IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1248

DCA CASE NO. 3D02-2467

ALEX EXPOSITO,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Petitioner, **ALEX EXPOSITO**, was the Petitioner in the trial court and the Appellant in the Third District Court of Appeal. Respondent, **THE STATE OF FLORIDA**, was the prosecution in the trial court and Appellee in the Third District Court of Appeal. The parties shall be referred to as Petitioner and Respondent in this brief. The symbol "R" designates the record on appeal, the symbol "T" designates the transcript of proceedings.

STATEMENT OF THE CASE AND FACTS

The Petitioner is before this Court on review of the decision of the Third District Court of Appeal reversing the trial court's order granting Petitioner's Motion For New Trial or Reduction Of the Charge to Possession With Intent To Sell Cannabis.

On March 28, 2001, Petitioner was charged in Count 2 of the Information with Trafficking in Cocaine 25 lbs. but less than 2000 lbs.-a first degree felony, for the offense committed on March 7, 2001, in violation of §893.135(1)(a)2, Florida Statutes. (R/V1:2). Count 1 – Possession With Intent to Sell, was nolle prossed, as a lesser included offense of trafficking. (T/V1:6-8).

The issue at trial was the weight of the marijuana plants, and it was contested throughout the trial. The following facts were adduced at trial. Detective Rodriguez testified that he and Detective Del Guidice responded with a search warrant to information regarding a marijuana "grow house" belonging to the Petitioner. (T/V2:153-154). Del Guidice located the Petitioner and brought him to the house where he opened the front door with a set of keys he had on his person. (T/V2:154). Both bedrooms of the house contained numerous plants from two to three feet tall, mother plants and smaller plants, and electrical equipment to help grow the plants. (T/V2:155, 157-158). Rodriguez confiscated 93 plants, cut down to the roots along with timers, light bulbs, and other equipment. (T/V2:158-160). Rodriguez testified, over defense objection, that he weighed the plants and the total weight of the plants was 80.8 pounds. (T/V1:164-165).

Walter Bodie, a chemist in the County Crime Laboratory, testified that at the police property room he weighed the marijuana in this case which was contained in a sealed drum, factored out the weight of the drum and concluded that the weight of the contents was 80.8 pounds. (T/V2:187-188). The chemist further testified that when kept in a sealed drum the smell of the marijuana is contained and the weight remains

constant until the drum is opened, but that decomposition begins to occur and rot sets in over time. (T/V2:189). He tested the marijuana on March 24, 2001, and weighed the evidence in May, two months after police gathered the evidence. (T/V2:187).

Wayne Morris, a former FDLE chemist currently self-employed at Morris Kopek Forensics, Inc., testified that when he was retained in October he was unable to weigh the marijuana in this case because of its advanced decomposition. (T/V2:210-211). Morris further testified that marijuana should be weighed when dry, that a fresh plant contained an average of 75 percent water weight. (T/V2:214-216). He further testified that 80.8 pounds of fresh marijuana left to dry at room temperature and then weighed when dry would weigh approximately one fourth the original weight or 20.2 pounds. (T/V1:217-218). On cross-examination Morris testified that he was retained by the defense on October 5, 2001, to test the evidence, that is, seven months after the plants were stored in evidence. (T/V2:224).

Following trial, on July 9, 2002, the jury returned a verdict of guilty as charged in the Information of trafficking in cannabis over 25 lbs and under 2000 lbs., specifically finding the amount of cannabis was 25 pounds but less than 2,000 pounds. (R/V1:47, 65).

Prior to sentencing Petitioner filed a Motion For New Trial on July 17, 2002, alleging that the sole issue at trial was whether the weight of the cannabis was sufficient to meet the 25 pound threshold of the trafficking statute, which, they argued, could not be determined because decomposition resulting from storage of the plants prevented defense counsel from weighing the evidence. (R/V1:48-52). Petitioner further alleged that a new trial was warranted because his pretrial Motion To Dismiss on the same grounds had been improperly denied by the trial court, and as grounds in support thereof argued the State failed to present evidence of the weight of the cannabis. (R/V1:51). Petitioner concluded the argument in his Motion For New Trial by seeking either a new trial or reduction of the charge from trafficking under §893.135 to possession with intent to sell, deliver or manufacture under §893.13 pursuant to Rule 3.620, Fla.R.Crim.P. (R/V1:52). On August 8, 2002, Petitioner filed an Addendum To Motion For New Trial, alleging sentencing under §893.135 was an unconstitutional violation of the single subject rule. (R/V1:53-54). Then on August 15, 2002, Petitioner filed a Second Addendum To Motion For New Trial alleging Petitioner could not be convicted of trafficking because he did not satisfy the statutory requirement that he "possess 25 pounds of cannabis or 300 or more cannabis plants." (R/V1:55-57).

