IN THE SUPREME COURT OF FLORIDA

CASE NO. **SC03-1248**

LOWER COURT CASE NO. 3D02-2467

ALEX EXPOSITO,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ISSUES PRESENTED 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. JURISDICTION SHOULD BE ACCEPTED 3

II. THERE IS NO JURISDICTION TO HEAR AN APPEAL BY THE STATE FROM A REDUCTION OF CHARGE 5

III. CHAPTER 99-188 IS UNCONSTITUTIONAL 11

CONCLUSION 14

CERTIFICATE OF SERVICE 14

CERTIFICATE OF COMPLIANCE 15

TABLE OF AUTHORITIES

Cases **Page**

Hayes v. State,
750 So. 2d 1 (Fla. 1999) 9

Nicoll v. Baker,
668 So. 2d 989 (Fla. 1996) 9

Ramos v. State,
469 So. 2d 145 (Fla. 3d DCA 1985) 7, 8, 10

Ramos v. State,
505 So. 2d 418 (Fla. 1987) 5, 7, 8

Seagrave v. State,
802 So. 2d 281 (Fla. 2001) 9

State ex rel. Quigley v. Quigley,
463 So. 2d 224 (Fla. 1985) 9

State v. Creighton,
469 So. 2d 735 (Fla. 1985) 5, 10

State v. Estevez,
753 So. 2d 1 (Fla. 1999) 13

State v. Exposito,
854 So. 2d 674 (Fla. 3d DCA 2003) 2, 4, 5, 6

State v. Furen,
118 So. 2d 6 (Fla.1960) 8

State v. Hankerson,
482 So. 2d 1386 (Fla. 3d DCA 1986) 6

State v. Jones,
488 So. 2d 527 (Fla. 1986) 5

State v. MacLeod,
600 So. 2d 1096 (Fla. 1992) 5, 6, 10

State v. Richars,
792 So. 2d 570 (Fla. 4th DCA 2001),
review denied, 819 So. 2d 139 (Fla. 2002) 2, 3, 4, 7, 11

State v. Smulowitz,
482 So. 2d 1388 (Fla. 3d DCA 1986) 6

Taylor v. State,
818 So. 2d 544 (Fla. 2d DCA 2002) 2, 3, 12

STATUTES AND OTHER AUTHORITIES

Article III, sec. 6, Florida Constitution 12

Section 893.135(1)(a)1, Fla. Stat. (1997) 13

Section 893.135(1)(a)1, Fla. Stat. (1999) 13

Section 924.07, Fla. Stat. . . . . *passim*

Section 924.071, Fla. Stat. (1999) 6

Chapter 87-243, Laws of Florida 10

Chapter 93-37, Laws of Florida 10

Chapter 99-188, Laws of Florida . . . . *passim*

Fla. R. Crim. P. 3.190 6

Florida Rule of Criminal Procedure 3.620 7

INTRODUCTION

Petitioner, Alex Exposito, seeks discretionary review of a decision that was certified to be in conflict with decisions from other district courts of appeal. On November 7, 2003, this Court entered an order granting expedited briefing while postponing a decision on jurisdiction. In this brief, the designation "R." refers to the Record of Appeal, the designation "S.R." refers to the Supplemental Record of Appeal, and the designation "T." refers to the separately bound transcript of the trial.

STATEMENT OF THE CASE AND FACTS

The State of Florida charged Mr. Exposito with one count of possession with intent to sell marijuana and one count of trafficking in marijuana. (R. 1-4). Prior to trial, the possession charge was nolle prossed. (T. 7). The trafficking charge went to trial.

The weight of the marijuana was sharply contested. The State presented evidence that the police seized marijuana plants growing in a house that was being used as a hydroponic lab. The total weight of the seized plants was 80.8 pounds. (T. 165, 171, 188). The defense presented expert testimony that marijuana is supposed to be weighed dry, that freshly cut marijuana is 75 percent water, and that 80.8 pounds of freshly cut marijuana would yield approximately 20.2 pounds of

dried marijuana. (T. 215-18).

