ORIGINAL

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC12-644

RICHARD MASONE,

Petitioner,

v.

CITY OF AVENTURA,

Respondent.

BRIEF ON JURISDICTION OF CITY OF AVENTURA

ON DISCRETIONARY REVIEW FROM A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

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ABBREVIATIONS USED IN THIS BRIEF

References to petitioner, Richard Masone, will appear as "Masone," while references to respondent, City of Aventura, will appear as "City."

References to the Mark Wandall Safety Program, codified at section 316.0083, Florida Statutes, will appear as either the "Mark Wandall Safety Act" or the "Act."

References to Masone's brief on jurisdiction will appear as "MBJ."

References to the Third District Court of Appeal's decision in *City of Aventura v. Masone*, Case No. 3D10-1094, will be to the pagination reflected in the appendix ("App.") attached to Masone's brief.

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INTRODUCTION

Masone asks this Court to exercise its discretionary jurisdiction to review the Third District Court of Appeal's decision below based upon a purported "express and direct" conflict with certain precedents of this Court and the Fourth District Court of Appeal's decision in *Hoesch v. Broward County*, 53 So. 3d 1177 (Fla. 4th DCA 2011). Inasmuch as such "express and direct" conflict does not exist, the Court should decline review.

STATEMENT OF THE CASE AND FACTS

The City accepts Masone's statement of the case and facts.

SUMMARY OF ARGUMENT

Since the 1980 amendment of the Florida Constitution, this Court has been a court of limited jurisdiction, leaving the district courts of appeal to be courts of last resort in most cases, including those involving statutory construction. Masone incorrectly invokes the Court's limited jurisdiction claiming an express and direct conflict that simply does not exist. Masone's jurisdictional brief fails to identify a single case from this Court or another district court of appeal that addresses whether municipal red light camera programs, as they existed prior to the enactment of the Mark Wandall Safety Act, were preempted by Chapters 316 and 318, Florida Statutes. In fact, no such decision exists.[1]

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[1] Masone correctly points out that the Fifth District Court of Appeal heard oral argument in *City of Orlando v. Udowychenko*, Case No. 5D11-720, a case involving Orlando's red light camera program. MBJ at 2, 10. No decision, though, has been rendered in that case; and therefore, it provides (continued . . .)

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Instead, Masone reargues his position on the merits and relies on the general application of preemption and conflict precedents in factual and legal situations *substantially* dissimilar from those at issue here. This is not enough. Moreover, even if the Third District's decision could be said to *marginally* conflict with a prior precedent of this Court or another district court of appeal, the exercise of discretionary jurisdiction is unwarranted in a case of first impression where the Florida Legislature has enacted subsequent legislation – the Mark Wandall Safety Act – that renders defunct the question of whether municipal programs no longer in effect are preempted by or conflict with previously existing law.

ARGUMENT

I. THE COURT'S LIMITED JURISDICTION.

Pursuant to Art. V, § 3(b)(3) of the Florida Constitution, this Court may "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." According to the Commentary to Article V, this section of the State Constitution was amended in 1980 to restrict the Court's jurisdiction and represented "a departure from the existing jurisdiction of the supreme court which was essentially an appellate court of last resort. Under this

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no basis for express and direct conflict. *If* and when the Fifth District issues a decision expressly and directly conflicting with the Third District's decision, then review of that Fifth District decision may be sought.

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amendment, the district courts of appeal, except in the enumerated cases, are the courts of final appeal."

As the Court, itself, has observed, "[the Court] is without power to simply assume jurisdiction in a case to correct what [it] perceive[s] as error, even if the issue appears to be important .... Thus, a decision of a district court construing a statute can remain in effect indefinitely." *State v. Barnum*, 921 So. 2d 513, 523 (Fla. 2005). A conflict has been said to be direct when the other decision concerns "the same point of law and leaves the jurisprudence of the State on the point of law in confusion and lacking uniformity." *Dupont Plaza, Inc. v. Dade County*, 125 So. 2d 564, 565 (Fla. 1960). The Court's conflict jurisdiction arises when there is a "collision on a point of law" and where "two decisions are wholly irreconcilable." *Williams v. Dugan*, 153 So. 2d 726, 727 (Fla. 1963). Further, where a DCA reaches the opposite result on controlling facts which, if not identical, more strongly dictate the result reached by the alleged conflict case, then a conflict exists warranting the acceptance of jurisdiction. *Aravena v. Miami-Dade Cty.*, 928 So. 2d 1163, 1166-67 (Fla. 2006) (citing *Crossley v. State*, 596 So. 2d 447, 449 (Fla. 1992)).