Petitioner came on for sentencing and hearings on the motions on August 29, 2002, before the Honorable Peter R. Lopez. (R/V1:75-84). The trial court determined:

> THE COURT: Fifth District and the Second District declared Chapter 99 unconstitutional. This previous case followed that case law and ruled it unconstitutional.
>
> The Court is waiting for the Third District to rule. However, under the concept, I'm bound by the other Appellate Court's opinion. The Third District has not spoken on this issue.
>
> Based on that, the Defendant's motion to reduce charges from Trafficking in Cannabis to Possession with Intent, a Third Degree Felony, is well taken. The motion is granted.
>
> The Court will vacate the finding of the jury and actually Declare the Trafficking unconstitutional and reduce it to Possession with Intent and will adjudicate the Defendant guilty of that.

(R/V1:78). The trial court sentenced Petitioner to two (2) years community control. (R/V1:77-83).

The State appealed the order reducing the charge to possession with intent to sell cannabis in the Third District Court of Appeal, DCA# 3D02-2467. Petitioner, relying upon State v. Richars, 792 So. 2d 570 (Fla. 4th DCA 2001), challenged the State's right to appeal, arguing the appellate court had no jurisdiction to review the appeal since §924.07, of the Florida Statutes does not authorize an appeal by the State from a reduction of charge. Following briefing of the issues and oral

argument, the Third District reversed and remanded the case, holding:

> We decline to follow the lead of Richars. In State v. Hankerson, 482 So. 2d 1386 (Fla. 3d DCA 1986), this court in dealing with a pretrial order reducing a charge stated: "Analytically, an order reducing a charge set forth in the information or indictment to some lesser-included charge is, despite its label, an order dismissing the charge in the information." Hankerson at 1387. As section 924.07 authorizes the State to appeal orders dismissing an indictment or information or any count therein, we conclude that we have jurisdiction over the State's appeal. Further, we reinstate the original charge and conviction, and certify conflict with Taylor v. State, 818 So. 2d 544 (Fla. 2d DCA 2002), *review dismissed*, 821 So. 2d 302 (Fla. 2002), and State v. Richars, 792 So. 2d 570 (Fla. 4th DCA 2001).
>
> This petition followed.

QUESTIONS PRESENTED

I

WHETHER THE APPELLATE COURT HAD JURISDICTION OVER THE STATE'S APPEAL FROM THE TRIAL COURT'S ORDER GRANTING APPELLANT'S POST-TRIAL MOTION TO REDUCE CHARGE WHERE REDUCTION OF THE CHARGE FROM TRAFFICKING IN CANNABIS MORE THAN 25 POUNDS TO THE LESSER CHARGE OF POSSESSION WITH INTENT TO SELL CONSTITUTED DISMISSAL OF THE CHARGE SET FORTH IN THE INFORMATION AS DEFINED IN §924.07, FLA. STAT. WHICH AUTHORIZES THE STATE TO APPEAL ORDERS DISMISSING INDICTMENTS OR INFORMATION OR ANY COUNT THEREIN? [RESTATED].

II

WHETHER CHAPTER 99-188 DOES NOT VIOLATE THE SINGLE SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION, AND EVEN IF THERE WERE A CONSTITUTIONAL VIOLATION, THE VIOLATION IS CURED BY THE 2002 REENACTMENTS OF THE ACT WHICH CAN BE APPLIED RETROACTIVELY?

