

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOSEPH JENKINS,

Petitioner,

v.

S. Ct. Case No.

STATE OF FLORIDA,

Respondent.

_____ /

**ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT**

PETITIONER'S BRIEF ON JURISDICTION

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SEVENTH JUDICIAL CIRCUIT

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TABLE OF CITATIONS

<u>CASES CITED:</u>	<u>PAGE NO.</u>
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<i>State v. Adkins</i> 71 So. 3d 117 (Fla. October 12, 2011)	4
<i>State v. Adkins</i> 71 So. 3d 184 (Fla. 2 nd DCA 2011)	4
 <u>OTHER AUTHORITIES CITED:</u>	
Chapter 893, Florida Statutes	4
Section 843.02, Florida Statutes (2009)	1
Section 893.13(6)(a), Florida Statutes (2009)	1

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by Information with one count of possession of a controlled substance in violation of Section 893.13(6)(a), Florida Statutes (2009). Appellant filed a Motion to Suppress which was denied. He then plead no contest to the offense specifically reserving his right to appeal the denial of the Motion to Suppress. On appeal to the Fifth District Court of Appeal, Appellant initially filed a brief raising the suppression issue on appeal. During the pendency of the appeal a Federal District Court judge declared Florida's drug possession statute unconstitutional for failure to include a scienter element. *Shelton v. Secretary, Department of Corrections*, 23 Fla.L.Weekly Fed. D11(M.D. Fla. July 27, 2011). Petitioner filed a supplemental brief raising the constitutionality of the statute. On November 18, 2011, the Fifth District Court of Appeal issued an opinion affirming Appellant's judgment and sentences thus rejecting Appellant's attack on the constitutionality of Chapter 893. In doing so, the district court cited *Flagg v. State*, 1D11-2372 (Fla. 1st DCA Oct. 13, 2011), wherein the First District Court of Appeal rejected the *Shelton* rationale. (Copy of opinion from the Fifth District attached as Appendix hereto)

Petitioner filed a timely Notice to Invoke the discretionary jurisdiction of this Court on January 19, 2012.

SUMMARY OF THE ARGUMENT

Where a district court of appeal cites as authority for its affirmance, a decision of another district court of appeal which is currently pending review in this Court, the Supreme Court has jurisdiction to accept the case for review.

ARGUMENT

THIS COURT HAS DISCRETIONARY
JURISDICTION TO ACCEPT THE DECISION OF
THE FIFTH DISTRICT COURT OF APPEAL BELOW
FOR REVIEW.

Petitioner raised the constitutionality of Chapter 893 on the grounds that a Federal District Court judge had declared the statute unconstitutional for failure to include a scienter element. *Flagg v. State*, 1D11-2372 (Fla. 1st DCA Oct. 13, 2011), wherein that Court held that the decision of the Federal District Court was not binding on State courts and since State courts had previously upheld the constitutionality of Chapter 893, it saw no reason to revisit the issue. The First District also recognized that the issue was squarely before this Court having been certified for immediate resolution from the Second District Court of Appeal in *State v. Adkins*, 71 So. 3d 184 (Fla. 2nd DCA 2011). This Court granted review in *Adkins* and has recently held oral arguments thereon. *State v. Adkins*, 71 So. 3d 117 (Fla. October 12, 2011). A Petition for Discretionary Review was filed in *Flagg* on November 21, 2011 and is currently pending before this Court in Case No. SC11-2282.

In *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), this Court held that a district court of appeal per curiam opinion which cites as controlling authority a decision

that is either pending review in or has been reversed by the Supreme Court continues to constitute prima facie express conflict and allows the Supreme Court to exercise its jurisdiction. This Court continues to adhere to the *Jollie* principle. *See Jackson v. State*, 64 So. 3d 1209 (Fla. 2011). Therefore, this Honorable Court has the jurisdiction to accept the instant case for discretionary review.

CONCLUSION

Based on the foregoing reasons and authorities cited herein, this Honorable Court should accept the instant case for review, quash the decision of the Fifth District Court of Appeal and remand with instructions to discharge Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Office of the Attorney General and mailed to Joseph Jenkins, 870 Bananna Lake Road, Lake Mary, FL 32746, on this 19th day of January, 2012.

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is 14 point Times New Roman font.

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER