IN THE SUPREME COURT OF FLORIDA

BARON GREENWADE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC12-598

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, was the Appellee in the First District Court of Appeal ("DCA") and the prosecuting authority in the trial court, and will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, BARON GREENWADE, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name. "PJB" will designate Petitioner's Jurisdictional Brief followed by any appropriate page number.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set forth in the attached decision of the lower tribunal to this brief.

SUMMARY OF ARGUMENT

The decisions of *Ross v. State*, 528 So. 2d 1237 (Fla. 3d DCA 1988), *Safford v. State*, 708 So. 2d 676 (Fla. 2d DCA 1998), and *Sheridan v. State*, 850 So. 2d 638 (Fla. 2d DCA 2003), are not in express and direct conflict with *Greenwade v. State*, 80 So. 3d 371 (Fla. 1st DCA 2012) because samples in *Ross*, *Safford*, and *Sheridan* were tested and then commingled and weighed with other non-tested material, whereas in *Greenwade*, each bag was tested for cocaine, and tested positive, before combined to be weighed. Therefore, Petitioner failed to establish an express and direct conflict, and this Court should decline to exercise discretionary jurisdiction.

ARGUMENT

WHETHER THE FIRST DISTRICT'S OPINION IN *GREENWADE V. STATE*, 80 SO. 3D 371 (FLA. 1ST DCA 2012), IS IN EXPRESS AND DIRECT CONFLICT WITH THE THIRD DISTRICT COURT OF APPEAL'S DECISION IN *ROSS V. STATE*, 528 SO. 2D 1237 (FLA. 3D DCA 1988), AND THE SECOND DISTRICT COURT OF APPEAL'S DECISIONS IN *SAFFORD V. STATE*, 708 SO. 2D 676 (FLA. 2D DCA 1998) AND *SHERIDAN V. STATE*, 850 SO. 2D 638 (FLA. 2D DCA 2003)?

A. Standard of review.

The applicable standard of review for claims of direct and express conflict is de novo subject to the following criteria.

B.Jurisdictional criteria.

Petitioner contends that this Court has jurisdiction based on direct and express conflict certified by the First DCA. (PJB. 6). The Florida Constitution provides that the supreme court has the discretion to "review any decision of a district court of appeal . . . that **expressly and directly conflicts** with a decision of another district court of appeal or of the supreme court on the same question of law." Article V, §3(b)(3), Fla. Const. (emphasis added); *see* Fla. R. App. P. 9.030(a)(2)(A)(iv). The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). *Accord Dept. of Health and Rehabilitative Serv. v. Nat'l Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986)(rejecting the notion of "inherent" or "implied" conflict and dismissing the petition). The record on appeal, a concurring

opinion, or a dissenting opinion cannot be used to establish jurisdiction. *Reaves*, 485 So. 2d at 830; *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980)(stating that "regardless of whether they are accompanied by a dissenting or concurring opinion"). Conflict cannot be based upon "unelaborated per curiam denials of relief . . . ." *Stallworth v. Moore*, 827 So. 2d 974, 976 (Fla. 2002). Additionally, it is the "conflict of **decisions**, not conflict of **opinions** or **reasons** that supplies jurisdiction for review by certiorari." *Jenkins*, 385 So. 2d at 1359 (quoting *Gibson v. Maloney*, 231 So. 2d 823, 824 (Fla. 1970)) (emphasis added).

In order to support this Court's jurisdiction, the lower court must have "explain[ed], define[d] or overtly expresse[d] a view which eliminates some existing doubt as to a constitutional provision . . . ." *Rojas v. State*, 288 So. 2d 234, 235 (Fla. 1974). Merely applying a constitutional provision or precedent is insufficient. "Applying is not synonymous with Construing; the former is NOT a basis of our jurisdiction, while the Express construction for a constitutional provision is." *Id.* (emphasis in original). Accordingly, the determination of direct and express conflict jurisdiction distills to whether the First District Court's decision in *Greenwade* reached a result opposite to that in *Ross*, *Safford*, and *Sheridan* on the same issue of law.

C. The *Ross*, *Safford*, and *Sheridan* Decisions

In *Ross*, a law enforcement officer observed defendant throwing a brown paper

bag to the ground, walking away from the bag, returning to the bag to place an object in it, and walking away from the brown bag. *Ross*, 528 So. 2d at 1238. Ross was detained and the officer retrieved the brown paper bag on the ground. *Id.* The officer discovered that within the brown paper bag were two bundles: one bundle contained 36 "separately wrapped, plastic packets of white powder" and the second bundle contained 56 "separately wrapped, plastic packets of white powder." *Id.* These packets were turned over to a crime laboratory technician who tested two of the plastic packets, one packet from each bundle. *Id.* The tests indicated that these two packets contained cocaine. *Id.* The baggies were then commingled and poured into two envelopes, one envelope containing the 36 plastic packets from one bundle and the other envelope containing the 56 plastic packets from the second bundle. *Id.* The total weight of the two envelopes was 38.8 grams. *Id.* Subsequently, Ross was charged and convicted for trafficking in cocaine. *Id.*

On appeal, the Third District contemplated

> whether the state presented a prima facie case that the defendant had in his actual possession twenty-eight grams or more of cocaine - and was guilty of trafficking in cocaine . . . - upon evidence adduced at trial which showed that (1) a total of ninety-two (92) separately wrapped plastic packets of white powder were seized by the police from the defendant's person, (2) only two (2) of these packets were chemically tested by a duly qualified crime laboratory technician and were found to contain a mixture of cocaine weighing *less* than twenty-eight grams, and (3) the total weight of the material in all the packets seized-including the untested packets-was over twenty-eight (28) grams.

