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

REPLY BRIEF OF PETITIONER ON THE MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

ROBERT GODFREY
Assistant Public Defender
Florida Bar No. 0162795

Counsel for Petitioner

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STATEMENT OF FACTS

One factual misstatement in the State's brief needs to be cleared up. The State writes that "the trial court effectively 'dismissed' the trafficking charge instead of simply reducing the sentence as requested by the Petitioner." (State Br. at 12). Petitioner, though, never requested that his sentence be reduced. His posttrial motions sought either a new trial or a reduction in the charge. (R. 48-57).

ARGUMENT

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

What is most notable about the State's brief is what is missing.[1] In the initial brief, petitioner cited to rules of statutory construction and several of this Court's cases to show that there was no jurisdiction to hear the State's appeal. (Initial Br. at 9-11). The State's brief does not dispute any of the rules of statutory construction relied on by petitioner. Nor does the State's brief make any attempt

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[1] The State does not dispute that jurisdiction should be accepted (Point I of the initial brief), and both parties agree that **if** this Court gets to the issue of whether Chapter 99-188 is unconstitutional (Point III of the initial brief), then the decision in the companion cases of *Franklin v. State*, SC03-413, and *State v. Green*, SC03-532, will be dispositive. Petitioner will thus not discuss those issues in this reply. Instead, the reply will solely address the argument raised in Point II of the initial brief – whether there was jurisdiction to hear the State's appeal of a posttrial reduction of charge. That argument is dispositive here, and is the **only** issue that this Court needs to decide to rule on this case.

to distinguish any of the cases that petitioner cited in support of his argument.

In fact, the State's brief does not even mention, much less attempt to distinguish, either *Hayes v. State*, 750 So. 2d 1 (Fla. 1999), or *Seagrave v. State*, 802 So. 2d 281 (Fla. 2001), or *Collins Inv. Co. v. Metropolitan Dade County*, 164 So. 2d 806 (Fla. 1964), or *Nicoll v. Baker*, 668 So. 2d 989 (Fla. 1996), or *State ex rel. Quigley v. Quigley*, 463 So. 2d 224 (Fla. 1985), or *State v. Creighton*, 469 So. 2d 735 (Fla. 1985), or *State v. MacLeod*, 600 So. 2d 1096 (Fla. 1992). There is no reason, then, to depart from the precedents established by these cases that (1) courts are not at liberty to add words to statutes, and (2) the legislature is presumed to know the existing law when a statute is enacted. As Section 924.07 does not contain the right to appeal a posttrial reduction of the charge, and the legislature has not seen fit to amend the statute in the years following the decision in *State v. Richars*, 792 So. 2d 570 (Fla. 4th DCA 2001), *review denied*, 819 So. 2d 139 (Fla. 2002), there was no jurisdiction to hear the State's appeal in this case.

In his initial brief, petitioner also cited to cases from this Court to show that statutes which give the State the right to appeal in criminal cases should be construed narrowly. (Initial Br. at 5). Again, the State does not even mention, much less attempt to distinguish, any of these cases in its brief. Despite this, the State asks this Court to **expansively** construe its right to appeal, by trying to

stretch Section 924.07(1)(a), Fla. Stat., which authorizes the State to appeal from an order dismissing an indictment or information or any count thereof, to cover this case. Thus, the State argues that the posttrial reduction of the charge "**effectively** was an order dismissing the charge in the information," (State Br. at 8), and "[o]n the facts of this case, the trial court **effectively** 'dismissed' the trafficking charge." (State Br. at 12) (emphasis added). The statute, though, does not authorize an appeal from what the State calls an "effective" dismissal of a count; it only authorizes an appeal from an actual dismissal of a count. The trial court here did not dismiss any count.[2] Rather, it reduced the charge posttrial, finding Mr. Exposito guilty of possession of marijuana with intent to distribute. The State cites to no case that would support its expanded reading of the plain language found in Section 924.07(1)(a).

The State provides its opinion as to why the trial judge acted the way he did (State Br. at 12-13), but this is irrelevant. If there is no jurisdiction to hear the State's appeal, then it does not matter why the judge acted as he did.

