

IN THE SUPREME COURT OF FLORIDA

**Case No. SC12 - 0152
5th DCA Case No. 5D11-4390**

KENNETH DEAN FENDER,

Appellant/Petitioner,

v.

STATE OF FLORIDA,

Appellee/Respondent.

**On Review from the District Court of Appeal,
Fifth District
State of Florida**

**JURISDICTIONAL BRIEF OF PETITIONER,
KENNETH DEAN FENDER**

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Case No. SC12 - 0152
5th DCA Case No. 5D11-4390

Kenneth Dean Fender v. State of Florida

CERTIFICATE OF INTERESTED PERSONS

Counsel for the Petitioner, Kenneth Dean Fender, certifies that the following persons have or may have an interest in the outcome of this case:

The Honorable Carol Draper, County Court Judge

Pam Bondi, Attorney General, Office of the Attorney General

Kenneth Dean Fender, Defendant/Appellant

Lawson Lamar, State Attorney

The Honorable Scott Polodna, Circuit Court Judge, entered order appealed

in case no. 2009-CF-2166

Michelle P. Smith, Counsel for Defendant/Appellant

Robert Wesley, Public Defender

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Jan. 3, 2012 A

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STATEMENT OF THE CASE AND FACTS

On September 30, 2009, Mr. Fender pled no contest to possession of methamphetamine (count 1) and possession of drug paraphernalia (count 2). Mr. Fender was sentenced to 24 months probation as to count 1 with credit for 50 days time served, and to 50 days time served on count 2.

On July 27, 2011, U.S. District Court Judge Mary Scriven declared section 893.13, Florida Statutes, as amended by section 893.101, Florida Statutes (2002), unconstitutional on its face. *See Shelton v. Secretary, Dep't of Corrections*, No. 6:07-cv-839-ORL-35, 2011 U.S. Dist. LEXIS 86898, 2011 WL 3236040 (M.D. Fla. July 27, 2011).

On September 26, 2011, Mr. Fender filed his motion to vacate sentence, pursuant to Florida Rule of Criminal Procedure 3.850 based upon *Shelton*. On October 11, 2011, the Circuit Court entered an order denying Mr. Fender's motion.

Mr. Fender appealed the denial of his motion to vacate his judgment and sentence to the Fifth District Court of Appeal. The District Court affirmed the denial of his motion to vacate *per curiam*, citing *Flagg v. State*, 36 Fla. L. Weekly D2276 (Fla. 1st DCA Oct. 13, 2011), *cert. pet. filed*, SC11-2282 (Fla. Nov. 21, 2011).

SUMMARY OF THE ARGUMENT

Pursuant to Article V, Section 3(b)(4) of the Florida Constitution and *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), this Court should accept jurisdiction in this case because it accepted jurisdiction in *State v. Adkins*, 71 So. 3d 184 (Fla. 2d DCA Sept. 28, 2011), *rev. granted*, 2011 Fla. LEXIS 2648 (Fla. Oct. 12, 2011), on the certified question of the constitutionality of section 893.13, Florida Statutes, as amended by section 893.101. Furthermore, this Court should accept jurisdiction because a petition for certiorari review is pending in *Flagg v. State*, 36 Fla. L. Weekly D 2276 (Fla. 1st DCA Oct. 14, 2011), *cert. pet. filed*, SC11-2282 (Fla. Nov. 21, 2011), which was cited by the Fifth District in affirming the denial of Mr. Fender's motion to vacate.

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review a decision of a district court of appeal expressly construing a provision of the federal or state constitution, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. Fla. Const., Art. V, § 3(b)(4) (2011); Fla. R. App. P. 9.030(a)(2)(A); *Jollie v. State*, 405 So.2d 418, 420 (Fla. 1981).

ARGUMENT AND LEGAL AUTHORITY

The Decision in this Case Cites *Flagg v. State*, 36 Fla. L. Weekly. D2276 (Fla. 1st DCA Oct. 13, 2011), which Is Pending Review Before this Court, as Controlling Authority.

Mr. Fender raised the constitutionality of section 893.13, Florida Statutes, as amended by section 893.101, on the grounds that it had been declared unconstitutional facially by a federal district court. *See Shelton v. Secretary, Dep't of Corrections*, No. 6:07-cv-839-ORL-35, 2011 U.S. Dist. LEXIS 86898, 2011 WL 3236040 (M.D. Fla. July 27, 2011). Mr. Fender argued that section 893.101 eliminated the *mens rea* requirement and thus violated the Due Process clause of the Constitution. On January 3, 2012, the Fifth District Court of Appeal affirmed Mr. Fender's judgment and sentence citing *Flagg*. *Flagg* held that the decision of the federal district court in *Shelton* is not binding on state courts and noted that the constitutionality of Chapter 893 had been upheld by the state courts.