Id. (emphasis in original). The court noted that the crime laboratory technician tested two of the 92 packets found in the brown paper bag before emptying the packets into two envelopes. *Id.* at 1238, 1239. The Third District stated that

> [i]t is essential in order to sustain a cocaine trafficking conviction that each packet of white powder be chemically tested, by random sample, to contain cocaine, and that the total weight of the material in the tested packets equal or exceed twenty-eight (28) grams . . . .

Id. at 1239. Since the 92 packets were not separately tested for the presence of cocaine prior to being commingled, the court reversed Ross' conviction and sentence, remanding the case with direction to reduce Ross' conviction to simple possession of cocaine and to impose an appropriate sentence. *Id.* at 1241.

In *Safford*, the defendant was charged with trafficking in cocaine by possessing 28 grams or more of cocaine based on the seizure of two bags from Safford's residence. *Safford*, 708 So. 2d at 677. "One bag contained rock cocaine and the other bag contained forty individually wrapped foil packets of alleged powder cocaine." *Id.* The investigating officer combined the 40 packets of powder into one mixture for a police chemist to test.[1] *Id.* Relying on *Ross*, the Second District held that "the chemist's failure to test each individual packet before the contents were combined and

[1] However, the court found that "the analysis performed on the random samples of rock cocaine was proper because all the material is similar in appearance and commingled in a single bag." *Safford*, 708 So. 2d at 677.

weighed mandates reversal." *Id.*

Finally, in *Sheridan*, two baggies of methamphetamine were located in Sheridan's vehicle. *Sheridan*, 850 So. 2d 638-39. A chemist tested and weighed one of the baggies but not the second. *Id.* at 639-40. Both baggies were combined, totaling a weight of 14 grams or more, allowing the State to charge Sheridan with trafficking in methamphetamine. *Id.* On appeal, the Second District cited to both *Safford* and *Ross*, finding that *Ross*' rationale applied to Sheridan. *Id.* at 640. Adhering to *Safford* and *Ross*, the court found that "the contents of each baggie should have been tested separately, and, if found to be the same controlled substance, the weights combined." *Id.* The Second District noted that "it is inappropriate to permit the State to commingle . . . the contents without testing and then assert that he contents of each baggie when aggregated meet the trafficking quantity, all without providing the defense with an opportunity to test the alleged drugs." *Id.*

D. The Decision in *Greenwade*

In *Greenwade*, law enforcement executed a search warrant and found a bag which Petitioner admitted contained cocaine. *Greenwade*, 80 So. 3d at 372. A spoon with cocaine residue on it was sitting on top of the bag. *Id.* Inside the bag, an office found 9 power-filled on ounce plastic baggies. *Id.* Each baggie was field tested then transferred to the Sheriff's Office property room, where all 9 baggies were emptied

into one envelope. *Id.* A Florida Department of Law Enforcement forensic chemist tested the contents of the one envelope which indicated the powder contained cocaine. *Id.* Because the weight of the powder was 234.5 grams, Petitioner was charged with trafficking in cocaine and subsequently convicted. *Id.* On appeal, the First DCA declined to follow *Ross*, *Safford*, and *Sheridan*, affirmed Petitioner's conviction, and certified conflict with *Ross*, *Safford*, and *Sheridan*. *Id.* at 373-74.

E. Why *Greenwade* is not in express and direct conflict with *Ross*, *Safford*, and *Sheridan*

The opinions of *Ross*, *Safford*, and *Sheridan* do not conflict with *Greenwade*. The rule in *Ross*, which was followed by the Second District in *Safford* and *Sheridan*, required that each baggie be tested prior to commingling. *Ross*, 528 So. 2d at 1239. In *Ross*, one packet of 36 packets in a bundle was tested before being combined into one envelope and one packet of 56 packets in a bundle was tested before being combined into a second envelope. *Id.* at 1238. In *Safford*, none of the 40 packets found in one bag were tested before being combined and weighed. *Safford*, 708 So. 2d at 677. Finally, in *Sheridan*, one of two bags was tested before the bags were combined, tested, and weighed. *Sheridan*, 850 So. 2d 639-40.

Ross, *Safford*, and *Sheridan* included tested samples of presumably narcotic materials which were combined with untested material in order to obtain the weight for trafficking. *See Ross*, 528 So. 2d at 1238; *Safford*, 708 So. 2d at 677; *Sheridan*, 850

So. 2d 639-40. However, in Petitioner's case, all materials were tested with positive results of cocaine before commingled and weighed. *See Greenwade,* 80 So. 3d at 372. Therefore, despite the First DCA's certification, there is no direct and express conflict between *Greenwade* and *Ross*, *Safford*, and *Sheridan*.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by ELECTRONIC MAIL to Glen P. Gifford, Esq., Assistant Public Defender, at glen.gifford@flpd2.com on this 4th day of May, 2012.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared using Times New Roman 14 point font in compliance with the font requirement of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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