IN THE SUPREME COURT OF FLORIDA

RICHARD VINCENT PAEY, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC07-38 2DCA NO.: 2D04-2318

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

BILL McCOLLUM
ATTORNEY GENERAL

ROBERT J. KRAUSS
Chief—Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar No. 238538

JOHN M. KLAWIKOFSKY
Assistant Attorney General
Florida Bar No. 930997
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Petitioner appealed his judgment and sentence after being found guilty of seven counts of trafficking in oxycodone, four counts of possession of hydrocodone, and four counts of obtaining or attempting to obtain a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.1 Petitioner was sentenced to concurrent twenty five year mandatory minimum sentences for each trafficking count in accordance with section 893.135(1)(c)(1)(c). The majority opinion of the Second District Court of Appeal affirmed the judgment and sentence. Paey v. State, 943 So.2d 919(Fla. 2d DCA 2006). (See attached Appendix).

In 1985, while a resident of New Jersey, Paey was involved in an automobile accident, and as a result suffered from chronic back pain. He was treated by and received prescriptions from Dr. Stephen Nurkiewicz for oxycodone, hydrocodone and diazepam. In 1994, the Paey family moved to Florida, but Dr. Nurkiewicz continued to act as Paey's treating physician. On December 26, 1996, Dr. Nurkiewicz treated Paey for the last time, and gave him a prescription for oxycodone and hydrocodone, to be used in January 1997. Id.

---

1. Under Section 893.135, a person can be convicted of trafficking in oxycodone by knowingly possessing at least four grams of oxycodone or four grams of any mixture containing oxycodone.

Over the course of 34 days, between February 5, 1997 and March 10, 1997, Paey filled prescriptions for 700 oxycodone pills, 400 hydrocodone pills, and 320 diazepam pills. Dr. Nurkiewicz was interviewed by Pasco County Sheriff's investigators, and the doctor denied issuing, writing, authorizing or signing prescriptions for Paey after his last visit in December of 1996. A search of Paey's residence resulted in the seizure of miscellaneous pieces of paper cut into the size of prescription forms; blank prescription forms with Dr. Nurkiewicz's name and address at the top; and an address book containing Dr. Nurkiewicz's name, phone number, and DEA number. Id.

On appeal, Paey claimed the 25 year mandatory minimum sentence violated the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution and the cruel or unusual clause of a former version of Article I, Section 17 of the Florida Constitution. Id. On December 6, 2006, the Second District Court of Appeal issued its opinion in the instant case, Paey v. State, 943 So.2d 919 (Fla. 2d DCA 2006) and affirmed the judgment and sentence. Id.2

Pursuant to United States Supreme Court precedent3, the Second

---

2 Associate Judge James H. Seals filed a dissenting opinion.

3 Lockyer v. Andrade, 538 U.S. 63, 72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003).

District conducted a "gross disproportionality" analysis for sentences to be served for a term of years. The Second District found that Paey's mandatory minimum sentence of 25 years is not grossly disproportionate to his crime of trafficking in oxycodone. Id. The Court was "required to grant substantial deference to the broad authority that the Florida Legislature possesses in determining the types and limits of punishments for crimes." Id. "The Florida statutes addressing the subject demonstrate that the legislature considers oxycodone to be a potentially dangerous substance… Because of oxycodone's high potential for abuse and the effects of such abuse, the Florida Legislature could rationally conclude that the threat posed to the individual and to society by possession of at least twenty-eight grams of oxycodone is sufficient to warrant the deterrent and retributive effect of a twenty five year mandatory minimum sentence." Id. The Second District accordingly held "this is not one of those rare cases in which the sentence imposed is so grossly disproportionate in comparison to the crime committed that it is cruel and unusual. Id.