SUMMARY OF THE ARGUMENT

I. The Appellate Court had jurisdiction over the State's appeal from the trial court's order granting Petitioner's post-trial motion to reduce charge where reduction of the charge from trafficking in cannabis more than 25 pounds to the lesser charge of possession with intent to sell constituted dismissal of the charge as set forth in the Information. Section 924.07, Fla. Stat., authorizes the state to appeal orders dismissing indictments or information or any count therein. Because the trial court's reduction of the charge effectively dismissed the charge of the Information, this Court should affirm the decision of the Third District Court of Appeal in Exposito v. State, 854 So. 2d 674 (Fla. 3d DCA 2003), which relied upon State v. Hankerson, 482 So. 2d 1386 (Fla. 3d DCA 1986) for the proposition that the District Court of Appeal had jurisdiction over the State's appeal from the trial court's order granting the defendant's motion to reduce charge.

II. Chapter 99-188 does not violate the single subject requirement of the Florida constitution, and even if there were a constitutional violation, the violation is cured by the 2002 reenactments of the act which can be applied retroactively. This Court's decision is pending in Franklin v. State, SC03-413 consolidated with State v. Green, SC03-532, and will be

dispositive as to the issue of the constitutionality of Chapter 99-188, the “Three Strikes Law.”

ARGUMENT I

THE APPELLATE COURT HAD JURISDICTION OVER THE STATE'S APPEAL FROM THE TRIAL COURT'S ORDER GRANTING APPELLANT'S POST-TRIAL MOTION TO REDUCE CHARGE WHERE REDUCTION OF THE CHARGE FROM TRAFFICKING IN CANNABIS MORE THAN 25 POUNDS TO THE LESSER CHARGE OF POSSESSION WITH INTENT TO SELL CONSTITUTED DISMISSAL OF THE CHARGE SET FORTH IN THE INFORMATION AS DEFINED IN §924.07, FLA. STAT. WHICH AUTHORIZES THE STATE TO APPEAL ORDERS DISMISSING INDICTMENTS OR INFORMATION OR ANY COUNT THEREIN.

The Third District Court of Appeal correctly accepted jurisdiction on the authority of State v. Hankerson, 482 So. 2d 1386, 1387 (Fla. 3d DCA 1986) which holds that an order reducing a charge set forth in the information or indictment to some lesser-included charge is, despite its label, an order dismissing the charge in the information. The Third District declined to follow, but certified conflict with, State v. Richars, 792 So. 2d 570 (Fla. 4th DCA 2001), *review denied* 819 So. 2d 139 (Fla. 2002)(Table)(holding that section 924.07, Florida Statutes [2000] does not authorize an appeal from an order granting a motion to reduce a charge under Rule 3.670, Florida Rules of Criminal Procedure). The State submits the Third District was correct in accepting jurisdiction, under the authority of Hankerson, where the trial court here reduced the charge from trafficking in cannabis to possession with intent, which effectively was an order dismissing the charge in the

information; an order of dismissal of a charge is appealable by the State. §924.07(1)(a), Fla. Stat. (2001).

In State v. Richars the State appealed an order granting the defendant's motion to reduce his conviction from robbery to the lesser included offense of resisting a merchant. The proposition of law in Richars is inappropriate to the facts in this case. There, the reduction to the lesser included offense upon a Rule 3.670 motion was not an “acquittal” or “dismissal of the information” and therefore did not authorize appeal by the State. The facts in that case established that after being found guilty of robbery, the defendant filed a motion for new trial or, in the alternative, a motion for reduction of his conviction from robbery to the lesser included offenses of petit theft or resisting a merchant. The trial court denied the motion for new trial, but reduced the defendant's conviction to resisting a merchant pursuant to Rule 3.620, Florida Rules of Criminal Procedure.

The State then appealed contending that the appellate court had jurisdiction because the trial court's reduction to a lesser included offense was tantamount to granting a judgment of acquittal pursuant to Rule 9.140(c)(1)(D), Florida Rules of Appellate Procedure. The Fourth District disagreed finding that the trial court's ruling on a Rule 3.620 motion does not result

in an acquittal, only in a conviction of a lesser offense. The Fourth further concluded, because the State's right to appeal is purely statutory, and section 924.07, Florida Statutes (2000) does not authorize an appeal from this order, the appeal was dismissed for lack of jurisdiction.

The State submits that this Court should decline to follow Richars since it places form over substance which the Third District Court has rejected in determining the State's right to appeal. State v. Hankerson, 482 So. 2d 1386 (Fla. 3d DCA 1986). In Hankerson, the pretrial order from which the State sought to appeal was one reducing a charge of robbery to theft because, in the trial court's view, the facts, as recounted in the defendant's unrebutted and untraversed sworn motion to reduce, did not support a robbery prosecution. Hankerson attempted to avoid reversal by moving to dismiss the State's appeal on the ground that although there is jurisdiction over an appeal by the State from an order dismissing an indictment or information or any count thereof, there is no jurisdiction to review an order reducing the offense charged. The Third District Court rejected that contention.

