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SUPREME COURT OF FLORIDA

Case No. 91,424

CLERK, SUPREME COURT

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AVATAR DEVELOPMENT CORP.
and AMIKAM TANEL,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONERS' BRIEF ON JURISDICTION

Petition To Review Decision Of
The Fourth District Court Of Appeal

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PREFACE	iv
STATEMENT OF THE CASE AND OF THE FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE DECISION EXPRESSLY DECLARES FLA. STAT. § 403.161(1)(b) AND FLA. STAT. § 403.161(5) CONSTITUTIONAL	4
II. THE DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN <i>B.H. V. STATE OF FLORIDA</i> , 645 So.2d 987 (FLA. 1994), AS WELL AS WITH OTHER CASES.	5
A. Nondelegation Doctrine	5
B. Due Process	8
III. THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION BECAUSE FLORIDA HAS A STRONG POLICY AGAINST ALLOWING ADMINISTRATIVE AGENCIES TO DEFINE CRIMES.	9
CONCLUSION	10
APPENDIX	11
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

Page

B.H. v.
State Of Florida,
645 So.2d 987 (FLA. 1994) 5, 6, 7, 8, 9

Cantor v.
Davis,
489 So.2d 18 (Fla. 1986) 4

Chiles v.
Children A,B,C,D,E, & F,
589 So. 2d 260 (Fla. 1991) 5

Connor v.
Joe Hatten,
216 So. 2d 209, 211 (Fla. 1968) 8

Perkins v.
State,
576 So.2d 1310 (Fla. 1991) 9

Seaboard Air Line R.R. v.
Branham,
104 So.2d 356 (Fla. 1958) 4

Southeastern Fisheries Association, Inc. v.
Department of Natural Resources,
453 So. 2d 1351 (Fla. 1984) 8

Other Authorities

§ 403.161, Fla. Stat. (1993) 3,6, 8, 9

§ 403.161(1)(b), Fla. Stat. 1, 2, 4, 6, 7

§ 403.161(5), Fla. Stat. (1993) 1, 2, 4, 6

§ 403.813(2)(f), Fla. Stat. 7

Fla. R. App. P. 9.030(a)(2)(A)(i)	iv, 4
Fla. R. App. P. 9.030(a)(2)(A)(iv)	iv
Art. I, § 18, Fla. Const.	1
Art. II, § 3, Fla. Const.	1, 5
Art. III § 1, Fla. Const.	9
Art. V, § 3(b)(3), Fla. Const.	2, 4

PREFACE

This is a petition to invoke the discretionary review jurisdiction by this Court under Fla. R. App. P. 9.030(a)(2)(A)(i) based on an express declaration by the Fourth District Court of Appeal that a state statute is constitutional.

This petition also seeks discretionary review by this Court under Fla. R. App. P. 9.030(a)(2)(A)(iv) based on an express and direct conflict between the decision of the Fourth District Court of Appeal and decisions of this Court.

The Petitioners, Avatar Development Corp. and Amikam Tanel, will be referred to herein as "Avatar."

The Respondent, State of Florida, will be referred to herein as "State."

The Appendix to this Brief will be cited as "App.____" with page designations where appropriate.

The Opinion of the Fourth District Court of Appeal, App.3, will be referred to as the "Decision."

STATEMENT OF THE FACTS AND OF THE CASE

An information was filed by the State on November 28, 1995, charging Avatar with violating the conditions of a permit pursuant to § 403.161(1)(b) and § 403.161(5), Fla. Stat. (1993). App.1.

The county court below dismissed the information, finding that Fla. Stat. § 403.161(1)(b) and § 403.161(5) violated Art. I, § 18 and Art. II, § 3 of the Florida Constitution because they unconstitutionally delegated to an administrative agency the power to define a crime. It also found that § 403.161(1)(b) and § 403.161(5) violated Avatar's due process rights because the acts prohibited by the statutes did not appear on the face of the statutes. App.2.

On July 16, 1997, the Fourth District Court of Appeal reversed the county court's decision, expressly finding the challenged statutes to be constitutional. App.3.

On August 19, 1997, the Fourth District Court of Appeal denied Avatar's motion for rehearing. App.4.