The Second District further found the sentence did not violate the former version of article I, section 17 of the Florida Constitution which forbid cruel or unusual punishment. The court relied upon Benitez v. State, 395 So. 2d 514 (Fla. 1981) which found the minimum mandatory sentences of section 893.135(1) were

admittedly severe, but not cruel or unusual in light of their potential deterrent value and the seriousness of the crime involved. Benitez, 395 So. 2d at 518. Accordingly, the Second District affirmed Paey's judgment and sentence.

Petitioner has now invoked the discretionary jurisdiction of this Court, asserting that the decision of the Second District in the instant case (a) expressly declares valid a state statute; (b) expressly construes a provision of the state or federal constitution; or (c) expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

SUMMARY OF THE ARGUMENT

Pursuant to Rule 9.030, Fla. R. App. P., Petitioner has not alleged sufficient grounds which warrant the discretionary jurisdiction of this Court. The instant opinion does not "expressly" declare valid a state statute, does not "expressly" construe a provision of the state or federal constitution, or "expressly and directly" conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law. The well-reasoned, exhaustive decision of the Second District Court of Appeal presents a case in which this Court should respect the role of the District Courts of Appeal as the courts of last resort in Florida. The Second District Court's thorough analysis and rejection of Petitioner's constitutional

challenge is fully supported by a majority of precedent in this and other jurisdictions. Therefore, this Court should decline to exercise its discretionary jurisdiction where Petitioner has failed to identify and demonstrate any credible basis for this Court to revisit the Second District's opinion.

ARGUMENT

ISSUE

> WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE EXHAUSTIVE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN PAEY V. STATE, 943 SO. 2D 919 (FLA. 2D DCA 2006) WHICH HELD THAT THE IMPOSITION OF A TWENTY FIVE YEAR MINIMUM MANDATORY SENTENCE FOR TRAFFICKING IN OXYCODONE IN VIOLATION OF SECTION 893.135(1)C(1)C DOES NOT VIOLATE CRUEL AND/OR UNUSUAL PUNISHMENT? (AS RESTATED BY RESPONDENT)

Pursuant to Fla. R. App. P. 9.030(2), the discretionary jurisdiction of the Florida Supreme Court may be sought to review decisions of district courts of appeal that:

(i) expressly declare valid a state statute; (ii) expressly construe a provision of the state or federal constitution; or (iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law; Fla. R. App. P. 9.030(2). See Art. V § 3(b), Fla. Const.

Initially Petitioner claims this Court has discretionary jurisdiction to review the validity of the trafficking statute, Section 893.135(1)(c)(1)(c). Petitioner further challenges the

constitutionality of the mandatory sentence, claiming it constitutes cruel and/or unusual punishment. Lastly, Petitioner claims the instant opinion is in conflict with this Court's holding in State v. Benitez, 395 So. 2d 514 (Fla. 1981).

Under Rule 9.120(d), Florida Rules of Appellate Procedure, a petitioner's brief is limited solely to the issue of this Court's jurisdiction. However, Petitioner has failed to abide by this singular requirement. While ostensibly submitting a jurisdictional brief, Petitioner has instead raised various merits arguments taken from his "cruel and unusual" claims in the District Court.

In Florida, the District Courts of Appeal are not intended to be just preliminary or "intermediate" appellate courts. See, Jenkins v. State, 385 so. 2d 1356 (Fla. 1980), citing Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958); see also, Rule 9.030(a)(2)(A), Florida Rules of Appellate Procedure, Committee Notes, 1980 Amendment ("The district courts of appeal will constitute the courts of last resort for the vast majority of litigants under amended article V."); John M. Scheb, Florida's Courts of Appeal: Intermediate Courts Become Final, 13 Stetson L. Rev. 479 (1984). Here, the well reasoned, exhaustive majority opinion presents a case in which this Court should respect the role of the District Court of Appeal as the court of last resort in Florida.

