IN THE SUPREME COURT OF FLORIDA

CASE NO:

CRISTAIN ESTRADA,

Petitioner,

-vs-

THE STATE OF FLORIDA

Respondent. _____

BRIEF OF PETITIONER ON JURISDICTION

ON PETITION _____ FOR

DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

This is a petition for discretionary review on the grounds of express and direct conflict of decisions between the Third District Court of Appeal in State v. Estrada, 36 Fla. L. Weekly D2771 (Fla. 3d DCA Dec. 21, 2011), and the First District in Hatch v. State, Dept. of Revenue, 685 So.2d 1077 (Ha. 2st DCA 1991). The Third District's opinion also conflicts with all cases which require application of the Rule of Lenity. Attached to Co-Petitioner's (Rodolpho Cortina) brief is the appendix, paginated separately and identified below as "A."

STATEMENT OF CASE AND FACTS

The facts relevant to a determination of whether discretionary review is warranted are set forth in the district court's opinion, State v. Estrada, 36 Fla. L. Weekly D2771 (Fla. 3d DCA Dec. 21, 2011). In Estrada, the Third District reviewed the granting of the defendant's motion to dismiss a charge of cannabis trafficking (A.2). At trial, there were no disputed facts: a quantity of seized marijuana initially weighed 261bs, but subsequently weighed 24 lbs when it was weighed again months later, having secreted moisture while it remained in storage (A.2).[1] The trial judge ruled that, because wet marijuana cannot be sold on the market, the weight of "cannabis" does *not* include the plant's moisture (A.3). The only legal question before the Third District was therefore *whether Florida's definition of cannabis, under section 893.02(3), Florida Statutes, includes the moisture of a fresh marijuana plant.* (A.4 at n.4).

On review, the Third District interpreted section 893.02(3) and *Cronin v. State*, 470 So.2d 802 (Fla. 4th DCA 1985), to exclude *only* "excess water" that has been added extrinsically to the plant or that is "not inherent in the plants' vegetable matter" (A.4-5). In a footnote, the Third District expressly declined to adopt the contrary interpretation on the First District in *Hatch v. State*, 585 So.2d 1077 (Fla. 1st DCA 1991), which also in reliance on *Cronin*, held that under section

' Under section 893.125(1)(a), the threshold weight for trafficking is 25 lbs.

893.02(3), courts are to exclude "any weight attributable to the moisture content of the freshly cut plants." (A.5. at n. 5). The Third District acknowledged that its holding conflicted with hatch, but attempted to distinguish Hatch factually by finding that the case interpreted the definition of cannabis only for tax assessment purposes and not for criminal cases. (A.5 at n. 5). Accordingly, the Third District reversed the granting of the defendant's motion to dismiss, ruling that, as a matter of law, the original 26 pound weight controlled, despite that the cannabis as the time of that weighing still contained all of its moisture (A.6).

As a result of the Third District's ruling, the defendant now faces a trafficking charge which carries a three year minimum mandatory sentence, and a maximum sentence of 30 years in prison. *Id.;* §775.082(3)(b), Fla. Stat. Had the trial judge's order been affirmed, the defendant would have faced a third-degree felony charge which carries no minimum mandatory sentence, and a maximum penalty of 5 years in prison. §775.082(3)(d), Fla. Stat.

NOTICE OF ADOPTION

Petitioner, CRISTAIN ESTRADA, hereby adopts CO-PETITIONER, RODOLPHO CORTINA'S, brief in its entirety. Notice invoking this Court's jurisdiction was filed by co-petitioner on December 29, 2011. This jurisdictional brief follows.

SUMMARY OF ARGUMENT

The opinion of the Third District Court of Appeal in this case, *State v. Estrada,* No. 3D10-647 (Fla. 3d DCA Dec. 21, 2011), expressly and directly conflicts with the First District Court of Appeal's decision in *Hatch v. State, Dept. of Revenue,* 685 So. 2d 1077 (Fla. 1st DCA 1991). In both cases, the First and Third Districts decided whether Florida's definition of cannabis, under section 893.02(3), includes the moisture content of a fresh plant. The First District, in *Hatch*, held that under that definition, the plant's moisture *is excluded* from the total weight of the substance. The Third District, in *Estrada,* held that, *under the same statutory definition,* the moisture content of the plant *is included* in its weight. Thus, the holdings of the two cases conflict.

