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IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. KELLY MATHIS, Respondent.	Case No. SC16-2186 Lower Tribunal No(s).: 5D14-492 2013-CF-695AA

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JURISDICTIONAL BRIEF OF THE RESPONDENT

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C. STATEMENT OF THE FACTS.

In its jurisdictional brief, the State makes the following assertion that does *not* appear within the "four corners"[1] of the decision below: "However, between 2007 and 2014, Respondent took on a more expanded and involved role in the operation of the individual internet cafes across the State." State's Jurisdictional Brief at 2. The Fifth District Court of Appeal actually stated the following regarding Mr. Mathis' role in this case: "Appellant dealt with Allied Veterans solely in the scope of an attorney-client relationship." *Mathis v. State*, 41 Fla. L. Weekly D2333, D2333 (Fla. 5th DCA Oct. 14, 2016). The State's jurisdictional brief also omits the following relevant facts contained within the four corners of the decision below:

> Before trial, Appellant requested that the trial court take judicial notice of evidence supporting his theory of the defense, including: (1) ordinances regulating internet cafes in Jacksonville, Clay County, Leon County, Seminole County, St. Johns County, Volusia County, and Wakulla County; (2) a circuit court order upholding the Jacksonville ordinance; and (3) various Florida House of Representatives staff analyses and proposed bills regulating internet cafes. In response, the State filed two motions in limine to prevent Appellant from both referencing any ordinances and raising an "advice of counsel" defense at trial.
>
> The trial court considered the notice requests and motions in limine at a hearing in August 2013. The State argued that Appellant improperly wished to raise an "advice of counsel" defense and requested

[1] In *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986), the Court explained that "[c]onflict between decisions must be express and direct, i.e., *it must appear within the four corners of the majority decision*." (Emphasis added).

that the trial court compel Appellant to provide the names of all attorneys with whom he discussed the legality of the internet cafes. Defense counsel disagreed with the State's framing of the issue, explaining that Appellant did not rely on advice of retained counsel, but rather that his research and meetings with government officials led him to advise Allied Veterans that internet cafes were legal. The trial court found the State's argument compelling, reasoning that the State was not charging Appellant as an attorney, only as an ordinary member of the organization. The trial court expressed its understanding of the issue in the following statement:

> I think you're elevating Mr. Mathis much higher than the state intends to do it. I think they're putting him down on the same common level as everybody else for the most part.
>
> . . . .
>
> It's a slot machine, lottery, RICO case with everybody involved. And if the State decides that they are going to single him out as the attorney, which necessitates you having to bring in these other attorneys for some reason, I'll be very careful to hear what they have to say as far as that's concerned, but otherwise to me . . . it's a simple trial with a bunch of defendants here going on.
>
> And the fact that you are concerned or for some reason you think they're focusing on him as the attorney to where you need to bring other attorneys to give their interpretation of the law, I just don't see that, really.

After the hearing, the trial court entered an order granting the State's motion in limine regarding the "advice of counsel" defense, prohibiting Appellant from introducing any "communication between [him] and any other attorney" regarding the legality of the Allied Veterans' business model. The trial court granted the State's remaining motion in limine, prohibiting Appellant from "present[ing] evidence and testimony relating to county and municipal ordinances, as such evidence is irrelevant to the issue of whether he acted in violation of State statutes."

Appellant's trial commenced on September 16, 2013, and

concluded on October 11, 2013. The State contradicted its pre-trial assertion that it would not focus on Appellant's capacity as an attorney, as demonstrated by the prosecutor's remarks during opening statement:

> [W]ith Kelly Mathis – it's about gambling. That's what the charges are. Let's be clear. But it's about Kelly Mathis gaming the system. He's a lawyer and he gamed the legal system.
>
> . . . .
>
> You see, one of the other reasons we know that Kelly Mathis is gaming the system is that you're going to learn that . . . a couple of attorney generals from the State of Florida had issued opinions on similar types of sweepstakes . . . and said they're illegal.
>
> You're going to learn that one attorney general . . . wrote a letter to Mr. Mathis about it . . . saying it was illegal. But the games continued.
>
> . . . .
>
> [Y]ou're going to hear people say that if he had said, hey, this is a real risk or this is illegal, like the attorney general opinion said, they wouldn't have done it. He gamed the system.

Throughout the trial, the State elicited witness testimony focusing on the soundness of Appellant's legal conclusions. Yet, the trial court prohibited Appellant from presenting any testimony to rebut the prosecutor's theme, including the local ordinances that specifically permitted the operation of internet cafes.

