

IN THE SUPREME COURT OF THE STATE OF FLORIDA,

GEORGE WRIGHT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC05-1231
4th DCA Case No. 4D04-499

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant, and Respondent was Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of possession of cocaine. On direct appeal to the Fourth District Court of Appeal, Petitioner claimed, among other things, that § 893.101, Florida Statutes (2003), violates the due process clauses of the Florida and United States Constitutions. On May 4, 2005, the Fourth District Court of Appeal issued its opinion in this case affirming Petitioner's conviction.

On June 15, 2005, the Fourth District Court of Appeal granted Petitioner's motion for rehearing or clarification, withdrew the opinion of May 4, 2005, and substituted a new opinion in *Wright v. State*, 30 Fla. L. Weekly D1495 (Fla. 4th DCA Jun. 15, 2005). The substituted *Wright* decision added the following sentence: "Accordingly, we reject Appellant's substantive due process challenge to the facial constitutionality of section 893.101, *Florida Statutes*, expressly declaring it valid." *Wright*, 30 Fla. L. Weekly at D1496. Petitioner filed a notice to invoke discretionary jurisdiction .

SUMMARY OF THE ARGUMENT

This Court should decline to exercise its discretion to review this case. First, Petitioner's jurisdictional brief improperly addresses the merits of this case, contrary to Rule 9.120(d), Florida Rules of Appellate Procedure. Second, the *Apprendi* argument Petitioner raises in his brief on jurisdiction was not raised in the Fourth District Court of Appeal. Therefore, this argument was not preserved for review by this Court. Third, *Apprendi* is distinguishable from the case at bar. Therefore, this Court should deny review.

ARGUMENT

THE COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL.

Petitioner seeks to invoke the discretionary jurisdiction of this Court pursuant to Article V, §3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(i) to review a decision of the Fourth District Court of Appeal. Petitioner contends that section 893.101, Fla. Stat. (2003), is unconstitutional. The State acknowledges that this Court has discretionary jurisdiction to review a decision of a district court “that expressly declares valid a state statute” under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i). However, the State submits that this Court should nonetheless decline to review the instant case.

First, Rule 9.120(d), Florida Rules of Appellate Procedure, states that a jurisdictional brief is “limited solely to the issue of the supreme court’s jurisdiction.” In the 1977 Amendment to the Committee Notes, Rule 9.120 states, “The jurisdictional brief should be a short, concise statement of the grounds for invoking jurisdiction and the necessary facts. It is not appropriate to argue the merits of the substantive issues involved in the case or discuss any matters not relevant to the threshold jurisdictional issue.” *Id.*

Respondent maintains that Petitioner's jurisdictional brief reads more like a merits brief. Pages five through seven of Petitioner's jurisdictional brief actually addresses the merits of the issue on review. Thus, Petitioner's jurisdictional brief should be stricken.

As such, since it would be improper for Respondent to respond to Petitioner's argument on the merits, Respondent will not do so in this brief. If this Court finds that an argument on the merits is necessary, Respondent will address the merits in its brief on the merits.

Second, Petitioner raises a new argument on review before this Court. In his brief on jurisdiction, Petitioner relies heavily on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Petitioner argues that the courts in Florida are following the dissent's suggestion in *Apprendi* by reversing the burden of illicit knowledge finding and by requiring the defendant to disprove such knowledge in order to be acquitted. Petitioner's Jurisdictional Brief, at p. 6-9. However, this argument was not raised below in the Fourth District Court of Appeal. Thus, this situation is analogous to a situation where an issue is not preserved for appellate review. This Court has held that in order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered

preserved. *Tillman v. State*, 471 So. 2d 32 (Fla. 1985). This situation is also analogous to improperly raising a new issue on a motion for rehearing. Further, for purposes of determining conflict jurisdiction, this Court is limited to the facts which appear on the face of the opinion. *Hardee v. State*, 534 So. 2d 706 (Fla. 1988). Since the *Apprendi* argument is being raised for the first time in Petitioner's brief on jurisdiction, it should not be considered by this Court.

Third, *Apprendi* is distinguishable from the case at bar. In *Apprendi*, the court found that the fact that the defendant intended to commit a hate crime, as a factor in sentencing for the charge of possession of a firearm for an illegal purpose, was an issue to be decided by a jury. Thus, *Apprendi* dealt with a sentencing issue. In the instant case, Petitioner challenges section 893.101, Florida Statutes, which was amended to remove guilty knowledge as an element of possession of a controlled substance and adding lack of knowledge of the illicit nature of a controlled substance as an affirmative defense. As such, *Apprendi* deals with a sentencing issue and the instant case deals with an affirmative defense to the charged offense during trial and prior to sentencing. As such, *Apprendi* is not applicable in the case *sub judice*.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court deny jurisdiction in this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to: DAVID JOHN MCPHERRIN, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401, on August ___, 2005.

MYRA J. FRIED
Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with *Fla. R. App. P. 9.210*, the undersigned hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is not proportionately spaced.

MYRA J. FRIED
Assistant Attorney General

APPENDIX A