The jury was instructed on trafficking and the lesser included offense of possession with intent (the count that was nolle prossed). (R. 29-36). The jury returned a verdict of guilty as charged, checking off a box that indicated the amount of cannabis involved was 25 pounds but less than 2,000 pounds. (R. 47). The defense filed a motion for new trial and two subsequent addenda, pursuant to Florida Rules of Criminal Procedure 3.600 and 3.620, seeking either a new trial or a reduction of the conviction. (R. 48-57).

The trial court held a hearing on August 29, 2002 and granted the motion to reduce the charge to possession of cannabis with intent. (R. 78; S.R. 1-3). The court sentenced Mr. Exposito to two years community control. (R. 81-83; S.R. 4-6).

The State appealed. The Third District Court of Appeal reversed, finding that the State had jurisdiction to appeal a reduction of charge and that Chapter 99-188, Laws of Florida, was constitutional. *State v. Exposito*, 854 So. 2d 674 (Fla. 3d DCA 2003). The Third District certified conflict with *State v. Richars*, 792 So. 2d 570 (Fla. 4th DCA 2001), *review denied*, 819 So. 2d 139 (Fla. 2002), on the issue of jurisdiction to bring the appeal, and certified conflict with *Taylor v. State*, 818 So. 2d 544 (Fla. 2d DCA 2002), on the issue of the constitutionality of Chapter

99-188.

A motion to stay the mandate was denied by the Third District, so the case went back to the trial court, which reinstated the trafficking conviction and sentenced Mr. Exposito to the three-year minimum mandatory sentence required by Chapter 99-188. As bail on appeal is prohibited by Section 903.133 of the Florida Statutes, Mr. Exposito is presently serving that sentence in state prison.

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

1. Jurisdiction should be accepted. The decision below certified that it was in conflict with *Richars* and *Taylor*, and it is.

2. There was no jurisdiction to hear the State's appeal. The State may appeal in a criminal case only as provided by statute. There is no statute that gives the State the right to appeal from the posttrial reduction of a charge.

3. Chapter 99-188 is unconstitutional as it violates the single subject law.

The issues posed by this case – jurisdiction and the constitutionality of a statute – are matters of law, so review should be *de novo*.

ARGUMENT

I. JURISDICTION SHOULD BE ACCEPTED

The decision of the Fourth District in *Richars*, 792 So. 2d 570, is factually

indistinguishable from this case. The decision in *Richars* reads, in entirety, as follows:

> The State appeals the order granting the Defendant's motion to reduce his conviction from robbery to the lesser included offense of resisting a merchant. However, because there is no basis upon which this Court can assert jurisdiction, we dismiss the appeal.
>
> 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.
>
> Section 924.07, Florida Statutes (2000), sets forth what the state can appeal. It does not authorize an appeal from an order granting a motion under rule 3.620.
>
> The State argues that this Court has 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. We disagree.
>
> 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. Because the State's right to appeal is purely statutory, and section 924.07 does not authorize an appeal from this order, we have no jurisdiction. *See State v. Allen*, 743 So.2d 532 (Fla. 1st DCA 1997).
>
> DISMISSED FOR LACK OF JURISDICTION.

The opinion by the Third District in the present case states, "Prior to sentencing, Exposito filed a motion seeking either a new trial or a reduction of the

trafficking charge." 854 So. 2d at 675; *see* R. 48-57. The same motion filed in *Richars*, then, was filed here. The trial court here, just as in *Richars*, reduced the conviction to a lesser included offense. 854 So. 2d at 675; *see* R. 78. The cases cannot be distinguished, so this Court should accept jurisdiction and resolve the conflict on the merits.

This Court has already decided that the conflict between the Second and Third Districts on the constitutionality of Chapter 99-188 must be resolved on the merits. Argument on the issue was heard on November 7, 2003 in the consolidated cases of *Franklin v. State*, SC03-413, and *State v. Green*, SC03-532.

