CASE NO. SC12-480
L.T. CASE NO. 4D09-2436

IN THE SUPREME COURT OF FLORIDA

RAYMOND KELLY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Appeal from the District Court of the State of Florida,
Fourth District

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS..... ii

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

SUMMARY OF THE ARGUMENT 2

ARGUMENT AND CITATIONS OF AUTHORITY.....2

THE FOURTH DISTRICT COURT OF APPEAL'S OPINION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THIS COURT OR ANOTHER DISTRICT COURT; THEREFORE, PETITIONER HAS FAILED TO ESTABLISH A BASIS TO INVOKE THIS COURT'S DISCRETIONARY JURISDICTION......2

CONCLUSION.....6

CERTIFICATE OF SERVICE 7

CERTIFICATE OF COMPLIANCE.....7

TABLE OF CITATIONS

CASES:

Alvarez v. State, 16 So. 3d 220 (Fla. 4th DCA 2009) 6

Bowen v. State, No. 4D10-96, 2012 WL 555417 (Fla. 4th DCA Feb. 22, 2012).....5

Chavez v. State, 25 So. 3d 49 (Fla. 1st DCA 2009) 6

Hernandez v. State, 31 So. 3d 873 (Fla. 4th DCA 2010).....5

Johnson v. State, 40 So. 3d 883 (Fla. 4th DCA 2010) 5

Kelly v. State, 77 So. 3d 818 (Fla. 4th DCA 2012) ..... passim

McKeown v. State, 16 So. 3d 247 (Fla. 4th DCA 2009) 6

Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla.1960).....3

State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)..... 1-6

Ventura v. State, 29 So. 3d 1086 (Fla. 2010) 2, 5

Ventura v. State, 973 So. 2d 634 (Fla. 3d DCA 2008).....3

Wallace v. Dean, 3 So. 3d 1035 (Fla. 2009).....3

RULES:

Fla. R. App. P. 9.210(a)(2) 7

STATEMENT OF THE CASE AND FACTS

In *Kelly v. State*, 77 So. 3d 818 (Fla. 4th DCA 2012), the Fourth District Court of Appeal affirmed Appellant's judgment and sentence, holding, in pertinent part, that the erroneous admission of evidence found within a backpack in the home of the Defendant's girlfriend did not merit reversal. *Id.* at 826. The Court ruled:

> Nevertheless, we conclude that the admission of the evidence in the red bag was harmless beyond a reasonable doubt. *See State v. DiGuilio*, 491 So.2d 1129, 1139 (Fla. 1986). The relevant evidence from that bag constituted flex cuffs and blue tape which were used by Kelly on the victim during the sexual battery. Pictures admitted in evidence from Kelly's computer also showed the victim with blue tape on her eyes and flex cuffs on her wrists. In addition, Kelly's DNA was found on her body, and her camera and Blackberry were found in his possession, thus tying him to the victim. That Kelly had possession of similar flex cuffs and blue tape in his backpack did not add material evidence to the state's case that was not already confirmed with other evidence. Despite the Fourth Amendment violation, we conclude that the error does not merit reversal.

Id.

Previously in the Court's opinion, it noted that the victim of the Defendant's multiple armed sexual batteries positively identified Kelly as her attacker. *Id* at 821. Additionally, "DNA swabs taken from [the victim's] body proved a positive match for Kelly's DNA." *Id.* The Defendant was connected to the victim through papers found in a dumpster near the crime scene of another sexual battery

victim. *Id.* The Defendant was identified on a surveillance video near the crime scene. *Id.* The victim's camera was in the Defendant's possession at the time he was interviewed by the police, and the victim's stolen blackberry phone and camera were properly seized from a desk at the Defendant's workplace. *Id.*

SUMMARY OF THE ARGUMENT

Petitioner has failed to establish an express and direct conflict between the Fourth District Court of Appeal's opinion in *Kelly v. State*, 77 So. 3d 818 (Fla. 4th DCA 2012), and this Court's opinions in *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), or *Ventura v. State*, 29 So. 3d 1086 (Fla. 2010). To the contrary, Judge Warner, writing for the Court below, properly applied the long-standing harmless error test in determining there was no reasonable possibility that the erroneous admission of tape and flex cuffs contributed to the jury's verdict.

Petitioner has failed to establish express and direct conflict.

ARGUMENT AND CITATIONS OF AUTHORITY

THE FOURTH DISTRICT COURT OF APPEAL'S OPINION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THIS COURT OR ANOTHER DISTRICT COURT; THEREFORE, PETITIONER HAS FAILED TO ESTABLISH A BASIS TO INVOKE THIS COURT'S DISCRETIONARY JURISDICTION.

As this Court reiterated in *Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009), "there are two principle circumstances that support our jurisdiction to review district-court decisions based upon alleged express-and-direct conflict." *Id.* at 1039. These two circumstances include:

> (1)the announcement of a rule of law that conflicts with a rule previously announced by this Court or another district court; or (2) the application of a rule of law to produce a different result in a case that involves substantially similar controlling facts as a prior case disposed of by this Court or another district court.