Ultimately, the State's entire argument on the merits is that "the reduction of charge was appealable either as a post-verdict judgment of acquittal under §

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[2] The State's use of quotation marks around the word "dismissed" shows that the State recognizes the trial court's action was not really a dismissal at all.

924.07(1)(j), Fla. Stat., or as a dismissal of a count of the information under § 924.01(1)(a), Fla. Stat." (State Br. at 13-14). The decision in *Ramos v. State*, 505 So. 2d 418 (Fla. 1987), and the legislature's subsequent actions, entirely refute the State's argument.[3]

In *Ramos*, like here, the trial court reduced the conviction posttrial, from first-degree murder to second-degree murder. Ramos appealed his conviction and the State cross-appealed the reduction of the conviction. When Ramos dismissed his appeal, the district court and then this Court found that the State's cross-appeal could not survive. When *Ramos* was decided, though, the State already had statutory authority to appeal "an order dismissing an indictment or information or any count thereof." *See* § 924.07(1), Fla. Stat. (1983). The State's cross-appeal of the reduction of conviction, then, would have survived dismissal of the defendant's appeal **if** the theory now urged by the State was correct. Clearly, though, that theory is not correct. This Court did not equate a posttrial reduction of charge to an order dismissing a count of an information in 1987, and it should not do so now.

A posttrial reduction of charge is also not the equivalent of a post-verdict

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[3] *Ramos* was cited in the initial brief as being on point. (Initial Br. at 7). As with the many other cases from this Court that were cited in the initial brief, the State does not mention or attempt to distinguish *Ramos* in its brief.

judgment of acquittal. Most obviously, Mr. Exposito has not been acquitted. After the trial court reduced the charge, he still stood convicted of a felony, possession of marijuana with intent to distribute. Moreover, following the decision in *Ramos*, as was pointed out in the initial brief (at page 10, n.5), the legislature did **not** add any provision allowing the State to appeal a posttrial reduction of the charge, even though that was ultimately the issue involved there. Likewise, the legislature has not acted in the two years since *Richars* was decided. The rules of statutory construction described in the initial brief, then, which are entirely unrefuted by the State here, show that the legislature approves the result reached in *Ramos* and *Richars*.

Consistent with the requirement that the State's right to appeal in a criminal matter be narrowly construed, this Court in *State v. MacLeod*, 600 So. 2d 1096 (Fla. 1992), looked to see if the appeal the State wanted to take was "specifically provide[d]" for in the statute. *Id*. at 1098 ("Clearly, section 924.07 does not specifically provide an appeal for a denial of an order of restitution."). While the statute "specifically provides" for the State to appeal orders dismissing a count of an information or granting a motion for judgment of acquittal following a jury verdict, § 924.07(1)(a), (j), the statute does not "specifically provide" for the State to appeal a posttrial reduction of charge that is authorized by Florida Rule of

Criminal Procedure 3.620. The State's argument on the merits, then, should be rejected.

The State futilely attempts to distinguish *Richars*. The State acknowledges, as it must, that the defendant in *Richars*, like here, filed posttrial motions for a new trial or, in the alternative, for a reduction of his conviction. (State Br. at 9). The trial court reduced the conviction from robbery to resisting a merchant. According to the State, "*Richars* is inappropriate to the facts in this case. There, the reduction to the lesser included offense upon a Rule 3.670 [sic][4] motion was not an 'acquittal' or dismissal of the information' and therefore did not authorize an appeal by the State." (State Br. at 9). What, one wonders, does the State think is the legal difference between the posttrial reduction of a robbery conviction to resisting a merchant, and the posttrial reduction of a trafficking conviction to possession with intent to distribute? If, as the State concedes, the former "did not authorize an appeal by the State," then surely the latter also does not authorize an appeal by the State.

