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IN THE SUPREME COURT OF FLORIDA

CASE NO.

GARY G. DEBAUN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

AMENDED BRIEF OF PETITIONER ON JURISDICTION

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

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STATEMENT OF CASE AND FACTS

Mr. Debaun, the Petitioner in this case, seeks review of the Third District's opinion, *State v. Debaun*, 38 Fla. L. Weekly D2266 (Fla. 3d DCA Oct. 30 2013).[1] The Third District's majority opinion summarized the pertinent case facts, the issue before it, and its holding, as follows:

> The State of Florida appeal[ed] from an order interpreting the term "sexual intercourse" as used in section 384.24(2) of the Florida Statutes (2011) as meaning only contact between the genitals of a man and a woman and dismissing the charges against the appellee , Gary G. Debaun, for having uninformed HIV infected sexual intercourse with another man. Because we find that the term "sexual intercourse" as used in this provision applies to other behavior, including that between two men, we reverse.

(A. 1-2).[2]

To reach its conclusion, the Third District reasoned that the Legislature must have intended to criminalize the transmission of venereal disease through activity beyond penile/vaginal contact, such as "fellatio and penile-anal penetration."

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[1] The Third District's opinion is attached as the Appendix to this jurisdictional brief. The Appendix is paginated separately, and will be referred to as "A," followed by the page number(s).

[2] Section 384.24(2), Florida Statutes (2011), provides:

> It is unlawful for any person who has human immunodeficiency virus infection, when such person knows he or she is infected with this disease and when such person has been informed that he or she may communicate this disease to another person through sexual intercourse, to have sexual intercourse with any other person, unless such other person has been informed of the presence of the sexually transmissible disease and has consented to the sexual intercourse.

(A. 2). Moreover, since the Legislature did not define "sexual intercourse" in Chapter 384 of the Florida Statutes, the Third District majority referred to the Merriam Webster's Dictionary, which defined "sexual intercourse" as "genital contact between individuals other than penetration of the vagina by the penis." (A. 4).

Finally, the majority relied on the differences between the 1985 and 1986 versions of section 384.24(2); the latter version "expanded [the statute's scope] from only sexual intercourse between 'any female . . . with any male person' and 'any male person . . . with any female,' to sexual intercourse between 'any person . . . with any other person.'" (A. 9-10). The 1986 amendment also enumerated several more diseases to be regulated by the statute. (A. 9). Since the Legislature had replaced the gender specific words with gender neutral words, the Third District found it "evident that the legislature sought not only to address additional sexually transmissible diseases, but also to expand the definition of 'sexual intercourse' beyond relationships between only a man and a woman." (A. 10).

Thus, the Third District reversed the trial judge's ruling and certified conflict with the Second District Court of Appeal:

> Accordingly, because we conclude that the plain and ordinary meaning of the term "sexual intercourse" as used in section 384.24(2) includes more than an act where a male's penis is placed inside a female's vagina, and encompasses the oral and anal sexual activity involved here, we reverse the order on review and remand for reinstatement of the charges against Debaun. In doing so we certify

> conflict with the decision in *L.A.P. v. State*, 62 So. 3d 693 (Fla. 2d DCA 2011).
>
> Reversed and remanded; conflict certified.

(A. 12) (footnote omitted).[3]

Petitioner now requests this Court to exercise its discretionary jurisdiction to resolve the certified conflict in this case.

[3] The dissent in *Debaun* rejected the majority's statutory interpretation, noting that this Court had already defined "sexual intercourse" to mean "penetration of the female private parts by the private male organ." (A. 17-18). Moreover, the dissent contended that the legislative history of section 384.24(2) illustrated that the majority had incorrectly inferred the legislature's intent. (A. 19-20). Finally, the dissent noted that even if the statutory term was vague or ambiguous, the rule of lenity would have to apply in this criminal case. (A. 22); *see* § 775.021(1), Fla. Stat. (2011) (requiring vague or ambiguous criminal statutes to be interpreted in the light most favorable to the accused).

SUMMARY OF ARGUMENT

The Third District Court of Appeal, in *State v. Debaun*, 38 Fla. L. Weekly D2266 (Fla. 3d DCA Oct. 30 2013), properly certified conflict with the Second District's opinion, *L.A.P. v. State*, 62 So. 3d 693 (Fla. 2d DCA 2011). In *Debaun*, the Third District held that for the purposes of section 384.24(2), "sexual intercourse," encompasses the sexual activity between two men, such as oral and anal contact. In evaluating that same statute, the Second District in *L.A.P.* came to the opposite conclusion, holding that sexual intercourse *only* encompasses "the penetration of the female sex organ by the male sex organ." As the Third District recognized, these two cases are irreconcilable. Thus, this Court should exercise its discretionary jurisdiction to resolve the conflict between these district courts of appeal.

