

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: SC10-1347

FRANTZY JEAN-MARIE,
Petitioner,

Vs.

STATE OF FLORIDA
Respondent

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PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal
Third District of Florida
Case number: 3D10-880

FRANTZY JEAN-MARIE
Jail # 070088205
Pretrial Detention Center
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Petitioner, Pro se

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STATEMENT OF CASE AND FACTS

On March 19, 2003, Frantzy Jean-Marie was a passenger of a vehicle that had been stopped for a traffic citation for its right headlight out. The traffic stop had been effected by two officers in an unmarked police car. When the vehicle came to a stop the passenger jumped out and ran. The officer in the passenger side of the police car ran after him allegedly yelling "stop police". Jean-Marie jumped over a fence into a yard and continued to run. As he ran something was discarded. Jean-Marie was then placed into custody without further incident. A firearm was later discovered in the vicinity where the incident took place. The officer never looked to see if anything else could have been discarded.

Jean-Marie was initially charged with carrying a concealed

firearm, resisting an officer without violence and possession of a firearm with an altered serial number. The state later amended the case and charged Jean-Marie with armed burglary with the intent-to-commit resisting an officer without violence and or carrying a concealed firearm therein; carrying a concealed firearm, and possession of a firearm with an altered serial number. Jean-Marie was tried by a jury and was found guilty of all charges. Jean-Marie appealed to the Third District Court of Appeal, which affirmed the armed burglary conviction, see *Jean-Marie V. State*, 947 So.2d 484 (Fla. 3rd DCA 2006). Discretionary review was denied on September 5, 2007, case number SC07-531. Petitioner filed a petition alleging ineffective assistance of appellate counsel simultaneously with his postconviction motion 3.850 incorrectly. On January 20, 2010 the Third District Court of Appeal reversed in part allowing the refiling of a proper motion pursuant to rule 9.141 (c) alleging ineffective assistance of appellate counsel, case number 3D09-2783, Rehearing was denied March 4, 2010. Petitioner then filed a petition pursuant to Fla. R. App. P. 9.141(c)(2) alleging ineffective assistance of appellate counsel on May 11, 2010, Case number 3D10-880, Petition was denied May 19, 2010. Rehearing denied June 21, 2010. Therefore this pleading ensues.

SUMMARY OF ARGUMENT

The decision of this case expressly and directly conflicts with

the decision of the First District in *Comer v. State*, 997 So.2d 440 (Fla. 1st DCA 2008), where the court held that appellate counsel's failure to challenge jury instructions that impermissibly used "and/or" conjunctive in referencing multiple victims was ineffective assistance of counsel warranting new appellate proceeding. While in this case, the Third District Court of Appeal held that the error was not preserved for appeal and it was not a fundamental error.

JURISDICTIONAL STATEMENT

This court has discretionary jurisdiction 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 point of law. Art. V, § 3(b)(3), Fla. Const. (1980); and Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL
IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS
WITH THE DECISION OF *COMER V. STATE*, 997 So.2d
440 (Fla. 1st DCA 2008)

In the decision in *Comer v. State*, 997 So.2d 440 (Fla. 1st DCA 2008), the first district decided a case whose facts are similar to


those here. In that case the court of appeal held that appellate counsel was ineffective for failure to raise on direct appeal the impermissible use of and/or conjunctive in jury instructions. The court ruled that fundamental error occurred when the trial court used the and/or conjunctive between the names of the deputies when instructing the jury on resisting arrest. The court held that the error should have been raised on direct appeal. In this case the trial court used the and/or conjunctive in referencing to multiple victims for resisting an officer without violence. The trial court instructed the jury as follows: Before you can find the defendant committed the act of resisting an officer without violence as an element of burglary, you must find: 1) Frantz Jean-Marie resisted or obstructed or opposed Officer J. Smith and or Officer J. Lang, 2) at the time Officer J. Smith or Officer J. Lang were engaged in the lawful execution of a legal duty, and 3) At the time Officer J. Smith and or Officer J. Lang were officers. By including Officer J. Lang in the jury instruction for resisting without violence, the jury may have found him guilty of obstructing Officer J. Lang in issuing the driver a traffic ticket, which Jean-Marie attempted to avoid entirely. There were no evidence to support that theory, the jury should not have been given those instructions. In *Comer, supra*, the district court of appeal held the error to be fundamental and reviewable on direct appeal to determine whether the ruling in *Garzon v. State*, 980 So.2d 1038 (Fla. 2008),

should be applied in reviewing the conviction and whether the record supports a new trial. The ruling challenged expressly and directly conflicts with the decision of *Comer v. State*, 997 So.2d 440 (Fla.1st DCA 2008).

CONCLUSION

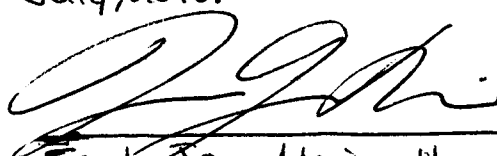
This Court has discretionary jurisdiction to review the decision below in order to resolve the conflict presented and the court should exercise that jurisdiction to consider the merits of Petitioner's argument.

Respectfully Submitted


Franky Jean-Marie, petitioner, pro se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I placed this document in the hands of correctional officials at Pretrial Detention Center for mailing to: Olga L. Villa, Assistant Attorney General, 444 Brickell Avenue, Miami Florida 33131 on this 12th day of July, 2010.



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