Further, by declining to apply the Rule of Lenity in construing section 893.02(3), the Third District is in conflict with all cases which hold that the application of the Rule is required whenever statutory language is ambiguous and subject to differing constructions. As the *Estrada* opinion expressly recognizes, the definition of cannabis is susceptible to differing constructions. Moreover, the Third District construes the statute in a way that least favors a defendant, in contrast with the defendant-friendly way the First District and the Federal courts have interpreted the same statute.

ARGUMENT

I.

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL, IN THE PRESENT CASE, CONFLICTS WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL *IN HATCH V. STATE, 585* So. 2d 1077 (Fla. 1st DCA 1991), AS TO WHETHER THE DEFINITION OF CANNABIS, UNDER SECTION 893.02(3), FLORIDA STATUTES, EXCLUDES "ANY WEIGHT ATTRIBUTABLE TO THE MOISTURE CONTENT OF " FRESHLY CUT PLANTS."

The Florida Statutes define "cannabis" only once, in section 893.02(3). The statute does not say whether cannabis includes a fresh marijuana plant's moisture. In *Estrada,* the Third District addressed that precise issue to determine whether a quantity of cannabis exceeded the twenty-five pound weight requirement for trafficking. *See Estrada,* 36 Fla. L. Weekly D2771 (Fla. 3d DCA Dec. 21, 2011). The Third District held that the definition of cannabis *does not* exclude the moisture to the extent that the contraband would be reduced to its dried, consumable form.[2] *Id.* Applying that interpretation of the cannabis definition, the

[2] It should be noted that Florida's definition of cannabis is *identical* to the Federal definition codified in 21 U.S.C. § 802(16) (2009), and that the *contrary* interpretation has been adopted by the Federal Sentencing Guidelines. *See* FSG § 2D 1.1, cmt., n. I (as amended in 1995). Moreover, the Commentary to the Amendment of the Federal Statutory Guidelines specifically departed from the *only* federal case cited in the Third District's opinion, *United States v. Garcia,* 925 F.2d 170, 172 (7th Cir. 1991). *See State v. Gonzalez,* 596 S.E. 2d 297, 301 (N.C. App. 2004) ("Defendant correctly interprets these amendments as a clear and intended shift from the *Garcia* and *Pinedo-Montoya* holdings, and that the weight

Third District held that the moisture of the fresh plants could be included when determining the weight of cannabis. *Id.*

Prior to *Estrada,* the First District, in *Hatch v. State, Dept. of Revenue,* 685 So. 2d 1077 (Fla. 1st DCA 1991), addressed the same question -- whether the definition of "cannabis" under section 893.02(3) includes or excludes the moisture of a fresh marijuana plant. There, a quantity of marijuana had been confiscated, and the weight of the substance, along with a tax assessment based on that weight, was in dispute. *Hatch,* 585 So. 2d at 1079. The Court noted that the tax statute had incorporated by reference section 893.02(3), and *held* that under "the rule enunciated in *Jordan v. State* and *Cronin v. State,* the weight of the wrappings and any *weight attributable to the moisture content of the freshly cut plants could not be included in the determination of the amount of marijuana* to be taxed." *Id.*[3]

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of marijuana for federal sentencing purposes must be that when it is in usable form, meaning suitable for consumption and dried."); FSG § 2D1.1 (as amended in 1993); *see also United States v. Lipp,* 54 F. Supp. 2d 1025, 1030-32 (D. Kan. 1999) (providing helpful hyperlinks to the Sentencing Amendments, and finding that they abrogated *Garcia).* In sum, federal courts exclude from the cannabis definition the weight of the plant's moisture because it is unfit for sale when in that state. This is consistent with the premise that the trafficking statute punishes individuals who *sell* cannabis.

