

IN THE SUPREME COURT OF FLORIDA

SC13-2336
DCA CASE NO. 3D11-3094

GARY DEBAUN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Petitioner, Gary Debaun, was the defendant in the trial court and the Appellee in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the Appellant in the Third District Court of Appeal. The parties shall be referred to as they stand in this court.

STATEMENT OF THE CASE AND FACTS

Respondent adopts Petitioner's statement of the case and facts as presented in his amended jurisdictional brief.

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). The Fifth District in *State v. D.C.*, 114 So.3d 440 (Fla. 5th DCA 2013) employed a similar analysis to the one set forth in the *State v. Debaun* opinion. 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, we agree that a conflict exists and discretionary jurisdiction rests with this Court to resolve said conflict between these district courts of appeal.

ARGUMENT

THIS COURT HAS DISCRETION TO REVIEW THE THIRD DISTRICT COURT’S OPINION IN *State v. Debaun*, 38 Fla. L. Weekly D2266 (Fla. 3d DCA Oct. 30 2013), WHICH HAS CERTIFIED CONFLICT WITH THE SECOND DISTRICT COURT’S OPINION IN *L.A.P. v. State*, 62 So.3d 693 (Fla. 2nd DCA 2011) AS TO THE DEFINITION OF THE TERM SEXUAL INTERCOURSE AS UTILIZED IN SECTION 384.24(2).

Respondent agrees that a conflict exists between the Third District and Second District. The Fifth District certified conflict with *L.A.P. v. State*, 62 So.3d 693 (Fla. 2nd DCA 2011) too in *State v. D.C.* 114 So.3d 440 (Fla. 5th DCA 2013) but according to the Florida Supreme Court docket, review of *D.C.* was denied due to the untimely filing of the notice to invoke this Court’s jurisdiction. According to *Debaun* and *D.C.*, sexual contact between people of the same sex is sexual intercourse under section 384.24(2). In the *L.A.P.* opinion though, such acts are not considered sexual intercourse. Thus, to remedy the certified conflict among the

district courts, the Florida Supreme Court has the discretion exercise its discretionary jurisdiction and grant review if it so chooses.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that this Court decline jurisdictional review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief was mailed to Brian L. Ellison, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, FL, 33125, this 22nd day of January 2014.

s/Joanne Diez
JOANNE DIEZ
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

s/Joanne Diez
JOANNE DIEZ
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