II. THERE IS NO JURISDICTION TO HEAR AN APPEAL BY THE STATE FROM A REDUCTION OF CHARGE

This Court has "repeatedly held that the State's right to appeal is not a matter of right and is purely statutory." *State v. MacLeod*, 600 So. 2d 1096, 1097 (Fla. 1992); *Ramos v. State*, 505 So. 2d 418, 421 (Fla. 1987) ("in criminal cases the state has only those rights of appeal as are expressly conferred by statute"); *State v. Creighton*, 469 So. 2d 735, 740 (Fla. 1985) ("the state's right of appeal in criminal cases depends on statutory authorization and is governed strictly by statute."). Further, this Court has noted its "adherence to the general principle that statutes which afford the government the right to appeal in criminal cases should be

construed narrowly." *State v. Jones*, 488 So. 2d 527, 528 (Fla. 1986).

The State's right to appeal in a criminal case is governed by Section 924.07, Florida Statutes (1999).[1] *MacLeod*, 600 So. 2d at 1098 ("section 924.07 is the only basis upon which the state may appeal as a matter of right").[2] That section contains no provision allowing the State to appeal the trial court's posttrial reduction of the charge. The lower court, then, was without jurisdiction to hear the State's appeal.

The Third District relied upon its holding in *State v. Hankerson*, 482 So. 2d 1386, 1387 (Fla. 3d DCA 1986), to reach a contrary conclusion. *See Exposito*, 854 So. 2d at 675. *Hankerson*, though, is readily distinguishable. There, a **pretrial** order reducing a charge was at issue. But, as the Third District noted, the rules of criminal procedure only authorize motions to dismiss pretrial; the rules do not allow for a pretrial motion to reduce. 482 So. 2d at 1387; *see* Fla. R. Crim. P. 3.190. The pretrial order reducing the charge, then, was necessarily an order dismissing

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[1] The date of petitioner's offense was March 7, 2001, so the 1999 laws apply to his case.

[2] Section 924.071, Florida Statutes (1999), sets out additional grounds for appeal by the State, none of which are applicable here.

the charge. 482 So. 2d at 1387.[3] The State is authorized by Section 924.07(1)(a) to appeal a dismissal of a charge.

This case, though, like *Richars*, does not involve a pretrial order; at issue here is a **posttrial** motion for reduction of the charge. A posttrial reduction of the charge by the trial court is specifically allowed by Florida Rule of Criminal Procedure 3.620. Section 924.07 does not authorize the State to appeal a posttrial reduction of the charge.

On point here is the decision in *Ramos*, 505 So. 2d 418. In that case, the defendant had been tried and found guilty by a jury of first-degree murder. After the verdict, the defendant filed a motion for new trial and a motion for reduction of judgment under Rule 3.620. The trial court reduced the conviction to second-degree murder. 505 So. 2d at 419.

Ramos appealed his conviction of second-degree murder, and the State cross-appealed the reduction of the conviction. Ramos moved to dismiss the State's cross-appeal, but the district court denied the motion. Ramos then voluntarily dismissed his own appeal and sought again to dismiss the cross-appeal. The district court found the State's right to cross-appeal was wholly dependent on

[3] The same conclusion was reached in the case of *State v. Smulowitz*, 482 So. 2d 1388 (Fla. 3d DCA 1986), decided the same day as *Hankerson*.

the continuation of the main appeal, so it dismissed the cross-appeal. *Id*. at 419-20; *see Ramos v. State*, 469 So. 2d 145 (Fla. 3d DCA 1985).

On further review, this Court approved both rulings by the district court, agreeing that the State could cross-appeal a reduction in charge while also agreeing that such an appeal could not survive the dismissal of the main appeal. 505 So. 2d at 420-21. On the latter point, the Court held as follows:

> The state argues that a cross-appeal under section 924.07(4) survives the dismissal of the main appeal. The state relies on Florida Rule of Appellate Procedure 9.350, which provides that a voluntary dismissal by an appellant does not affect proceedings brought by means of a timely perfected cross-appeal. Although the state is correct in asserting that the appellate rules apply in criminal as well as civil cases, this argument overlooks the fact that in criminal cases the state has only those rights of appeal as are expressly conferred by statute. Substantive rights conferred by law can neither be diminished nor enlarged by procedural rules adopted by this Court. *State v. Furen*, 118 So.2d 6 (Fla.1960).
>
> Although the state had a statutory right to take the cross-appeal, we agree with the district court, for the reasons stated in its opinion, that a cross-appeal by the state cannot survive the main appellant's voluntary dismissal of the main appeal. "[W]here the cross-appellant could not have initially appealed ... the cross-appeal depends entirely on the existence of an appeal." *Ramos v. State*, 469 So.2d at 146-47.
>
> The decisions of the district court of appeal are approved.