The Third District Court reasoned that analytically, an order reducing a charge set forth in the information or indictment to some lesser-included charge is, despite its label,

an order dismissing the charge in the information. Indeed, the court opined,

> ...were the defendant's motion truly not one to dismiss, there would be neither authority for its filing nor its granting, since Florida Rule of Criminal Procedure 3.190(c)(4), which provides the sole authority for this summary pretrial procedure, and pursuant to which the defendant's motion was filed, authorizes motions to dismiss, not motions to reduce. The sole determination to be made by the trial judge in ruling on this "motion to reduce" is whether the undisputed facts support the charge of robbery. Labeling the motion as one to reduce rather than dismiss is merely an acknowledgment by the defendant that the thrust of his motion goes to an element – force – which, if not capable of being proved, does not completely exonerate him, but instead leaves him amenable to conviction for some lesser offense – here, theft.

See State ex rel. Sebers v. McNulty, 326 So. 2d 17 (Fla. 1975), which relied on the well-established principle that the label a party gives to a motion does not control its legal effect or the appealability of an order disposing of the motion. State v. Hankerson, 482 So. 2d at 1387.

The Third District Court stated that it was fully cognizant that the statute affording to the State a right to appeal in enumerated instances sets forth carefully crafted exceptions to the general rule that the State may not appeal in a criminal case. However, from the very fact that the statute gives the State the right to appeal the dismissal of fewer than all counts of an information or indictment, it is apparent that there is no

overriding policy limiting appeals by the State only to dismissals that dispose of the entire case. Moreover, a ruling that the State may not appeal a reduction of a charge could be avoided in future cases by the cumbersome expedient – which we should hardly want to encourage – of the State filing informations and indictments which allege the greater and lesser-included offenses in separate counts, so that a motion directed to the count describing the greater offense would necessarily be one to dismiss. Surely the result in the present case should not turn on the fact that the State, consistent with its long standing practice, charged the greater and all lesser-included offenses in a single count by charging the greater offense only. Moreover, Petitioner moved to dismiss the trafficking count prior to trial on the same grounds as to weight of the cannabis, and his motion was denied. Failing that, at the end of trial Petitioner moved for a new trial on the same grounds again. The trial court denied the motion for new trial but granted the alternate relief requested to reduce the charge.

The trial court "dismissed" the charge of trafficking because it erroneously thought it was forced to impose the three (3) year minimum mandatory sentence required by the new "Three Strikes Law." Instead of declining to sentence Petitioner to

the three year minimum mandatory pending a ruling on the constitutionality of the statute, the trial court reduced the trafficking charge to possession. On the facts of this case, the trial court effectively "dismissed" the trafficking charge instead of simply reducing the sentence as requested by the Petitioner. The trial court never found the evidence of trafficking insufficient, making this more analogous to a dismissal than to an acquittal of the greater charge. In the end, what the jury refused to do based upon the facts presented in court, i.e., convict the Petitioner of the lesser-included offense of possession, the trial court did, erroneously believing in the unconstitutionality of the trafficking statute, despite the evidence to the contrary.

Here, the jury was instructed on trafficking with specific instruction as to the quantity involved, and was further instructed on the lesser-included offense of possession with intent to sell. (T/V2:266-267, 268). The jury rejected a finding on the lesser-included offense of possession, returning a verdict of guilt as to the trafficking charge, specifically finding the weight and quantity to be between 25 pounds and 2000 pounds. The trial court reduced the jury verdict from trafficking in marijuana between 25 and 2000 pounds to the lesser-included offense of possession with intent to sell. The

legal effect of this was to grant a judgment of acquittal on the greater charge. Judgment of acquittal would have been appealable under the statute authorizing State appeals. §924.07(1)(j), Fla. Stat. (2001). However, under these facts, judgment of acquittal would not have been appropriate given the substantial competent evidence to support the jury verdict, particularly where the jury heard evidence from both experts with respect to the correct weight and quantity of the marijuana, and specifically found that the weight was 25 pounds or more and under 2000 pounds, rejecting the defense argument and expert testimony to the contrary.

