IN THE SUPREME COURT OF FLORIDA

CASE NO. SC______

DCA NO. 3D10-2415

ANTHONY MACKEY,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

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

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INTRODUCTION

This is a petition for discretionary review by the petitioner/defendant Anthony Mackey based on certified direct conflict jurisdiction, as per Rule 9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure, from the decision of the Third District Court of Appeal. The symbol "A." refers to the opinion of the lower court, as set forth in the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Mr. Anthony Mackey was standing in front of an apartment complex when City of Miami Police Department Officer May saw him. (A. 2.) Mackey was not engaged in any particular criminal or suspicious behavior. (A. 2.) But the officer did see that Mackey was carrying a firearm inside his pocket with a piece of the handle sticking out. (A. 2.) Officer May had had no prior contact with Mackey, and did not know whether he had a permit to carry the concealed firearm. (A. 2.)

The officer approached Mr. Mackey, but did not ask whether he had a concealed weapons permit. (A. 2.) Instead he asked Mr. Mackey if he "had anything on him," to which Mr. Mackey replied "no." (A. 2.) The officer then conducted a pat-down search and retrieved the firearm he had seen earlier. (A. 2.) After seizing Mackey, patting him down, and seizing the firearm, for the first time May asked whether Mr. Mackey had a concealed firearms permit. (A. 3.) Mackey stated he did not, and the officer arrested him for carrying a concealed firearm. (A. 3.)

Before trial, Mr. Mackey moved to suppress the firearm, contending that the fact that he was carrying a concealed firearm, standing alone, did not give the officer reasonable suspicion to initiate an investigatory stop. (A. 3-4.) The motion was denied, and became the subject of Mr. Mackey's appeal. (A. 3.)

In its decision below, the Third District acknowledged that its previous decisions in Hernandez v. State, 289 So. 2d 16 (Fla. 3d DCA 1974), and State v. Navarro, 464 So. 2d 137 (Fla. 3d DCA 1984), conflicted with the Fourth District's decision in Regalado v. State, 25 So. 3d 600 (Fla. 4th DCA 2010). The Fourth District held in Regalado that carrying a concealed firearm in itself did not constitute reasonable suspicion because it is only illegal if the person has no concealed firearms license. (A. 5.) The Third District disagreed, holding that since having a license is an affirmative defense, an officer need not know whether the defendant has a license to initiate a Terry stop. (A. 10.) The Third District accordingly affirmed, but certified direct conflict with Regalado:

> We affirm the trial court's order denying the motion to suppress and, given Regalado's holding that an officer who observes an individual carrying a concealed firearm does not have reasonable suspicion to conduct a Terry stop, we certify express and direct conflict with the decision in Regalado.

(A. 11.)

SUMMARY OF ARGUMENT

In its decision below, the Third District certified direct conflict with the Fourth District's decision in Regalado v. State, 25 So. 3d 600 (Fla. 4th DCA 2010), as to whether the fact that an individual is carrying a concealed firearm gives the officer reasonable suspicion to stop that individual, conduct a Terry pat down, and seize that firearm.

The Fourth District in Regalado answered this same question in the negative. Under Regalado, since the possession of a concealed weapon is only unlawful if the person has no permit, the facts and circumstances must show that the person does not have a permit before a legal Terry stop can occur.

In the present case, the Third District disagreed with the Fourth District's decision and held that since the possession of a license is an affirmative defense, the facts and circumstances need not establish that the person had no permit.

The Third District, by certifying direct conflict, has joined the Eleventh Circuit Court of Appeal and the Southern District of Florida, which have also documented the interdistrict conflict. This Court should acknowledge that interdistrict conflict and exercise its discretionary jurisdiction to harmonize Florida law.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL CERTIFIED DIRECT CONFLICT WITH THE FOURTH DISTRICT'S DECISION IN REGALADO V. STATE, 25 So. 3d 600 (Fla. 4th DCA 2010), AS TO WHETHER THE FACT THAT A CITIZEN IS CARRYING A CONCEALED FIREARM GIVES AN OFFICER REASONABLE SUSPICION TO CONDUCT A TERRY SEARCH OF THAT PERSON AND A SEIZURE OF THAT FIREARM.

The Third District Court of Appeal, in its decision below, certified direct conflict with the Fourth District's decision in **Regalado v. State, 25 So. 3d 600 (Fla. 4th DCA 2010)**, as to whether the presence of a concealed firearm alone gives the officer reasonable suspicion to stop that individual, conduct a Terry pat down, and seize that firearm.

Florida's Department of Agriculture and Consumer Services is authorized to issue licenses to carry concealed weapons and firearms to qualifying persons. § 790.06(1), Fla. Stat. (2010). Once authorized, the licensee, while carrying the weapon or firearm, must carry the permit and present it on demand to law enforcement. § 790.06(1), Fla. Stat. The issue for which review is sought is whether an officer who sees a citizen carrying a concealed weapon or firearm must ask that person to produce his or her license before proceeding to a Terry pat down and seizure of that firearm.

The Third District, in its decision below, held that law enforcement officers need not first request the production of a concealed weapons permit or otherwise

have information suggesting the lack of a permit, and may immediately conduct a Terry pat down search and seizure.

In Mackey, the Petitioner was standing alone by an apartment complex. The officer did not observe any criminal or suspicious behavior. But he did notice that Mr. Mackey was carrying a concealed firearm. The officer did not know Mr. Mackey and did not know whether he had a concealed weapons permit. Instead of asking Mr. Mackey whether he had a permit, the officer conducted a Terry pat down search and seizure of that weapon. Only afterwards did the officer ask Mr. Mackey whether he had a concealed weapons permit.