SUMMARY OF ARGUMENT

The Fourth District Court has expressly held that § 403.161(1)(b) and § 403.161(5), Fla. Stat.(1993), which violate Florida's constitutional nondelegation doctrine and the separation of powers, are constitutionally valid and enforceable. Pursuant to Art. V, § 3(b)(3) of the Florida Constitution, the District Court's express finding provides a basis for jurisdiction in this Court.

The Decision also expressly and directly conflicts with this Court's decisions holding that all challenged delegations in the criminal context must expressly articulate reasonably definite standards of implementation that do not merely grant open-ended authority, but that impose an actual limit - both minimum and maximum - on what an agency may do. The Decision determines that a statute, which in effect allows an agency to define crimes as it chooses, is constitutional. Such a finding is not only in direct conflict with decisions of this Court, but it is also contrary to Florida's strong policy against allowing administrative agencies to define crimes. Therefore, this Court should exercise its discretionary jurisdiction and hear this case on its merits.

Additionally, the Decision expressly and directly conflicts with this Court's decisions holding that a statute violates Due Process for failure to give adequate notice on its face of the

prohibited acts. The Decision holds Fla. Stat. § 403.161 constitutional even though there is no possible way one can determine from reading the statute what acts are prohibited. Therefore, the Decision expressly and directly conflicts with a decision of this Court on the same question of law, and this Court has jurisdiction.

ARGUMENT

I. THE DECISION EXPRESSLY DECLARES FLA. STAT. § 403.161(1)(b) AND FLA. STAT. § 403.161(5) CONSTITUTIONAL.

Pursuant to Art. V, § 3(b)(3) of the Florida Constitution, this Court has discretionary jurisdiction over district court decisions that expressly declare a state statute constitutional. For jurisdiction to exist in these cases, the decision under review must contain some statement to the effect that a specified statute is valid or enforceable. See *Cantor v. Davis*, 489 So.2d 18 (Fla. 1986). This Court has further indicated that the term "decision," as used in the constitution's jurisdictional sections, encompasses not merely the result but also the entire opinion. *Seaboard Air Line R.R. v. Branham*, 104 So.2d 356, 358 (Fla. 1958).

In the Decision at issue, the Fourth District Court of Appeal expressly held that § 403.161(1)(b) and § 403.161(5) of the Florida Statutes (1993) are constitutionally valid and enforceable. App.3, p.5. This express finding creates jurisdiction in this Court. *Cantor*, 489 So.2d 18 at 20. Therefore, pursuant to Art. V, § 3(b)(3), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(i), it is respectfully submitted that this Court should exercise its discretionary jurisdiction and hear this case on its merits.

II. THE DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN B.H. V. STATE OF FLORIDA, 645 So.2d 987 (FLA. 1994), AS WELL AS WITH OTHER CASES.

A. Nondelegation Doctrine

Florida's nondelegation doctrine is based on the principle of separation of powers, which is expressed in Art. II, § 3, of the Florida Constitution as follows:

The powers of the State government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any power appertaining to either of the branches unless expressly provided herein.

This Court "has stated repeatedly and without exception that Florida's Constitution absolutely requires a 'strict' separation of powers." *B.H. v. State of Florida*, 645 So.2d 987, 991 (Fla. 1994). If a statute purports to give one branch powers that are textually assigned to another by the Constitution, then that statute is unconstitutional. *Chiles v. Children A,B,C,D,E,& F*, 589 So. 2d 260, 264 (Fla. 1991).

In *B.H.*, the statute at issue created the crime of escape from a commitment facility, and merely left it to the Department of Health and Rehabilitative Services to specify which facilities would fall under the prohibition. 645 So.2d 987. This Court held the statute unconstitutional because it violated the nondelegation

doctrine. 645 so. 2d at 994. The holding was based on the notion that all challenged delegations in the criminal context must expressly articulate reasonably definite standards of implementation that do not merely grant open-ended authority, but impose an actual limit, both minimum and maximum, on what an agency may do. *Id.*

The Decision of the Fourth District Court of Appeal, which found Fla. Stat. § 403.161(1)(b) and § 403.161(5) to be constitutional, is in conflict with the holding set forth by this Court in *B.H.* Fla. Stat. § 403.161 (1993) provides in pertinent part:

(1) It shall be a violation of this chapter, and it shall be prohibited for any person: ...

(b)... to violate or fail to comply with any rule, regulation, order, permit, or certification adopted or issued by the department pursuant to its lawful authority ...

