IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-71
DCA CASE NO. 3D10-647

CRISTIAN ESTRADA,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Petitioner, Cristian Estrada, was a co-defendant in the trial court and the Appellee in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the Appellant in the Third District Court of Appeal. The parties shall be referred to as they stand in this court.

The symbol "A." refers to Petitioner's Appendix which was attached to his jurisdictional brief, and consisted of a conformed copy of the district court's opinion.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with trafficking in cannabis pursuant to section 893.135(1)(a), *Florida Statutes* (2008), which requires that the cannabis seized weigh in excess of twenty-five pounds. (A. 2). When the Petitioner was initially arrested, the contraband seized weighed twenty-six pounds. (A. 2). Seventeen months later, the petitioners' expert witness re-weighed the cannabis and discovered that a pool of liquid had formed at the bottom of the container holding the cannabis and packaging; without the packaging and the liquid, the cannabis weighed twenty-four pounds. (A. 2).

Petitioner filed a sworn motion to dismiss asserting that no material facts were in dispute, because the weight of the cannabis was below the twenty-five pound requirement for the charged trafficking offense. The State filed a traverse

that did not dispute that the second cannabis weighed of twenty-four pounds. (A. 2). However, the State argued that its expert testimony would explain to the trier of fact the reason for the difference in weight from the date of impounding to the date of re-weighing. (A. 2). The State agreed that there was now liquid in the container, but that the expert would explain the breakdown of the plants and how water seeps from the plants during storage and argued that the law permitted the inclusion of such water in weighing the plants. (A. 3). The trial court granted the motion to dismiss based on the legal conclusion that the weight of cannabis does not include any plant moisture. (A. 3).

On review, the Third District Court of Appeal agreed with the State's contention that the trial court incorrectly applied the definition of cannabis. (A. 3). The Third District noted that under section 893.02(3), "cannabis" is defined as "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 or its seeds or resin." (A. 3). The Third District also noted that the weight of cannabis does not include the packaging. (A. 4). Recognizing that the procedural posture of this case was a pre-trial motion to dismiss, it was determined that when the facts were construed in the light most favorable to the State, a reasonable jury could find the cannabis weight to be in excess of the twenty-five pounds required under the

trafficking statute. (A. 5).

No motion for rehearing or clarification was filed with the district court below. The mandate was issued on January 6, 2012. Petitioner now seeks discretionary review in this Court.

SUMMARY OF ARGUMENT

There is no basis upon which discretionary review can be granted in this case because, there is no express and direct conflict among any of the cases upon which Petitioner relies and the Third District Court's opinion. Each of the cases upon which Petitioner relies is distinguishable or inapplicable. Consequently, conflict jurisdiction does not exist for the exercise of this Court's discretionary jurisdiction to review the decision below. This Court should therefore deny Petitioner's petition to review the decision of the district court.

ARGUMENT

I. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL BELOW IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE FIRST DISTRICT IN *HATCH V. STATE, DEP'T OF REVENUE,* 585 SO. 2D 1077 (FLA. 1ST DCA 1991) BECAUSE THE CASES ARE FACTUALLY DISTINGUISHABLE.

As a general rule, conflict jurisdiction exists when a decision of a court of appeal expressly and directly conflicts with another court of appeal or the Florida Supreme Court "on the same question of law." Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). "Conflict between decisions must be express and

direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986); *see also The Florida Bar v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988). First, Petitioner claims there is conflict with *Hatch v. State, Dep't of Revenue*, 585 So. 2d 1077 (Fla. 1st DCA 1991). Second, Petitioner contends the instant case conflicts with all cases that apply the Rule of Lenity.

In this case, Petitioner claims there is conflict between *Hatch v. State, Dep't of Revenue* and the instant case. However, as the Third District stated, Petitioner's reliance on this tax case is misplaced. *Hatch* involved the Department of Revenue's attempt to determine the fair "estimated retail price" of cannabis for tax assessment purposes. This is clearly distinguishable from a criminal trafficking statute where at issue is the weight of cannabis as an element of proof for the charged offense, and not the tax assessment objectives of the Department of Revenue. Thus, to the extent that *Hatch* determined that any weight attributed to the moisture content of cannabis should not be included for tax assessment purposes, it is inapplicable to the instant case. As a result, express and direct conflict on the question of whether the weight of cannabis should exclude moisture content in fresh cut plants does not exist.

II. THERE IS NO CONFLICT WITH THE THIRD DISTRICT'S OPINION AND ALL CASES WHICH APPLY THE RULE OF LENITY BECAUSE THE STATUTE IS NOT AMBIGUOUS AND THE THIRD DISTRICT'S ANALYSIS OF THE STATUTORY DEFINITION OF CANNABIS IS CONSISTENT WITH THE CASE LAW OF FLORIDA.

Petitioner contends the instant case conflicts with all cases that apply the rule of lenity. The rule of lenity provides that "when a criminal statute is ambiguous and capable of different constructions, it should be constructed in the favor of the accused." *See* Fla. Stat. § 755.021(1); *Cabal v. State*, 678 So.2d 315 (Fla. 1996). Absent ambiguity, the rule of lenity is inapplicable.

Section 893.02(3) defines cannabis as "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 or its seeds or resin." The clear definition of cannabis includes ". . . all parts of any plants of any plant of the genus Cannabis, whether growing or not . . . ," making it illogical that the Legislature would have included the words "any plant whether living or not" and not have intended that the cellular moisture that makes a "living plant" a living plant, not be included in the definition. Case law has reiterated that this definition does not include wrappings or *excess* water that is not inherent in the vegetable matter of the plant. *Hatch*, 585 So. 2d at 1078 (citing *Jordan v. State*, 419 So.2d 363, 364 (Fla. 1st DCA 1982) and

Cronin v. State, 470 So. 2d 802 (Fla. 4th DCA 1985) (finding it necessary to exclude excess water that was attributed to a bale of marijuana after it fell into a canal)). Rather, the extent to which there may be excess water is a factual determination for the trier of fact. *Cronin v. State*, 470 So. 2d at 804. Thus, there is no ambiguity in the definition of cannabis and the rule of lenity does not apply in the instant case.

Additionally, Petitioner's line of reasoning in citing all cases that apply the rule of lenity regardless of the specific and individual facts of each case is misguided. He cites three cases as examples of how "the Third District is in conflict with all cases which have routinely held that courts are bound by the Legislative mandate . . . ." However, each of the cases cited, *Perkins v. State*, 576 So. 2d 1310 (Fla. 1991); *Palmer v. State*, 438 So. 2d 1 (Fla. 1983); and *Ferguson v. State*, 377 So. 2d 709 (Fla. 1979), deal with a different statute than the case at bar and the application of a general principle of law to the specific facts of each case. This does not create express and direct conflict. *See Riggs v. State*, 918 So. 2d 274, 278 (Fla. 2005)("Riggs sought review in this Court based on express and direct conflict with [the First District in] *Eason.* Although the two decisions recite the same principles of Fourth Amendment law, we have jurisdiction because of the Second District's 'application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case.'"). Therefore, there is

no express or direct conflict exists between the opinion under review and the rule of lenity.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that this Court decline jurisdictional review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief was mailed this 20th day of January 2012 to: Brian L. Ellison, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, FL, 33125; and Roderick D. Vereen, 4770 Biscayne Blvd, Suite 1250, Miami Florida 33137.

_____
KERI T. JOSEPH
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).

_____
KERI T. JOSEPH
Assistant Attorney General