—such as a physical description—with absolutely no observation or development of any suspicious behavior.") (emphasis added). For example, a truly anonymous tip has been consistently held to fall on the low end of the reliability scale, primarily because the veracity and reliability of the tipster is unknown. *Id.*; *Baptiste*, 995 So. at 292.

Thus, in order for an anonymous tip to provide a reasonable basis for a *Terry* stop, the tip must contain *specific details which are then corroborated by independent police investigation*. *Baptiste*, 995 So. 2d at 292 (emphasis supplied). On the other hand, if the tipster is classified as a citizen informant, he is considered more reliable and corroboration of the tip is generally not required. *Regalado*, 25 So. 3d at 602-03; *Baptiste*, 995 So. 2d at 291-92. Based on the content of the tip and the point in time the tipster revealed himself to the police, *Regalado* classified the tipster as “somewhat less than a citizen informant who provides some identification, but he was more than a completely anonymous tipster who has no face-to-face contact with the police. *Regalado*, 25 So. 3d at 604. It was only then that the court then went on to consider the reliability of the tip in the context of the corroborating facts as observed by the officer, which the court found that there were none since the officer did not observe any criminal behavior. *Id.* at 604. It is for this reason—the unreliability of the tip due to the lack of police corroboration—that the Fourth District held that there was no reasonable suspicion and for which there is no express and direct conflict with this case.

In *Regalado*, the analysis centered upon the reliability of an anonymous tip, first analyzing the status of the informant, and if the informant was someone less than a citizen informant, only then must the officers independently corroborate the criminal activity. Thus, the purpose of discussing the legality of carrying a firearm

was in order to establish the *reliability of the tip*, but not, whether the officer's observations, alone, were sufficient to justify the stop. This distinction was crucial to the analysis and outcome of *Regalado* because the anonymous tip was the only fact that was determinative of whether an officer had reasonable suspicion, because the officers therein did not directly observe a firearm. That is not so in this case. Here, there is a direct observation of the firearm by Officer May prior to Petitioner's detention. Because there was no anonymous tip, the analysis and subsequent ruling of *Regalado* have no bearing on this case.

Moreover, this case is further distinguishable from *Regalado* on the basis that the officer here had reasonable suspicion. Before Officer May even approached Petitioner, he had observed a piece of a handle which he identified was a firearm. And, when the officer approached Petitioner and asked whether he had anything on him, the encounter was a consensual encounter, where reasonable suspicion was not needed. But when Petitioner replied, "no," and the officer asked to pat him down knowing that Petitioner was lying about having the firearm, Petitioner had the opportunity to inform Officer May that he had a license to carry the firearm. Because he did not do so, Officer May had the requisite reasonable suspicion at this point in time to conduct a pat down. These facts go beyond those in *Regalado* where the officer had no information of suspicious criminal activity other than appellant's possession of a gun, since Officer May engaged in a

consensual encounter, provided Petitioner with an opportunity to inform him that he had a permit, Petitioner did not, and which resulted in the officer's suspicion that Petitioner's possession of the firearm was unlawful.

In the instant brief on jurisdiction, Petitioner provides that the conflict apparent between the district courts of appeal has been recognized by the Eleventh Circuit and Southern District. Brief on Jurisdiction, 8-9 (citing *United States v. Montague*, 437 Fed. Appx. 833, \*836 (11th Cir. 2011) and *United States v. Montague*, No. 10-20638-CR, 2010 WL 3294289, at \*6 (S.D. Fla. July 27, 2010)). However, *Montague* does not appear within the four corners of either the opinion below or that of *Regalado*, nor is *Montague* an opinion emanating from the five district courts of appeal. See Article V, § 3(b)(3), Fla. Const. (2012); Fla. R. App. P. 9.030(a)(2)(A)(iv) (2012) (discretionary jurisdiction of the Florida 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); *Reaves v. State*, 485 So. 2d 829 (Fla. 1986) ("Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision."). As such, *Montague* cannot be used to establish jurisdiction.

Accordingly, notwithstanding the Third District's certification of conflict, this Court should deny the petition invoking jurisdiction.

## CONCLUSION

WHEREFORE, Respondent, THE STATE OF FLORIDA respectfully requests that this Court deny discretionary jurisdiction in this case.

Respectfully submitted,

PAMELA JO BONDI  
Attorney General  
Tallahassee, Florida

---

RICHARD L. POLIN  
Florida Bar No. 0230987  
Bureau Chief

---

SHAYNE R. BURNHAM  
Florida Bar No. 0085757  
Assistant Attorney General  
Office of the Attorney General  
Criminal Appeals  
444 Brickell Avenue, Suite 650  
Miami, FL 33131  
Telephone: (305) 377-5441  
Facsimile: (305) 377-5655

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was furnished by mail to Michael T. Davis, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125, on this 12th day of April, 2012.

---

SHAYNE R. BURNHAM  
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS**

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

---

SHAYNE R. BURNHAM  
Assistant Attorney General