ARGUMENT

THIS COURT SHOULD REVIEW THE THIRD DISTRICT'S OPINION, *State v. Debaun*, 38 Fla. L. Weekly D2266 (Fla. 3d DCA Oct. 30 2013), WHICH HAS CERTIFIED CONFLICT WITH THE SECOND DISTRICT COURT OF APPEAL AS TO WHETHER "SEXUAL INTERCOURSE," AS USED IN SECTION 384.24(2), INCLUDES MORE THAN AN ACT WHERE A MALE'S PENIS IS PLACED INSIDE A FEMALE'S VAGINA, AND ENCOMPASSES THE ORAL AND SEXUAL ACTIVITY BETWEEN TWO PEOPLE OF THE SAME SEX.

Since 1986, section 384.24(2), Florida Statutes, has made it a third-degree felony for a person who knowingly carries HIV to have "sexual intercourse" with another person without informing them of their HIV positive status. The Third District Court of Appeal is now in conflict with the Second District Court of Appeal as to whether the statute's term, "sexual intercourse," narrowly encompasses vaginal/penile penetration, or additional types of sexual contact between two people of the same sex, such as oral and anal sexual activity.

In *State v. Debaun*, 38 Fla. L. Weekly D2266 (Fla. 3d DCA Oct. 30 2013), Mr. Debaun was charged under section 384.24(2) with having uninformed HIV infected sexual contact with another man. The trial judge dismissed the charge on the ground that the alleged acts – oral and anal sexual contact – were outside the scope of the statute. (A. 1-2). The Third District reversed trial court's order and held that sexual acts between two men could constitute "sexual intercourse" under

section 384.24(2). (A. 2, 12). While *Debaun* was pending, the Fifth District Court of Appeal issued its decision, *State v. D.C.*, 114 So. 3d 440 (Fla. 5th DCA 2013), which mirrored the facts and holding of the Third District's opinion in all material respects.[4]

The Third District recognized that the Second District's holding in *L.A.P. v. State*, 62 So. 3d 693 (Fla. 2d DCA 2011), is irreconcilable with the result in *DeBaun*. In *L.A.P.*, the defendant challenged a judgment for violating section 384.24(2). 62 So. 3d at 693. The undisputed facts were that the defendant, a female, engaged in "oral sex and digital penetration of the vagina without informing her partner of her HIV positive status . . ." *Id*. at 694. The sole issue was therefore whether the defendant engaged in "sexual intercourse." *Id*.

The Second District held that "sexual intercourse" is an unambiguous phrase which must be given its plain meaning in the absence of a definition in Chapter 384:

> The meaning of sexual intercourse within section 384.24(2) is clear and unambiguous. Courts should apply a literal interpretation of the language of a statute unless "to do so would lead to an unreasonable or ridiculous conclusion." *Holly v. Auld*, 450 So.2d 217, 219 (Fla.1984). The result here is neither unreasonable nor ridiculous; it is merely an application of the statutory language to L.A.P.'s actions.

[4] The Fifth District certified conflict with *L.A.P. v. State*, 62 So. 3d 693 (Fla. 2d DCA 2011), just as the Third District did. *State v. D.C.*, 114 So. 3d 440 (Fla. 5th DCA 2013). However, this Court's online docket indicates that further review of *D.C.* was denied due to the untimely filing of the notice to invoke this Court's jurisdiction.

> Thus, "there is no occasion for resorting to the rules of statutory interpretation and construction [,]" including consideration of the legislative history of the statute. *Id.* (quoting *A.R. Douglass, Inc. v. McRainey,* 102 Fla. 1141, 137 So. 157, 159 (1931)). However, even were we to do so, the result would remain the same. *See Maddox v. State*, 923 So.2d 442, 446 (Fla.2006).

62 So. 3d at 695. Based on its finding that "sexual intercourse" was neither vague nor ambiguous, the Second District held that the term could *only* refer to contact between a penis and a vagina. *Id.*

Thus, the Third and Fifth Districts are in conflict with the Second District. According to *Debaun* and *D.C.*, sexual contact between people of the same sex is sexual intercourse under section 384.24(2). But according to *L.A.P.*, such acts are not sexual intercourse. To remedy the certified conflict among the district courts, this Court should exercise its discretionary jurisdiction.

CONCLUSION

Based on the foregoing facts, authorities and arguments, Petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by e-mail to CrimAppMIA@MyFloridaLegal.com and by mail to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this __ day of December, 2013.

/s/Brian Ellison
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