Thus, the reduction of charge was appealable either as a post-verdict judgment of acquittal under §924.07(1)(j), Fla. Stat., or as a dismissal of a count of the information under §924.07(1)(a), Fla. Stat. Either one or the other authorizes review of a State appeal. Furthermore, the trial court declined to grant the Petitioner's pretrial motion to dismiss the trafficking charge for failure to establish the required weight before trial, only to grant dismissal of the charge after trial on his motion for new trial, albeit calling it by another name – reduction of charge. The fact that the trial court reduced the conviction to the lesser included charge obviates the jury's finding of factual weight and dismisses the jury's rejection of

a conviction on the lesser included charge despite the evidentiary support on the record. Petitioner herein, just as in Hankerson, attempts to avoid the unenviable task of defending this ruling that runs counter to the Third District Court's recent precedence by contending lack of jurisdiction. This should not be permitted.

If this Court finds there is no appellate jurisdiction, then this Court should treat the State's notice of appeal from order as a petition for writ of certiorari. State v. Mitchell, 445 So. 2d 405 (Fla. 5th DCA 1984)(State's notice of appeal treated as a petition for writ of certiorari where the trial court's order suppressing identification testimony of State's eyewitnesses departed from the essential requirements of law). Notwithstanding Petitioner's citation to State v. Jordan, 783 So. 2d 1179 (Fla. 3d DCA 1993) for the proposition that the State cannot circumvent the absence of a statutory right of a direct appeal by a petition for certiorari, the State submits jurisdiction should be available to review what is clearly dismissal of a charge in the Information in substance, if not in form, which departs from the essential requirement of law. *See* State v. Swett, 772 So. 2d 48, 52 (Fla. 5th DCA 2000)(where the reduced sentence which breached the plea agreement was reviewable as a departure sentence under §924.07(1)(i)).

Alternatively, a Petition for Writ of Mandamus to compel reinstatement of the charge is a remedy for the wrongful dismissal of the charge. *See* State ex. rel. Goethe v. Parks, 179 So. 780 (Fla. 1938)(after trial court dismissed action, Supreme Court held mandamus was proper remedy for purpose of compelling trial court to reinstate the action which had been dismissed, as the dismissal of the case had been erroneous); State ex. rel. Baggs v. Frederick, 168 So. 252 (Fla. 1936)(mandamus is proper remedy to reinstate appeal which had been improperly dismissed.); *see also* Rule 9.040(c), Fla.R.App.P. (If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy.)

ARGUMENT II

CHAPTER 99-188 DOES NOT VIOLATE THE SINGLE SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION, AND EVEN IF THERE WERE A CONSTITUTIONAL VIOLATION, THE VIOLATION IS CURED BY THE 2002 REENACTMENTS OF THE ACT WHICH CAN BE APPLIED RETROACTIVELY.

The trial court determined that because the Third District had not yet decided the issue of the constitutionality of Chapter 98-188, it was bound by the opinions of the Fifth and Second District Courts of Appeal declaring Chapter 99-188 unconstitutional. With respect to this claim, the Third District Court reinstated the original charge and conviction on grounds it had decided that Chapter 99-188, Laws of Florida, was constitutional in State v. Franklin, 836 So. 2d 1112 (Fla. 3d DCA 2003). The Third District certified conflict with Taylor v. State, 818 So. 2d 544 (Fla. 2d DCA 2002), *review dismissed*, 821 So. 2d 302 (Fla. 2002), on the issue of the constitutionality of Chapter 99-188. Exposito v. State, 854 So. 2d 674 (Fla. 3d DCA 2003).

This Court heard oral argument in Franklin v. State, SC03-413, consolidated with State v. Green, SC03-532, on November 7, 2003, to decide the issue of the constitutionality of Chapter 99-188. Pending this Court's decision, the State adopts the Respondent's argument in Franklin v. State, SC03-413.

CONCLUSION

WHEREFORE, the State respectfully requests that Opinion of the Third District Court be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was mailed to **ROBERT GODFREY**, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit Court, 1320 NW 14th Street, Miami, Florida 33125 on this ____ day of December, 2003.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel for Petitioner, the State of Florida, hereby certifies this brief is formatted to print in Courier New 12-point font and complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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APPENDIX TO
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