505 So. 2d at 418.[4] This Court should follow its earlier decision in *Ramos* and find

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[4] In its opinion, the district court had stated "where the State is not authorized to appeal the ruling that the evidence was insufficient to sustain the jury's verdict of first-degree murder, and is only authorized to cross-appeal such ruling,

that the State does not have the right to appeal a posttrial reduction of the charge, other than by way of a cross-appeal.

Rules of statutory construction also support the conclusion that there was no jurisdiction to hear the State's appeal of the posttrial reduction of the charge. "[I]t is a basic principle of statutory construction that courts 'are not at liberty to add words to statutes that were not placed there by the Legislature.' *Hayes v. State*, 750 So.2d 1, 4 (Fla. 1999)." *Seagrave v. State*, 802 So. 2d 281, 287 (Fla. 2001). The Legislature has not seen fit to amend Section 924.07 to give the State the right to appeal from a posttrial reduction of the charge, so this Court should not read such a right into the statute.

Further, "Florida's well-settled rule of statutory construction [is] that the legislature is presumed to know the existing law when a statute is enacted, including 'judicial decisions on the subject concerning which it subsequently enacts a

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the dismissal of the main appeal prior to decision puts an end to the State's appellate rights." 469 So. 2d at 147 (citations omitted). The district court also stated that "the fate of the State's cross-appeal is left to the defendant. This result follows, however, from the fact that our controlling law, *see* § 924.07(4), Fla.Stat. (1983); Fla.R.App.P. 9.140(c)(1)(H), does not authorize, as it constitutionally could, the State to directly appeal a trial court ruling, as the one here, that the evidence is insufficient to sustain a jury's verdict." *Id*. (citation omitted).

In the present case, the Third District did not mention or attempt to distinguish *Ramos*.

statute.'" *Seagrave*, 802 So. 2d at 290 (quoting *Wood v. Fraser*, 677 So.2d 15, 18 (Fla. 2d DCA 1996) (quoting *Collins Inv. Co. v. Metropolitan Dade County*, 164 So.2d 806, 809 (Fla.1964)). "The legislature is presumed to be cognizant of the judicial construction of a statute when contemplating making changes in the statute." *Nicoll v. Baker*, 668 So. 2d 989, 991 (Fla. 1996); *State ex rel. Quigley v. Quigley*, 463 So. 2d 224, 226 (Fla. 1985). This principle is certainly true when it comes to the legislature knowing about decisional law that affects the State's right to appeal in criminal cases.

Thus, in *State v. Creighton*, 469 So. 2d 735 (Fla. 1985), this Court held that the version of Section 924.07 in effect at the time did not authorize an appeal by the State from a trial court's order granting a motion for judgment of acquittal. *Id*. at 736-37. The Legislature responded by passing Chapter 87-243, Laws of Florida. Section 46 of that law added the State's right to appeal "[a] ruling granting a motion for judgment of acquittal after a jury verdict." That law is now codified as Section 924.07(1)(j).[5]

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[5] Section 46 of Chapter 87-243 also responded to the decision in *Ramos* by adding the second sentence to what is now Section 924.07(1)(d), which provides "Once the state's cross-appeal is instituted, the appellate court shall review and rule upon the question raised by the state regardless of the disposition of the defendant's appeal." Of significance here is the fact that the Legislature did **not** add any provision allowing the State to appeal a posttrial reduction of the charge,

In *State v. MacLeod*, 600 So. 2d 1096 (Fla. 1992), this Court held that the version of Section 924.07 in effect at the time did not authorize an appeal by the State from a trial court's order denying restitution. *Id*. at 1097-98. The Legislature responded by passing Chapter 93-37, Laws of Florida. Section 14 of that law added the State's right to appeal "[a]n order denying restitution under s. 775.089." That law is now codified as Section 924.07(1)(k).

