

IN THE SUPREME COURT OF FLORIDA

BRUCE HUNSICKER,

Petitioner,

CASE NO. SC04-2034

v.

DCA CASE No. 5D03-373

STATE OF FLORIDA,

Respondent.

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ON DISCRETIONARY REVIEW FROM  
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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## **SUMMARY OF ARGUMENT**

The decision of the Fifth District Court of Appeal in this case does not construe a provision of the constitution, it only applies the constitution to the facts of the case. The decision also does not expressly and directly conflict with a decision of this Court or any other court. The Fifth District applied the law consistently with other district courts but construed the facts of the record against Hunsicker. Under these circumstances, there is no conflict of law between the district courts. This court does not have jurisdiction to review this case.

## ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL DOES NOT CONSTRUE A PROVISION OF THE CONSTITUTION NOR DOES IT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THIS COURT OR ANY OTHER COURT.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution and Florida Rules of Appellate Procedure 9.030(a)(2)(A)ii, iv, where a decision of a district court "expressly construes" a provision of the state or federal constitution or "expressly and directly conflicts" with a decision of this Court or another district court. With regard to jurisdiction through construction of a provision of the constitution, this Court has said:

In order to sustain the jurisdiction of this court there must be an actual construction of the constitutional provision. That is to say, by way of illustration, that the trial judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. It is not sufficient merely that the trial judge examine into the facts of a particular case and then apply a recognized, clear-cut provision of the Constitution.

*Armstrong v. City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958).

With regard to jurisdiction through conflict, this Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

Hunsicker cannot satisfy either test and this Court is without jurisdiction in this matter.

**The court below did not construe any provision of the constitution.**

Hunsicker argues that the decision of the Fifth District Court of Appeal construes the double jeopardy clause of both the state and federal constitutions. However, a close reading of the opinion below shows that the court actually construes a state statute, and then applies existing constitutional principles to the statute. Under these circumstances, this court does not have jurisdiction.

The Fifth District noted the longstanding constitutional principle that the "standard for determining the constitutionality of multiple convictions for offenses arising from the same criminal transaction is whether the Legislature intended to authorize separate punishments for the two crimes." *Hunsicker v. State*, 881 So. 2d 1166 (Fla. 5th DCA 2004), citing *Gordon v. State*, 780 So. 2d 17, 19 (Fla. 2001). The Fifth District then went on to determine the legislative intent behind the amendments to Florida Statute section 800.04 (2000), the statute under which Hunsicker was charged and convicted. *Id.* Construing the statute, the Fifth District determined that the Legislature did intend "that separate punishments be imposed for

each criminal offense created by the statute." *Id.* The court did not construe, that is "explain, define or otherwise eliminate existing doubts arising from the language or terms of the" double jeopardy clauses, but rather applied the existing construction of the constitutions to the facts of the instant case. *Armstrong*, 106 So. 2d at 409.

The Fifth District did find that a portion of the statute, specifically section 800.04(5)(a), Fla. Stat. (2000) did not provide separate punishments for the two counts of lewd or lascivious molestation with which Hunsicker was charged and convicted. However, the Fifth District applied the existing interpretation of the double jeopardy clauses enunciated in *King v. State*, 834 So. 2d 311 (Fla. 5th DCA 2003) to the facts of the case, and construed those facts against Hunsicker. *Hunsicker*, *supra*. Again, there was no construction of the constitution, but merely an application of the construction to the facts of this case. Under these circumstances, this Court does not have jurisdiction based on construction of a constitutional provision.

**The opinion of the court below does not conflict with any other opinions of this or any other court.**

Hunsicker alternatively argues that the opinion of the Fifth District below conflicts with prior decision of this Court and other district courts of appeal. However, because those other

decisions did not reach the issue decided by the Fifth District in the instant case, there is no conflict.

The Fifth District noted in its analysis that most of the prior decisions involving double jeopardy and multiple convictions were based on the version of section 800.04 prior to its amendment in 2000. *Hunsicker, supra*. Included in those cases is one of the cases Hunsicker now cites to this court as a basis for conflict, *Coffield v. State*, 872 So. 2d 430 (Fla. 4th DCA 2004). Because the Fifth District in this case construed a statute, and because it is a different statute than the one in effect in *Coffield*, there can be no direct and express conflict.

Likewise, there is no express or direct conflict with *King v. State*, 834 So. 2d 311 (Fla. 5th DCA 2003), *Cabanela v. State*, 871 So. 2d 279 (Fla. 3d DCA 2004), or *Mirarez v. State*, 2004 WL 1837888 (Fla. 4th DCA 2004). In each of those cases, the courts applied the same existing construction of the double jeopardy clauses to the cases before them. The courts in those cases did not interpret section 800.04, as amended, and apply the existing construction of the double jeopardy clauses. The question decided in the opinion in the instant case was not raised or decided in any of the cases Hunsicker cites as being in

conflict. There being no conflict, express or otherwise, this Court is without jurisdiction to hear this case.

**CONCLUSION**

Based on the arguments and authorities presented herein, the State asserts that this Court does not have jurisdiction to review the decision in this case.

Respectfully submitted,

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**CERTIFICATE OF FONT AND TYPE SIZE**

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced, in compliance with Fla. R. App. P. 9.210(a)(2).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished to NOEL A. PELELLA, Esq., 112A Orange Ave., Daytona Beach, FL, 32114 by U.S. Mail this 4<sup>th</sup> day of November, 2004.

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