[3] Both *Cronin v. State,* 470 So. 2d 802 (Fla. 4th DCA 1985), and *Jordan v. State,* 419 So. 2d 363 (Fla. 1st DCA 1982), are related criminal cases where the weight of marijuana was at issue. The *Hatch* court also explained that its holding was consistent with the legislative intent to tax *the sale of marijuana.* That reasoning

Contrary to the analysis in the Third District's footnote, the *Hatch* court never itself limited its holding to civil law or tax assessment cases. Rather, as mentioned in the footnotes above, the opinion relied *exclusively* on precedent from two criminal cases and applied them in harmony with federal criminal law.

Thus, simply put, the First and Third Districts have adopted contrary interpretations of the same statutory definition for cannabis. The narrow question in both cases was whether the moisture content of a fresh plant could be included as part of the weight of cannabis, under Florida's only statutory definition of that substance, subsection 893.02(3). The two cases therefore conflict and this Court should exercise its discretionary jurisdiction to harmonize the case law on this issue.[4]

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would apply with equal force to any criminal trafficking case, given that the legislative intent behind the trafficking statute, section 893.135, is to punish *the sale of marijuana.*

[4] Moreover, by eschewing a distinction between dry marijuana that can be sold, and wet marijuana that cannot be sold but which is heavier, the Third District has create a Due Process problem. For example, as in this very case, a defendant who possesses 24 pounds of *dry* and *sellable* marijuana now faces a substantially *lower* penalty than someone who possesses 26 pounds of wet marijuana which he *cannot sell* but would be of *lower* sellable quantity if dry. The statute provides no notice of this, and law enforcement has the discretion to weigh marijuana immediately or to wait until it has had time to dry, thus determining which crime a defendant has committed. Thus, the Third District conflicts with all Florida cases that require Due Process.

II.

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL, IN THE PRESENT CASE, CONFLICTS WITH ALL CASES WHICH APPLY THE "RULE OF LENITY" BECAUSE THE THIRD DISTRICT DECLINED TO CONSTRUE THE STATUTORY DEFINITION OF CANNABIS IN A MANNER MOST FAVORABLY TO THE ACCUSED.

The Rule of Lenity, codified in Section 775.021(1), Florida Statutes (2008), is a rule of statutory construction which compels courts to construe ambiguous statutes in the way that most favors the accused:

> when language is susceptible of differing constructions, it *shall be construed most favorably to the accused.*

§ 775.021(1), Fla. Stat. (2008). The definition of cannabis in section 893.02(3) is silent as to whether the plant's moisture content counts toward its weight.[5] Further, the Third District expressly acknowledged in its discussion of *Hatch* that the statutory definition of cannabis was susceptible to a construction which favored the defendant, and that the First District in *Hatch* had crafted such a construction. (A. at n.5). Yet, the Third District, departing from all precedent requiring compliance with the Rule of Lenity, construed the statute in a way that *least favored the*

[5] "Cannabis" is "all parts of any plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant seed or resin." § 893.02(3), Fla. Stat. (2008).

defendant, thereby elevating his possible sentence by at least three years and at most 25 years (See page 3 above).

Thus, the Third District is in conflict with all cases which have routinely held that courts are bound by the Legislative mandate of section 775.021(1), Florida Statutes. *See e.g., Perkins v. State,* 576 So. 2d 1310, 1312 (Fla. 1991) (emphasizing that criminal statutes "must be strictly construed" and that the application of the rule of lenity to criminal cases "is of especial importance"); *Palmer v. State,* 438 So. 2d 1 (Fla. 1983) (reaffirming the "fundamental rule of statutory construction, i.e. that criminal statutes shall be construed strictly in favor of the person against whom a penalty is to be imposed" and that "nothing that is not clearly and intelligently described in a penal statute's very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms."); *see generally Ferguson v. State,* 377 So. 2d 709, 711 (Fla. 1979) ("This rule is founded on the principles of fairness and justice, that a person is entitled to clear notice of what acts are proscribed and is therefore given the benefit of the doubt when the criminal statute is ambiguous."). This Court should therefore exercise its discretionary jurisdiction to resolve whether courts are bound to apply the Rule of Lenity, as the Legislature has mandated.

CONCLUSION

Based on the foregoing facts, authorities and arguments, Petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. mail to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 3313.1, this January 26, 2012.

By: ***/S/Roderick D. Vereen, Esq.***
Florida Bar No: 869589