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IN THE SUPREME COURT OF FLORIDA

FREDERICK BAILEY,
MARIO M. GOULD, and
MARCUS GORDON,

Petitioners,

v. Case No.: 81,621

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON JURISDICTION

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Preliminary Statement

Respondent, the State of Florida, the prosecuting authority in the trial court and appellant below, will be referred to in this brief as the state. Petitioners, FREDERICK BAILEY, MARIO M. GOULD, and MARCUS GORDON, the defendants in the trial court and appellees below, will be referred to in this brief as petitioners.

STATEMENT OF THE CASE AND FACTS

The state accepts petitioners' statement of the case and facts as reasonably supported by the record.

JURISDICTIONAL STATEMENT

The Supreme Court of Florida has jurisdiction to review a decision of a district court of appeal that expressly declares a state statute constitutional. **Fla. Const.** art. V, § 3(b)(3); **Fla. R. App. P.** 9.030(a)(2)(A)(i).

SUMMARY OF THE ARGUMENT

The instant decision does not expressly declare a state statute valid. Nevertheless, this court should exercise its discretionary jurisdiction in this matter, based on Thomas's direct and express conflict with Brown, upon which the instant decision is premised.

ARGUMENT

Issue

WHETHER STATE V. BAILEY, ET AL., 18 FLA. L. WEEKLY D850 (FLA. 1ST DCA MARCH 30, 1993), EXPRESSLY DECLARES A STATE STATUTE VALID.

The decision of the First District clearly shows that the court did not expressly declare a state statute valid. Rather, the court stated: "Subsequent to the trial court's decisions in these cases, this court has addressed the precise issue raised here, concluding that the statute is not unconstitutionally vague. Brown v. State, 18 Fla. L. Weekly D173 (Fla. 1st DCA Dec. 30, 1992)[1]; Turner v. State, 18 Fla. L. Weekly D773 (Fla. 1st DCA Mar. 16, 1993).[2] Accordingly, in all three cases, we reverse and remand with directions that the trial court reinstate the information." State v. Bailey, et al., 18 Fla. L. Weekly D850 (Fla. 1st DCA March 30, 1993).[3]

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1 Brown is pending before this Court in case number 81,189. It should be noted that Brown involves four challenges to the statute, only one of which is a challenge to its facial validity (vagueness). Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1983).

2 Turner is pending before this Court in case number 81,519, and involves the exact issues presented in Brown.

3 It should be noted that the only issue in these consolidated cases was a challenge to the facial validity of the statute.

Petitioners' brief jurisdictional contention,[4] i.e., that the First District's acknowledgment of Brown and Turner in reversing the orders of dismissal is an express declaration that section 893.13(1)(i) is constitutional, might have had merit if made before the 1980 amendments to **Fla. R. App. P.** 9.030. Under the pre-1980 rule, a petitioner could invoke this Court's jurisdiction if a lower tribunal "inherently" declared a statute valid. Harrell's Candy Kitchen v. Sarasota-Manatee Airport Auth., 111 So. 2d 439 (Fla. 1959). However, since 1980, the rule has required an express declaration:[5]

> The pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt. This Court may only review a decision of a district court of appeal that *expressly* [declares a state statute constitutional]. The dictionary definitions of the term

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[4] Petitioner's jurisdictional argument is relegated to the issue heading and the first sentence of his brief. The rest of his brief is devoted to a merits discussion, and as such, ordinarily should be disregarded by this Court pursuant to the express language of **Fla. R. App. P.** 9.120(d) (briefs on jurisdiction shall be "limited solely to the issue of the Supreme Court's jurisdiction . . . ."). Nevertheless, the state appreciates that a petitioner seeking review on statutory validity must persuade this Court that (1) the court below expressly upheld the validity of the statute, and (2) the court below arguably was wrong and this Court should exercise its discretionary review.

[5] The rule currently provides that the discretionary jurisdiction of the Supreme Court may be sought to review decisions of district courts of appeal that "expressly declare valid a state statute." **Fla. R. App. P.** 9.030(a)(2)(A)(i).

> "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner." *Webster's Third New International Dictionary*, (1961 ed. unabr.)

Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980) (emphasis in original). See also **Webster's Third New International Dictionary** Expressly, at 803 (1981 ed.) ("in direct and unmistakable terms").

There can be no doubt that the only action taken by the First District in "unmistakable terms" was its reversal of the trial court's orders dismissing the informations charging petitioner with selling drugs within 200 feet of a pubic housing project, based on Brown and Turner. That court in no way declared section 893.13(1)(i) to be valid "in direct and unmistakable terms."

Despite petitioners' failure to show that the First District expressly declared a statute valid, the state nevertheless joins with petitioners in asking this Court to exercise its discretionary jurisdiction. On April 21, 1993, the Second District found section 893.13(1)(i) to be unconstitutionally vague, a decision which is in direct and express conflict with Brown, Turner, and the instant decision. See State v. Thomas, et al., Case Nos. 91-3496, etc. (Fla. 2d DCA Apr. 21, 1993). The state is seeking

review before this Court in Thomas.[6] Because Turner and the instant decision are premised on Brown, and the Thomas opinion directly and expressly conflicts with Brown, this Court should exercise its jurisdiction in all four cases so as to speak once, consistently, and dispositively on the issue at hand.

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[6] The notice to invoke was filed in the Second District Court of Appeal on May 4, 1993.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to exercise its discretionary jurisdiction in this matter.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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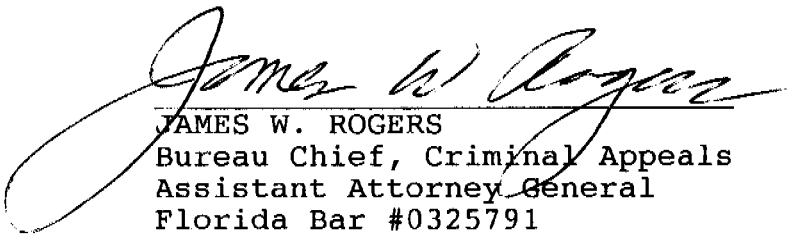

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to P. DOUGLAS BRINKMEYER, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 10th day of May, 1993.

Gypsy Bailey

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Assistant Attorney General