The State persisted in its assertion that Appellant knowingly provided false legal advice during closing argument and rebuttal:

> I'll submit to you that the Defendant was quite well aware of what he was doing when he was going out talking to everybody.
>
> [T]he Defendant, in explaining the Allied Veterans locations, was very aware of what the law is. He was very aware of what the law is. Because the manner in which he described what was happening at the Allied Veterans

> locations was a misrepresentation.
> . . . .
> But why are we here on Kelly Mathis? Because of the way he gamed the law, the way he chose to practice law, to mislead, to deceive.
> . . . .
> They tell you he had a love of the law. You know a love of the law would involve respect. It wouldn't be to come in here and try to manipulate it to make it work so that you can bill millions. That's not a love of the law.
> . . . .
> This case is about gambling. But in reality, it's about complete disrespect, a disregard, and misrepresentation and manipulation of the law.
> . . . .
> Four times I heard during the course of this, he was just a lawyer. He was only a lawyer . . . If anybody out of the fifty-seven defendants that were involved in this, if anybody knew better about what the law said, it was him.
> . . . .
> You know, it's not only – it's aggravated because he was a lawyer and he knew better.

Id. at D2333-34 (alterations in original).

D. SUMMARY OF ARGUMENT.

The decision below does not expressly and directly conflict with this Court's decisions in *State v. Giorgetti*, 868 So. 2d 512 (Fla. 2004), or *Bowden v. State*, 402 So. 2d 1173 (Fla. 1981), or the Second District's decision in *Huff v. State*, 646 So. 2d 742 (Fla. 2d DCA 1994). *See* art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). Accordingly, the Court should deny the petition for review.

E. ARGUMENT AND CITATIONS OF AUTHORITY.

The decision below does not expressly and directly conflict with this Court's decisions in *State v. Giorgetti*, 868 So. 2d 512 (Fla. 2004), or *Bowden v. State*, 402 So. 2d 1173 (Fla. 1981), or the Second District's decision in *Huff v. State*, 646 So. 2d 742 (Fla. 2d DCA 1994).

The *sole argument* for conflict jurisdiction set forth in the State's jurisdictional brief is as follows:

> The Fifth District Court of Appeal's decision in this case conflicts with this Court's decisions in *Giorgetti* and *Bowden*, as well as the decision of the Second District Court of Appeal in *Huff because each of these cases recognized the correct rule of law that the Legislature has the power to eliminate scienter requirements from a statute . . . .*

State's Jurisdictional Brief at 6 (emphasis added). Contrary to the State's argument, the decision below does *not* conflict with this Court's decisions in *State v. Giorgetti*, 868 So. 2d 512 (Fla. 2004), or *Bowden v. State*, 402 So. 2d 1173 (Fla. 1981), or the Second District's decision in *Huff v. State*, 646 So. 2d 742 (Fla. 2d DCA 1994), on the point of law cited by the State. In fact, in the decision below, the Fifth District expressly acknowledged that the Legislature has the power to eliminate scienter requirements from a statute:

> "The Legislature is vested with the authority to define the elements of a crime, and therefore 'determining whether scienter is an essential element of a statutory crime is a question of legislative intent.'" *Reynolds v. State*, 842 So. 2d 46, 49 (Fla. 2002) (quoting *Chicone v. State*, 684 So. 2d 736, 741 (Fla. 1996)).

Mathis, 41 Fla. L. Weekly at D2334. As the court correctly recognized, however, the

pertinent question was not whether the Legislature had the power to eliminate scienter, but *whether it intended to do so in the RICO statute.*

To answer that question, the Fifth District relied on *Giorgetti*, where this Court explained it "will ordinarily presume that the Legislature intends statutes defining a criminal violation to contain a knowledge requirement absent an express indication of a contrary intent." *Giorgetti,* 868 So. 2d at 516. *Mathis*, 41 Fla. L. Weekly at D2334 ("'In other words, the Court has virtually created a presumption in favor of a guilty knowledge element absent an express provision to the contrary.' . . . In determining the Legislature's intent, we look first to the statute's plain language.") (quoting and citing *Giorgetti*, 868 So. 2d at 515). After looking at the plain language of the subsections of the RICO statute that were charged in this case, the Fifth District determined that the "language does not express the Legislature's intent to dispense with a mens rea requirement." *Id.*

Finally, the Fifth District cited both *Giorgetti* and *Bowden* for its conclusion that it should interpret the RICO statute in a manner that comports with due process by presuming the Legislature intended to include a mens rea requirement:

> Accordingly, we interpret the statute in a manner that comports with due process by "ascrib[ing] the Legislature with having intended to include such a requirement." *See Giorgetti*, 868 So. 2d at 518. We find support in our supreme court's decision in *Bowden v. State*, where it rejected the argument that the statute "is facially unconstitutional because it imposes strict liability without requiring criminal intent or knowledge, and because its sanctions are predicated upon . . . presumptively protected

> activities." 402 So. 2d 1173, 1174 (Fla. 1981). The court further determined that the "assertion that 'under this law the prohibited association with the enterprise can be entirely innocent or unknowing,' is simply not correct. Nor is it true that 'participation, directly or indirectly, in the enterprise can occur without any intent . . . that the condemned behavior relate to any enterprise.'" *Id.* at 1175 (alteration in original).
>
> Based on the foregoing, we find no evidence that the Legislature intended to remove knowledge or mens rea as an element of the offense outlined in section 895.03(3). Thus, the trial court should have permitted Appellant to offer evidence negating his intent to commit racketeering.