Masone has failed to demonstrate the kind of express and direct conflict needed for this Court to exercise its jurisdiction for he has not demonstrated how the Third District's decision is "wholly irreconcilable" with a prior precedent of this Court or another district court of appeal.

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II. MASONE ARGUES JURISDICTIONAL GROUNDS THAT DO NOT EXIST UNDER THE FLORIDA CONSTITUTION.

At the outset, it must be noted that Masone advances arguments in favor of jurisdiction that have no foundation in the Florida Constitution or the jurisprudence of this state. For example, Masone argues that because other states' supreme courts have examined the validity of municipal red light camera programs, this Court should do the same. MBJ at 2, 3. He also suggests that the Court should hear the case because it is "of statewide importance." Assuming these assertions to be true – which the City disputes (*see* Argument IV, *infra*) – neither constitutes a basis for this Court's exercise of its limited jurisdiction.

Not surprisingly, Masone fails to cite any legal support for either of his suggested jurisdictional arguments. While a certified question of great public importance would have conferred a basis for review, the Third District denied Masone's requests for rehearing, rehearing *en banc* and for a certified question.

III. SINCE NO OTHER COURT HAS DETERMINED THAT CHAPTERS 316 AND 318, FLORIDA STATUTES, PREEMPT OR PRECLUDE MUNICIPAL RED LIGHT CAMERA PROGRAMS, NO EXPRESS AND DIRECT CONFLICT CAN EXIST.

A. Masone essentially ignores municipal home rule authority.

The Third District's analysis has its foundation in the broad home rule powers conferred on municipalities by Art. VIII, section 2(b) of the Florida Constitution and section 166.021(3)(c), Florida Statutes. A. 4-5. Masone fails to identify *any* decision of this Court or another district court of appeal that conflicts with the Third District's conclusions on the issue of municipal home rule authority.

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In fact, Masone's brief ignores entirely this fundamental principle of the Third District's analysis. Masone attempts, *sub silentio*, to divorce the Third District's reasoning regarding preemption and conflict from the overarching principle that municipalities have "the power to enact legislation concerning any subject matter upon which the state Legislature may act, except ... any subject ***expressly*** preempted to the state or county government by the constitution or general law...." A. 4 (citing § 166.021(3)(c), Fla. Stat.).

Ironically, one of the cases cited by Masone as conflicting with the Third District's decision[2] – *City of Hollywood v. Mulligan*, 934 So. 2d 1238 (Fla. 2006) – actually supports the Third District's analysis on municipal home rule authority and its interplay with preemption and conflict principles. In *Mulligan*, this Court reiterated that "a municipality may legislate concurrently with the Legislature on any subject which has not been expressly preempted to the State." *Id.* at 1243 (citing *Wyche v. State*, 619 So. 2d 231, 237-38 (Fla. 1993)). The Court concluded that Hollywood's ordinance authorizing seizure and impoundment of vehicles involved in the commission of drug crimes and prostitution was not preempted by the Florida Contraband Forfeiture Act ("FCFA"). *Id.* at 1246. The Court's

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[2] Masone suggests that the Third District failed to consider implied preemption as articulated in *Mulligan*. MBJ at 5-6. This is, of course, wrong; since the Third District did expressly address implied preemption. A. 12-13 ("Chapter 316 cannot be classified as being 'so pervasive that it completely occupies the field.' On the contrary, section 316.008 specifies that no provision of chapter 316 prevents local authorities, within the reasonable exercise of their police power from 'regulating, restricting, or monitoring traffic by security devices.'").