In *Flagg*, as in the instant case, the defendant was charged with possession of a controlled substance, in violation of section 893.13(6)(a), and possession of drug paraphernalia, in violation of section 893.147(1)(b). *Id.* at 140. As Mr. Fender did below, the defendant in *Flagg* argued that section 893.13 was unconstitutional because the *mens rea* requirement had been eliminated by section 893.101. *Id.* The First District found *Shelton* unpersuasive. *Id.* Rather than certifying a question of great public importance as the Second District did in

Adkins, the First District reasoned that

a definitive statement from this court reaffirming the constitutionality of section 893.13 notwithstanding *Shelton* will promote the consistent administration of justice by resolving the issue for the trial courts, thereby allowing drug prosecutions to proceed, at least until the supreme court or another district court weighs in on the issue. Of course, defendants remain free to raise the constitutional argument to preserve the issue for appellate or federal review, but this decision will at least preserve the status quo until the supreme court addresses the issue, and it should also address the Second District's legitimate concern in *Adkins* that, without a definitive ruling from a higher court, different circuits (or even different judges in the same circuit) may continue to take opposite positions on the issue.

Id. at 141. The defendant in *Flagg* filed his jurisdictional brief with this Court on November 30, 2011. *See id.*

Additionally, this Court accepted jurisdiction in *State v. Adkins*, 71 So. 2d 184 (Fla. 2d DCA 2011), on October 3, 2011 and oral argument was heard on December 6, 2011. *Adkins* involves the same issues as the instant case. Upon review in *Adkins*, the Second District Court of Appeal noted the difficulty the district courts had in producing a unified opinion on the constitutionality of section 893.13. As a result, the Second District certified the issue as a question of great public importance requiring immediate resolution by the Supreme Court. *Id.* at 186. Exactly as in *Adkins*, Mr. Fender was convicted of possession of a controlled substance, in violation of section 893.13, Florida Statutes (2009), and hence this Court should accept jurisdiction in this case as well.

Furthermore, according to the principle set forth in *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), this court has jurisdiction to review any *per curiam* decision issued by a district court of appeal that cites either a decision that is pending review in or has been reversed by the Supreme Court as controlling authority. Therefore, this Honorable Court has jurisdiction to accept the instant case for discretionary review.

As the precise issue raised below is currently pending before this Court in *Adkins* and *Flagg*, it would be appropriate for the Court to accept jurisdiction in this case as well.

CONCLUSION

Based on the foregoing arguments, reasoning, and citations of authority, Mr. Fender respectfully requests that this Honorable Court accept the instant case for review, quash the decision of the Fifth District Court of Appeal, and remand with instructions to discharge Mr. Fender.

Respectfully submitted,

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Counsel for Appellant Fender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant together with the attached Appendix were furnished by U.S. Mail to the Office of the Attorney General, Criminal Appeals Division, 444 Seabreeze Blvd., Suite 500, Daytona Beach, Florida 32118 and Mr. Kenneth Dean Fender on this 3rd day of February 2012.

CERTIFICATE OF COMPLIANCE

Counsel for Mr. Fender certifies that this brief complies with the type-font and volume limitations set forth in Rules 9.200 and 9.210 of the Florida Rules of Appellate Procedure.

Attorney

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**APPENDIX TO JURISDICTIONAL BRIEF OF PETITIONER,
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Opinion of the Fifth District Court of Appeal, affirming the denial of Mr. Fender's
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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JULY TERM 2011

KENNETH DEAN FENDER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING MOTION, AND,
IF FILED, DISPOSED OF

CASE NO. 5D11- 4390

Opinion filed January 3, 2012

3.850 Appeal from the Circuit Court
for Osceola County,
Scott Polodna, Judge.

Michelle Smith, of the Law Office of
Michelle P. Smith, P.A., Orlando, for
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No Appearance for Appellee.

PER CURIAM.

AFFIRMED. *See Flagg v. State*, 36 Fla. L. Weekly D2276 (Fla. 1st DCA Oct. 13,
2011).

MONACO, LAWSON, and EVANDER, JJ., concur.