Mr. Mackey claimed that since carrying a concealed firearm is illegal only without a permit, and since the officer had no information suggesting that he had no permit, he lacked reasonable suspicion to stop Mr. Mackey. The Third District rejected the argument, reasoning that because the possession of a license is an affirmative defense, the facts and circumstances need not first establish that the person has no permit:

> [T]he absence of a license is not an element of the crime, but is considered an "exception" to the crime, and proof that a defendant possessed a license to carry a concealed firearm must be raised as an affirmative defense. . . . Mackey's argument, and the holding in Regalado, taken to its logical conclusion, would require that a police officer not only have reasonable suspicion of criminal activity, but reasonable suspicion of the non-existence of an affirmative defense to the crime. We decline the invitation to adopt such a holding, which is contrary to both precedent and common sense.

(A. 9-10.)

In contrast, the Fourth District, on the same facts, came to the opposite conclusion. Under Fourth District case law, the officer must first ask the person to produce his or her concealed weapons permit, or must otherwise have information suggesting the absence of a permit, before conducting a Terry pat down search and seizure.

In Regalado, an officer determined, based on his training and experience, that the defendant was carrying a concealed firearm. 25 So. 3d at 601-02. The defendant had not threatened the officer, nor had the officer observed the defendant threaten anyone else. Id. at 602. The officer did, however, have information that the defendant had earlier exposed the gun, which was in his waistband, to his friends. Id. at 601. Concerned "for the safety of the citizens of Fort Lauderdale and himself," the officer drew his service revolver and ordered the defendant to the ground. Id. at 601-02. He then conducted a pat-down and retrieved the firearm. Id. at 206.

Unlike the Third District in Mackey, the Fourth District suppressed the firearm, finding that "no facts and circumstances were presented to show that [the defendant]'s carrying of a concealed weapon was without a permit and thus illegal." The court, relying on federal case law, explained as follows:

> [T]he only information received by the officer was that the individual had a gun. Possession of a gun is not illegal in Florida. Even if it is

> concealed, it is not illegal if the carrier has obtained a concealed weapons permit. Although the officer observed a bulge in Regalado's waistband, which in his experience looked like a gun, no facts and circumstances were presented to show that Regalado's carrying of a concealed weapon was without a permit and thus illegal.
>
> The officer admitted in his testimony at the suppression hearing that he had not observed any criminal behavior. He did not see the defendant threaten anyone with a gun, nor had the anonymous tipster mentioned the defendant threatening anyone with a gun or even removing it from his pants. The officer did not observe any threatening act against him, which might provide sufficient reasonable suspicion of an assault to permit a Terry stop. The officer also did not know whether the defendant had a permit for carrying a concealed weapon. The officer had no reasonable suspicion of any criminal activity.

Id. at 604 (emphasis added) (internal citation omitted).

Thus, the Third District correctly acknowledged that its decision in this case, as well as its *en banc* decision in State v. Navarro, 464 So. 2d 137 (Fla. 3d DCA 1984), and its panel decision in Hernandez v. State, 289 So. 2d 16 (Fla. 3d DCA 1974),[1] expressly and directly conflict with the Fourth District's decision in Regalado.

In addition, both the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Southern District of Florida have recognized that there is a conflict in Florida law—with the Third and Fifth

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[1] The Third District acknowledged its decisions in Navarro, 464 So. 2d 137, and Hernandez, 289 So. 2d 16, which held that possession of a concealed firearm, standing alone, not only supplied reasonable suspicion to conduct a Terry stop, but also provided probable cause to arrest that person for carrying a concealed weapon. (A. 6.)

Districts[2] holding one way and the Fourth District holding the other way. See United States v. Montague, 437 Fed. Appx. 833, *836 (11th Cir. 2011) ("The holding of Navarro, a Third District Court of Appeal case, is binding upon Montague's case because it occurred in that district, and Florida courts would only consider the holding of Regalado, a Fourth District Court of Appeal case, as persuasive. Under the facts of this case, the officers did not need to ascertain whether Montague had a permit before they conducted a Terry stop and search because they had reasonable suspicion that he was carrying a concealed weapon . . . ." (internal citations omitted)); United States v. Montague, CASE NO. 10-20638-CR-UNGARO/SIMONTON, 2010 U.S. Dist. LEXIS 86179, *2 (S.D. Fla. July 27, 2010) ("Regalado, however, is contrary to the law of at least **two** other District Courts of Appeal in Florida."), report and recommendation adopted by United States v. Montague, 2010 U.S. Dist. LEXIS 86034 (S.D. Fla. Aug. 18, 2010).

This Court should join the Third District, the Eleventh Circuit, and the Southern District of Florida in recognizing this interdistrict conflict, and exercise its discretionary jurisdiction to resolve the conflict and restore uniformity to Florida law.

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[2] Though not mentioned in the decision below, the Fifth District's case law is consistent with that of the Third District, which makes the Fourth District's decision the minority approach. See State v. Burgos, 994 So. 2d 1212, 1213-14 (Fla. 5th DCA 2008) (information from the defendant that he had a concealed firearm gave the officer reasonable suspicion to stop and frisk the defendant).

CONCLUSION

In light of the foregoing, the decision in this case expressly conflicts with a decision from the Fourth District, and Petitioner respectfully requests that this Court exercise its jurisdiction under Article V, Section 3(b)(3), Florida Constitution, to resolve this certified conflict.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida, this __ day of March, 2012.

BY:____________________________
MICHAEL T. DAVIS
Assistant Public Defender

CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the type used in this brief is 14 point proportionately spaced Times New Roman.

BY:____________________________
MICHAEL T. DAVIS
Assistant Public Defender

APPENDIX

Decision of the Third District Court of Appeal,
Mackey v. State, No. 3D10-2415 (Fla. 3d DCA Mar. 14, 2012) 1