Richars is directly on point and should be approved. The Fourth District

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[4] The State mistakenly cites to Rule 3.670, rather than Rule 3.620. The Third District made the same mistake in its opinion below. The Fourth District, though, cited only to Rule 3.620. It did not cite to Rule 3.670.

was faithful to the plain language of Section 924.07 and properly did not add a right to appeal that does not exist within that statute, in contrast to the decision below by the Third District in the instant case. This Court should follow its own precedent of narrowly construing the State's right to appeal and quash the decision below as Section 924.07 simply does not give the State the right to appeal from the trial court's posttrial reduction of the charge.

The State requests in the alternative that if this Court agrees with petitioner that there was no appellate jurisdiction, then it should treat the State's notice of appeal as a petition for writ of certiorari. This request is clearly foreclosed by caselaw. "The caselaw of this state . . . has unequivocally provided that the state cannot circumvent the absence of a statutory right of appeal from a final order through a petition for certiorari." *State v. Jordan*, 783 So. 2d 1179, 1182 (Fla. 3d DCA 2001); *see Jones v. State*, 477 So. 2d 566, 566 (Fla. 1985) ("no right of review by certiorari exists if no right of appeal exists") (citing *State v. G.P.*, 476 So. 2d 1272 (Fla. 1985).

The State also requests in the alternative that its appeal be considered as a Petition for Writ of Mandamus to compel the trial court to reinstate the charge. (State Br. at 15). This request too should be rejected.

Mandamus is an extraordinary remedy. *State ex rel. Haft v. Adams*, 238 So.

2d 843, 844 (Fla. 1970). It may be used only to enforce a right that is both clear and certain. *Florida League of Cities v. Smith*, 607 So. 2d 397, 400 (Fla. 1992). "Mandamus may not be used to establish the existence of such a right, but only to enforce a right already clearly and certainly established in the law." *Id*. at 401. Moreover, the writ is appropriately used to compel the performance of a ministerial duty imposed by law, but "discretionary authority cannot be the subject of the writ." *Holland v. Wainwright*, 499 So. 2d 21, 22 (Fla. 1st DCA 1986); *Lee County v. State Farm Mut. Auto. Ins. Co.*, 634 So. 2d 250, 251 (Fla. 2d DCA 1994) ("It is fundamental to the writ that the legal duty of the public agency must be ministerial in nature and not discretionary."). Obviously, whether to grant a posttrial motion to reduce the charge is discretionary. The State's request that its appeal be taken as a Petition for Writ of Mandamus, then, is not well taken as (1) it begs the question presented by this appeal, namely whether the State has **any** right to seek a reversal of the trial court's posttrial reduction of the charge, and (2) in any event, it exceeds the scope of a writ of mandamus.[5]

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[5] The two cases cited by the State are not helpful to its argument. In *State ex rel. Goethe v. Parks*, 179 So. 780 (Fla. 1938), a writ of mandamus was issued after the trial court, without authority, suppressed testimony and dismissed a bill of complaint. In contrast, the trial court here did not dismiss the case against Mr. Exposito, but merely reduced the charge on which he was convicted. Further, there was explicit authority in the form of Rule 3.620 to so reduce the charge.

This case is indistinguishable from *Richars*, which correctly held that Section 924.07 does not authorize the State to appeal from a posttrial reduction of the charge. This Court should thus quash the decision below, approve the decision reached in *Richars*, and remand with directions to reinstate the conviction as reduced to possession with intent.

CONCLUSION

For the foregoing reasons, as well as those stated in the initial brief, this Court should accept jurisdiction, quash the decision below, and reinstate the conviction, as reduced, entered by the trial court.

Respectfully submitted,

BENNETT H. BRUMMER

Public Defender
Eleventh Judicial Circuit of Florida
1320 NW 14th Street
Miami, Florida 33125
(305) 545-1958

By: _____
ROBERT GODFREY
Assistant Public Defender

Similarly, a writ of mandamus was issued in *State ex rel. Baggs v. Frederick*, 168 So. 252 (Fla. 1936), after the circuit judge improperly dismissed an appeal from the justice of the peace court. In contrast, there is no dismissal involved in the instant case, and the reduction of charge is explicitly authorized by rule.

Florida Bar No. 0162795

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply 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 December 26, 2003.

_____
Robert Godfrey
Assistant Public Defender
Florida Bar No. 0162795

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