Id. at D2334-35. Thus – not only does the decision below *not* "expressly and directly" conflict with *Giorgetti* or *Bowden*[2] – the decision below "expressly and directly" relied upon, and properly applied, the holdings in both cases.

The decision below is likewise not in conflict with *Huff*, as the "four corners" of the decision below do *not* contain a holding of law that is in irreconcilable conflict with the Second District's holding of law in *Huff*. *See* Harry Lee Anstead, Gerald Kogan, Thomas D. Hall & Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 516 (2005) (explaining that "holding conflict" exists when "[t]he majority opinion below contains a holding of law that is in irreconcilable conflict with a holding of law in a majority opinion of another district court"). In *Huff*, there is no discussion regarding whether the RICO

[2] In its jurisdictional brief, the State acknowledges that "[i]n *Bowden* this Court found that RICO does not impose strict liability or predicate sanctions on presumptively protected activities." State's Jurisdictional Brief at 6. This is the exact conclusion reached by the Fifth District below.

statute requires mens rea, and there is nothing to suggest that was even an issue in the case. Without an express holding that the RICO statute does not require mens rea, there is no "express and direct" conflict between the holding in *Huff* and the holding of the decision below.

At the conclusion of its jurisdictional brief, the State complains that the Fifth District did not provide sufficient articulation for reversing all of the counts in this case. Mr. Mathis disagrees, but the point is irrelevant because the State's complaint does not present a proper basis for this Court to accept jurisdiction. Moreover, because all of the counts charged in this case (including the slot machine counts) are punishable by imprisonment, it is presumed that the Legislature intended the counts to contain a mens rea requirement absent an express indication of a contrary intent. *See Giorgetti*, 868 So. 2d at 516 ("[W]e will ordinarily presume that the Legislature intends statutes defining a criminal violation to contain a knowledge requirement absent an express indication of a contrary intent.").

In sum, the decision below properly concluded that whether mens rea must be considered an element of the crimes with which Mr. Mathis was charged is controlled by this Court's decisions in *Chicone v. State*, 684 So. 2d 736 (Fla. 1996),[3] and

[3] In *Chicone*, the Court rejected the proposition that crimes that are merely *mala prohibita* are presumed not to require mens rea. *See Chicone*, 684 So. 2d at 741-42.

Giorgetti. Because (1) there is no clear indication the Legislature intended to remove mens rea as an element of any of those crimes, (2) all of the crimes are punishable by imprisonment, and (3) all involve the potential to punish otherwise law-abiding, well-intentioned, reasonable behavior, all of the crimes must be read as including a mens rea element.[4] This conclusion does not "expressly and directly" conflict with *Giorgetti*, *Bowden*, or *Huff.*

[4] A contrary conclusion would have a chilling effect on lawyers' First Amendment right to advise their clients, rendering the statutes unconstitutional. *See generally Smith v. California*, 361 U.S. 147 (1959) (an ordinance dispensing with a scienter element and imposing strict criminal liability on a bookseller possessing obscene material unconstitutionally inhibits protected First Amendment rights). It would also violate the right of one in Mr. Mathis' position to due process of law, as the law generally disdains criminal statutes that punish innocent conduct. *See, e.g., Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (referring to "the basic principle that 'wrongdoing must be conscious to be criminal'") (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)); *State v. Adkins*, 96 So. 3d 412, 423, 425 (Fla. 2012) (Pariente, J., concurring in result) ("there are constitutional limitations on the Legislature's ability to create crimes that dispense with mens rea and in effect criminalize actions that could be characterized as innocent conduct where such crimes carry substantial penalties").

F. CONCLUSION.

For all of the reasons set forth above, the Court should deny the petition for review.[5]

[5] Mr. Mathis notes that the Fifth District's opinion establishes an alternative basis for reversal. As explained in the Statement of Facts, the State made the soundness of Mr. Mathis' legal advice an issue throughout the trial and, therefore, the Fifth District concluded that the State opened the door to evidence establishing the basis for Mr. Mathis' opinion that his client could legally run internet cafes in Florida. As explained in this brief, the State has not established a basis for this Court to accept jurisdiction because the decision below does not conflict with *Giorgetti*, *Bowden*, or *Huff*. But even if there were a basis to accept discretionary jurisdiction, the alternative basis for reversal would be a compelling reason for the Court to exercise its discretion and decline to accept this case.

G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

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H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certify pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Jurisdictional Brief of the Respondent complies with the type-font limitation.

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