Id. at 1039, n.4 (citing *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla.1960)).

It appears Petitioner is traveling under the former of these two circumstances, suggesting the Fourth District Court of Appeal's opinion in *Kelly* applied an "overwhelming evidence" harmless error test, rather than the proper *DiGuilio* test. Petitioner concedes the Fourth District did not use the word "overwhelming" in its opinion, as did the Third District in its opinion in *Ventura v. State*, 973 So. 2d 634 (Fla. 3d DCA 2008), where that court concluded: "We conclude that the detective's testimony was improper, but harmless beyond a reasonable doubt given the overwhelming evidence of guilt." *Id.* at 637. Despite this lack of reference to an "overwhelming evidence" test, and the Fourth

District's express citation to *DiGuilio* below, Petitioner now claims that the Fourth District applied an "overwhelming evidence" test.

Petitioner's contention fails because there is no indication whatsoever in the Fourth District Court of Appeal's opinion in *Kelly*, that the Fourth District has strayed from its consistent course of determining harmlessness of an error with reference to whether there exists a reasonable possibility that the complained of error contributed to the jury's verdict. The Fourth District properly determined there was no reasonable possibility that the complained of error contributed to the jury's verdict.

As this Court explained in *DiGuilio*, "Application of the [harmless error] test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." *DiGuilio*, 491 So. 2d at 1138. In the opinion below, the Fourth District properly applied the harmless error test. As quoted in the excerpt under Statement of the Facts above, the Fourth District examined the properly admitted evidence, including the Defendant's DNA found on the victim, and the victim's camera and phone discovered in the Defendant's possession. *Kelly*, 77 So. 3d at 726. The Fourth District Also examined the impermissible evidence, and concluded there

was no possibility it influenced the jury's verdict:

> That Kelly had possession of similar flex cuffs and blue tape in his backpack did not add material evidence to the state's case that was not already confirmed with other evidence. Despite the Fourth Amendment violation, we conclude that the error does not merit reversal.

Id.

Thus, examination of the opinion below contradicts Petitioner's contention that the Fourth District misapplied the *DiGuilio* harmless error test. No direct conflict has been demonstrated.

Finally, Respondent notes just a few of the recent opinions issued by the Fourth District Court of Appeal, which involved one or more of the Judges who comprised the panel in the instant case, in which the *DiGuilio* harmless error test was expressly noted and properly applied:

> *Bowen v. State*, No. 4D10-96, 2012 WL 555417 at *3 (Fla. 4th DCA Feb. 22, 2012) (Judge Damoorgian writing for the Court noting: "Error is not harmless if there is any reasonable possibility that the error affected the verdict," citing *DiGuilio*, Judges Warner and Gerber concur);
>
> *Johnson v. State*, 40 So. 3d 883, 887 (Fla. 4th DCA 2010) (Judge Taylor writing for the Court noting: "The state's contention that the error was harmless because the evidence against the defendant was overwhelming is unavailing, since the state did not dispel the reasonable possibility that the error contributed to the defendant's convictions," citing *Ventura*, Judges Warner and May concur);
>
> *Hernandez v. State*, 31 So. 3d 873, 880 (Fla. 4th DCA 2010) (Judge

> Polen writing for the Court notes "'the pertinent question in a harmless error analysis is not the sufficiency or quality of the remaining, properly admitted evidence; rather, it is 'whether there is a reasonable possibility that the error affected the verdict,'" quoting *Chavez v. State*, 25 So. 3d 49 (Fla. 1st DCA 2009), citing *DiGuilio* and *Ventura*, Judges Warner and Stevenson concur);
>
> *McKeown v. State*, 16 So. 3d 247, 249 (Fla. 4th DCA 2009) (Judge Taylor citing the *DiGuilio* harmless error test, Judge Warner concurs);
>
> *Alvarez v. State*, 16 So. 3d 220, 222 (Fla. 4th DCA 2009) (Judge Ciklin explaining *DiGuilio* harmless error test, Judge Warner concurs).

These cases provide further support for Respondent's position that the panel of the Fourth District which determined Petitioner's direct appeal, properly applied the *DiGuilio* harmless error test.

CONCLUSION

Based upon the foregoing argument and citations of authority, the State respectfully requests this honorable Court decline Petitioner's invitation to invoke its discretionary jurisdiction to review the Fourth District's opinion in *Kelly*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Respondent's Brief on Jurisdiction was served by mail this 26th day of March, 2012, on JASON T. FORMAN, ESQ., Counsel for Petitioner, Law Offices of Jason T. Forman, P.A., 633 South Andrews Avenue, Suite 201, Fort Lauderdale, FL 33301.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2), and was typed in Times New Roman 14-point font.

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