In contrast to the response to *Creighton*, *Ramos*, and *MacLeod*, the Legislature has done nothing following the decision in *Richars*. There were no changes made to Section 924.07 in either 2002 or 2003. Given the Legislature's demonstrated willingness to readily amend Section 924.07 when it disagrees with a court decision interpreting the scope of that statute, the legislative silence following *Richars* is a strong indicator that the Legislature approves the result reached there.

On its face, Section 924.07 does not provide the State with the right to appeal a posttrial reduction of the charge. The Legislature has not changed or amended Section 924.07 in the two years since *Richars* held that the law "does not authorize an appeal from an order granting a motion under rule 3.620." 792 So. 2d at 571. This Court should thus quash the decision below, approve the decision

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even though that was ultimately the issue involved in *Ramos*.

reached in *Richars*, and remand with directions to reinstate the conviction as reduced to possession with intent.

III. CHAPTER 99-188 IS UNCONSTITUTIONAL

Assuming that relief is granted petitioner on the first point, then this issue need not be decided as it will be moot. In any event, appellant does not wish to belabor the issue here, as it has been fully briefed and argued already in the companion cases of *Franklin v. State*, SC03-413, and *State v. Green*, SC03-532. Appellant will thus present a brief summary of the argument against Chapter 99-188, then explain how it affects him.

Chapter 99-188, Laws of Florida, violated the single-subject provision of Article III, section 6 of the Florida Constitution. *Taylor v. State*, 818 So. 2d 544, 546-550 (Fla. 2d DCA 2002). Most of the 13 sections found in Chapter 99-188 address enhanced sentencing provisions. Section 11, however, creates a preemptive duty on the part of the clerk of court to furnish a copy of charging document, judgment, sentence and any other record in which an alien "is convicted of a felony or misdemeanor or enters a plea of guilty or nolo contendere to any felony or misdemeanor charge." Additionally, this section creates the obligation of the state attorney to assist in this process. Ch. 99-188, § 11, at 762, Laws of Florida. Section 13 broadens the definition of "conveyance" in the burglary and

trespass statute to include "railroad vehicle" as a conveyance. Sections 13 and 11 are not naturally or logically connected with the Act's remaining sections, and so the law violates the single subject rule. For a more comprehensive analysis of the issue, appellant relies on the briefs and oral argument submitted on behalf of the petitioner in *Corey Franklin v. The State of Florida*, case number SC03-413.

Two of the many changes wrought by Chapter 99-188, Laws of Florida, are relevant here: It reduced the amount of marijuana needed for a trafficking conviction from 50 pounds to 25 pounds, and it requires the imposition of a three-year minimum mandatory sentence upon conviction for trafficking. *See* § 893.135(1)(a)1, Fla. Stat. (1999).

The jury must find the quantity of contraband involved in the commission of the offense before a minimum penalty may be imposed for drug trafficking. *State v. Estevez*, 753 So. 2d 1, 3-4 (Fla. 1999). The jury here found that the amount of marijuana involved was between 25 and 2,000 pounds. (R. 47). If this Court finds Chapter 99-188 unconstitutional, though, then the amount of marijuana needed to sustain a trafficking conviction will revert back to 50 pounds. *See* § 893.135(1)(a)1, Fla. Stat. (1997). The jury's verdict in this case thus cannot sustain a trafficking conviction under the pre-Chapter 99-188 law as, from the verdict, it is possible that the jury found (or would have found) the amount of marijuana

involved to be between 25 and 50 pounds. Therefore, **if** this Court rules that there was jurisdiction for the State to bring its appeal, the decision below should still be quashed, with directions to reinstate the conviction as reduced to possession with intent.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction, reverse the decision below, and reinstate the conviction, as reduced, entered by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief of Petitioner on the Merits was mailed to Consuelo Maingot, Assistant Attorney General, Office of the Attorney General, Criminal Appellate Division, 110 SE 6th Street, 9th Floor, Fort Lauderdale, FL 33301 on November 26, 2003.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14-point font, and so is in compliance with Rule 9.210(a)(2).

____

Robert Godfrey