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reasoning demonstrates why a conflict does not presently exist with the Third District's analysis below:

> Furthermore, when the FCFA and the question of preemption are considered in light of the Municipal Home Rule Powers Act, *the absence of an express legislative intent to preempt the field of forfeiture in enacting the FCFA becomes more significant.* ... Passed the year before the original version of the FCFA, the Municipal Home Rule Powers Act does not reserve to the Legislature the power to legislate in the field of forfeiture. One cannot lightly disregard this omission because the Legislature did retain field preemption in other areas. For example, in chapter 166 itself, the Legislature preempted the field in regard to ammunition sales. *See* § 166.044, Fla. Stat. (2002) ("No municipality may adopt any ordinance relating to the possession or sale of ammunition."). And since 1973, the Legislature has continued to use similar preemptive language in other contexts. For instance, regarding the lottery, the Legislature stated that "[a]ll matters relating to the operation of the state lottery are preempted to the state, and no county, municipality, or other political subdivision of the state shall enact any ordinance relating to the operation of the lottery authorized by this act." § 24.122(3), Fla. Stat. (2005); *see also* § 320.8249(11), Fla. Stat. (2005) ("The regulation of manufactured homes installers or mobile home installers is preempted to the state....").

Id. (emphasis added). Here, as the Third District correctly noted, the Legislature specifically carved out various areas in which municipalities could legislate in the field of traffic regulation, including, but not limited to, "regulating, restricting, or monitoring traffic by security devices."[3] A. 6 (citing § 316.008(1)(w), Fla. Stat.).

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[3] Masone attempts to avoid the plain language of this statutory provision by unilaterally asserting that "regulate" and "restrict" do not mean "enforce." MBJ at 5. Setting aside that absent a statutory definition, terms are to be interpreted in accordance with their ordinary dictionary meaning, *Fla. Dep't of Rev. v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954, 961 (Fla. 2005); (continued . . .)

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In enacting the Mark Wandall Safety Act in 2010, the Legislature gave credence to the Court's observation in *Mulligan* that the Legislature knows how to preempt a field when it wants to. Specifically, the Act *now* provides, for the first time, that "[r]egulation of the use of cameras for enforcing the provisions of this chapter is expressly preempted to the state." § 316.0076, Fla. Stat. (2010).

The *Mulligan* Court also went on to observe that Hollywood's ordinance was not in conflict with state statute because "the fact that the FCFA and the ordinance employ differing procedures to achieve their purposes does not amount to an improper 'conflict' necessitating the invalidation of the ordinance. Therefore, the FCFA and the ordinance can coexist." *Id.* at 1247. Once the Third District correctly concluded that Chapter 316 authorized the use of red light cameras, it went on to conclude – again, correctly – that municipal home rule authority permitted the City to devise its own code enforcement scheme *independent* of the uniform traffic citation system contemplated by state statute. A. 14-16.

B. No other appellate decision has addressed the validity of municipal red light camera programs.

This Court has defined the term "expressly" by its ordinary dictionary meaning: "in an express manner." *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla.

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and that "regulate" means "to govern or direct according to rule; … to bring under the control of law or constituted authority," http://www.merriam-webster.com/dictionary/regulate last accessed June 12, 2012; Masone has not cited to *any* decision that has adopted a conflicting interpretation of the term "regulate," much less one in the context of Chapters 316 or 318.

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1980) (noting the 1980 constitutional amendment restricted conflict jurisdiction by adding the requirement of "express" conflict). In short, for there to be an "express and direct" conflict, the allegedly conflicting decision must, "in an express manner," address the same point of law decided by the Third District. *See, e.g., South Florida Hosp. Corp. v. McCrea*, 118 So. 2d 25, 27 (Fla. 1960). "It must appear that the court of appeal has, in the decision challenged, made a pronouncement of a point of law which the bench and bar and future litigants may fairly regard as an authoritative precedent but which is in direct conflict with the pronouncement of *the same point of law* in a decision or decisions of ... another District Court of Appeal." *Id.* (emphasis added).