Here, Petitioner's jurisdiction brief argues that the instant

decision "upheld the validity of a state statute as applied to petitioner," "considered the constitutionality of the statue and the mandatory sentence imposed on petitioner," and "misapprehended Benitez and contradicted its holding." (See Petitioner's Brief on jurisdiction, p. 10).

Conspicuously absent from petitioner's jurisdictional brief is any allegation that the opinion below "expressly" declared valid a state statute, or "expressly construes a provision of the state or federal constitution" which are necessary prerequisites for invoking discretionary jurisdiction. A District Court's decision is not subject to review under Article V, Section 3(b)(3), Florida Constitution, simply because it applies the requirements of a sentencing statute and upholds the application of that statute. In this case, the mere fact that the District Court upheld petitioner's lawful sentence does not warrant the exercise of this Court's discretionary jurisdiction on the basis of petitioner's claim that the District court allegedly declared valid a state statute. Similarly, a decision of a District court is not reviewable under Article V, Section 3(b)(3) merely because it has the practical effect of construing a provision of the state or federal constitution or because the district court applied constitutional principals to the facts of the case. See, e.g., Philip J. Padovano, Florida Appellate Practice, Section 3.7 and 3.8, at 48-50 (2d ed., 2001).

The Legislature "has the authority to not only define crimes but to also determine the range of punishment applicable to such crimes." State v. Huggins, 802 So. 2d 276 (Fla. 2001). Thus the power to set punishment for criminal offenses lies within the legislature, not the courts. See, e.g., State v. Coban, 520 So. 2d 40, 41 (Fla. 1988). In this case, the Second District recognized and applied this well-settled principle and thus, concluded that the appellate court's task was only to measure the penalty imposed against constitutional standards. Paey, supra. See also Phillips v. State, 807 So. 2d 713 (Fla. 2d DCA), rev.denied, 823 So. 2d 125 (Fla. 2002), cert.denied, 537 U.S. 1161, 123 S. Ct. 966, 154 L. Ed. 2d 896 (2003).

Petitioner claims the statute is constitutionally infirm because it criminalizes mere possession of oxycodone and permits the State to meet the threshold possession amount (28 grams) by using an aggregate amount of the oxycodone when mixed with over the counter medication such as Tylenol. Such issues have been addressed and disposed of by the plain language of Section 893.135(1)(c)(1)(c) which provides, "Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, **or who is knowingly in actual or constructive possession of**, 4 grams or more or of any morphine, opium, **oxycodone**, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b)

or (2)(a), **or 4 grams or more of any mixture containing any such substance**, but less than 30 kilograms of such substance or mixture, commits a felony of the first degree, which felony shall be known as **trafficking in illegal drugs**." (emphasis added); See also Travis v. State, 808 So. 2d 194 (Fla. 2002).

Petitioner further claims the instant opinion conflicts with this Court's holding in Benitez, supra. The Florida Constitution, article V, section 3(b)(3), authorizes this Court to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or with a decision of the Florida Supreme Court.

This Court has identified two basic forms of decisional conflict which properly justify the exercise of jurisdiction under section 3(b)(3) of the Florida Constitution. Either (1) where an announced rule of law conflicts with other appellate expressions of law, or (2) where a rule of law is applied to produce a different result in a case which involves "substantially the same controlling facts as a prior case. . . ." Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960).

Petitioner is unable to show direct, express conflict on the face of the opinion. In fact, the majority opinion relies upon Benitez in finding the instant sentence is not cruel and/or unusual.

CONCLUSION

Respondent respectfully requests that this Honorable Court decline to accept jurisdiction to review this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John P. Flannery II, Esq., A19 East Market Street, Leesburg, Virginia 20176, and Robert W. Attridge, Jr., Esq, 8606 Government Drive, New Port Richey, FL 34654, this 31st day of January 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

_____
ROBERT J. KRAUSS
Chief—Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar No. 238538

_____
JOHN M. KLAWIKOFSKY
Assistant Attorney General
Florida Bar No. 930997
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR RESPONDENT