

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ELEMELEC ORTIZ,

Petitioner,

Ct. Case No.

STATE OF FLORIDA,

Respondent.

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

**PETITIONER'S BRIEF ON JURISDICTION**

**JAMES S. PURDY PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT**

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 <u>OTHER AUTHORITIES CITED:</u>	
Chapter 893, Florida Statutes	1, 3

## **STATEMENT OF THE CASE AND FACTS**

Petitioner was charged by Information with trafficking in four grams or more of heroin, which is proscribed by Chapter 893, Florida Statutes (2010). Petitioner plead to the charge and two non-drug offenses and was sentenced. On appeal to the Fifth District Court of Appeal, Petitioner filed a brief raising the constitutionality of Chapter 893 based on a decision of a Federal District Court judge who ruled 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). On February 21, 2012, 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*, 74 So.3d 138 (Fla. 1st DCA 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 March 1, 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. *Shelton v. Secretary, Department of Corrections*, 23 Fla.L.Weekly Fed. Dl 1(M.D. Fla. July 27, 2011). The Fifth District Court of Appeal issued an opinion in the instant case on February 21, 2012, affirming Petitioner's judgments and sentences and rejecting the challenge to the constitutionality. In doing so, the Fifth District cited to the decision of the First District Court of Appeal in *Flagg v. State*, 74 So. 3d 138 (Fla. 1<sup>st</sup> DCA 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. SC1 1-2282.

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,

JAMES S. PURDY  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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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 Elemelec Ortiz, DOC #X48861, Franklin Correctional Institute, 1760 Highway 67 North, Carrabelle, FL 32322, on this 2<sup>nd</sup> day of March, 2012.

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MEGHAN ANN COLLINS  
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.

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MEGHAN ANN COLLINS  
ASSISTANT PUBLIC DEFENDER