Neither this Court nor any other district court of appeal has ever addressed the validity of municipal red light camera programs, much less whether such programs were preempted by or conflicted with state statute. While Masone grounds his "express and direct conflict" argument on *generalized* pronouncements of preemption and statutory conflict in other cases, the application of both doctrines is *entirely* dependent on the specific language of the statutory scheme in question. Thus, in *Mulligan*, the Court concluded that the Hollywood ordinance was not preempted by and did not conflict with state statute only *after* engaging in a comprehensive analysis of the statutory language.[4] 934 So. 2d at 1244-46.

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[4] For this reason, there is no express and direct conflict with the Fourth District's decision in *Hoesch*. The conflict in *Hoesch* arose solely because of the irreconcilable definition of "dangerous dog" in the county ordinance when compared with the *same* definition in the state statute. 53 So. 3d at 1180-81. The state statute did not confer broad authority to regulate, but (continued . . .)

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Similarly here, the Third District's analysis was pinned to a careful and *unique* examination of the language in Chapters 316 and 318 and the explicit statutory exemptions set forth therein for exercise of municipal authority. Accepting Masone's invitation to find express and direct conflict here would be tantamount to the Court's accepting jurisdiction merely because it potentially disagrees with the Third District's interpretation of Chapters 316 and 318, a concept at odds with the limited jurisdiction of this Court. *Barnum*, 921 So. 2d at 523 ("It is beyond dispute that [the Court] is without power to simply assume jurisdiction in a case to correct what [it] perceive[s] as error, even if the issue appears to be important ....").

IV. EVEN IF SOME ATTENUATED CONFLICT EXISTED BETWEEN THE DECISION BELOW AND OTHER APPELLATE DECISIONS, THE COURT SHOULD DECLINE TO EXERCISE JURISDICTION WHERE THE LEGISLATURE HAS EFFECTIVELY RESOLVED THE ALLEGED CONFLICT.

When Masone asserts that this case is one of "statewide importance," he overstates his position. Other than *Udowychenko*, Masone does not identify any other pending cases where the same issues of preemption or conflict are at stake with regarding to municipal red light camera programs. The fact is that the City's

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rather a restricted authorization directed to a defined class of animals: "dangerous dogs." *Hoesch* might have presented a conflict with the decision below if the City had sought to change the definition of a red light signal or what constitutes a violation of the signal. This, of course, did not occur.

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prior red light camera ordinance is no longer in effect, having been superseded by an ordinance that is in compliance with the Mark Wandall Safety Act.[5] Across the entire state, local governments have adapted to the new requirements of the Act to avoid being either explicitly preempted by or in conflict with the Act. Accordingly, the Third District's decision upholding a defunct municipal program raises no pressing "statewide" concerns, and the Court, respectfully, should not "reach" to exercise its jurisdiction.

CONCLUSION

The Court's limited jurisdiction cannot properly be invoked here. No other court has addressed the question of whether pre-Act municipal red light camera programs were preempted by or conflicted with the specific language of previously existing state statutes. Masone, therefore, has failed to identify an express and direct conflict between the Third District's decision below and a decision of this Court or another district court of appeal that would support jurisdiction. The City respectfully requests that the Court deny review.

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5 As the Third District observed, the Legislature in adopting the Act could have, but chose not to, immediately invalidate all previously existing municipal red light programs as unauthorized by or in conflict with state law. A. 16-17.

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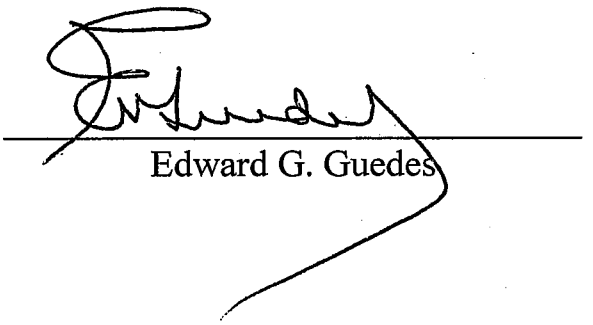
I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.



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