(5) Any person who willfully commits a violation specified in paragraph (1)(b) ... is guilty of a misdemeanor of the first degree punishable as provided in ss.775.082(4)(a) and 775.083(1)(g) by a fine of not more than \$10,000 or by 6 months in jail, or by both for each offense.

This statute is an even broader grant to an administrative agency of the power to define a crime than the statute in *B.H.* In

this case, § 403.161(1)(b), Fla. Stat. (1993), makes it a crime to "violate or fail to comply with any rule, regulation, order, permit, or certification adopted or issued by the department pursuant to its lawful authority." The DEP is not merely permitted to determine one element of a crime, as in *B.H.*, but is invited to legislate any and all crimes it might wish to create, whether by rule, regulation, order, permit, or certification.

The Decision recites various statutory provisions (including § 403.813(2)(f), which applies only to maintenance dredging and not to Avatar's bank stabilization project) to find legislative guidance for the exercise of administrative agency authority. App.3, pp.4, 5. However, these sections provide even less guidance than the statute struck down in *B.H.* These provisions merely state goals. They not only allow the agency to determine what activities should be regulated to achieve those goals, but also the best methods by which to regulate those activities. In accord with this Court's holding in *B.H.*, such broad authority may not be delegated to an agency. Therefore, an express and direct conflict exists between this Court's decision and the Decision of the Fourth District Court of Appeal.

B. Due Process

In *B.H.*, this Court stated that "the legislature may not delegate with open-ended authority such that no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law." *B.H.*, 645 So. 2d at 993 (quoting *Connor v. Joe Hatten*, 216 So. 2d 209, 211 (Fla. 1968)). A law must give fair notice of what is prohibited. *Southeastern Fisheries Association, Inc. v. Department of Natural Resources*, 453 So. 2d 1351, 1353-1354 (Fla. 1984). In *B.H.*, this Court determined that due process was violated by "the statute's failure on its face to give adequate notice of the prohibited act." *B.H.*, 645 So. 2d at 993.

The Decision of the Fourth District Court is in direct conflict with this Court's holding in *B.H.* Section 403.161, Fla. Stat. (1993) violates due process because one cannot determine from the text of the statute what acts are prohibited. In order to determine with certainty the activities prohibited by § 403.161, one must reference all of the DEP's rules, regulations, orders, permits, and the certifications adopted or issued by the Department. The text of all of DEP's rules, regulations, orders, permits and certifications are not included in the face of the statute.

III. THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION BECAUSE FLORIDA HAS A STRONG POLICY AGAINST ALLOWING ADMINISTRATIVE AGENCIES TO DEFINE CRIMES.

Admittedly, the legislature's objective in enacting § 403.161, Fla. Stat. (1993) was to serve the public good. No matter how laudable a piece of legislation may be, however, it is unconstitutional if it delegates to an administrative agency the power to define a crime. Pursuant to the Florida Constitution and to Florida's nondelegation doctrine which is based on the principle of strict separation of powers, there is a strong policy against allowing administrative agencies to define crimes.

Article III of the Constitution states that "the legislative power of the state shall be vested in a legislature of the state of Florida." Art. III § 1, Fla. Const. Furthermore, "the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch." *Perkins v. State*, 576 So.2d 1310, 1312 (Fla. 1991). (emphasis in original.) While the legislature may assign to administrative agencies certain duties involved in applying the law, it is against Florida policy to allow agencies to create the law. *B.H.*, So. 2d at 992.

Although not a basis for jurisdiction, it is important to note the potential evil of allowing an administrative agency to create criminal laws by individual permit, order or certification; in effect a special law. Because the legislature cannot create a crime by a special law, it certainly cannot delegate the power to do so to an agency. Considering the importance Florida places on the nondelegation doctrine and the separation of powers, this Court should exercise its discretionary jurisdiction over such an important policy issue.

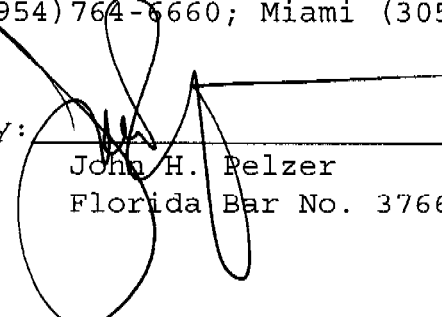
CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should accept jurisdiction and hear this case on its merits.

Respectfully submitted,

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