

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JEFFREY McDONALD,

Petitioner,

DCA Case No.: 5D08-1906

v.

S. Ct. Case No. SC09-1808

STATE OF FLORIDA,

Respondent.

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ON DISCRETIONARY REVIEW FROM  
THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

**PETITIONER'S BRIEF ON JURISDICTION**

JAMES S. PURDY  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NO.: 0267082  
444 SEABREEZE BLVD. STE. 210  
DAYTONA BEACH, FL 32118  
(386) 254-3758

COUNSEL FOR PETITIONER



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## STATEMENT OF THE CASE AND FACTS

By Information filed July 19, 2007, Petitioner was charged with one count of lewd or lascivious molestation which was alleged to have occurred “on or between 1998 through 2007.” Petitioner entered a plea of no contest to the charge and all parties agreed that it was a open plea to the court and that no specific sentence had been promised. Petitioner was adjudicated guilty and sentenced to fifteen years in prison followed by lifetime sex offender probation. Petitioner filed a timely notice of appeal to the Fifth District Court of Appeal. During the pendency of the appeal, Petitioner filed a motion to correct sentencing error pursuant to Rule 3.800(b)(2), Florida Rules of Criminal Procedure arguing that the sentence exceeded the statutory maximum that was in effect at the time the offense was alleged to have been committed and the addition of life probation was improper since the statute authorizing that occurred subsequent to the conduct for which Petitioner was being sentenced. At the hearing on the motion to correct sentence, defense counsel argued that the state chose to charge Petitioner with conduct that began in 1998 and continued to 2007. Because of this, the applicable sentencing laws were those that were in effect at the time the offense was alleged to have begun. The state argued that because Petitioner was informed that the statutory maximum he could receive was life in prison, he in essence agreed to an amendment of the

information to provide for that. However, the state also conceded that the statute providing for life probation should not be applied to Petitioner. The trial court granted the motion in part and denied the motion in part and agreed that the offense should be a first degree felony rather than a first degree felony punishable by life and re-sentenced Petitioner to fifteen years in prison followed by fifteen years sex offender probation. On appeal, the District Court of Appeal affirmed. The court noted that the statute proscribing the crime that Petitioner was charged with had undergone three revisions which covered the time period alleged in the information. At the beginning of the time period, the offense was proscribed by Section 800.04(1), Florida Statutes (1997), which defined the crime as a second degree felony. Effective October 1, 1999, the statute was redefined and reclassified as a first degree felony pursuant to Section 800.04(5)(a)-(b), Florida Statutes (1999). The statute was again amended effective September 1, 2005, to reclassify the offense as a first degree felony punishable by life. Section 800.04(5)(a)-(b), Florida Statutes (2005). The District Court of Appeal rejected Petitioner's argument that he should be sentenced only as a second degree felony because it found that there was ample evidence that he molested the child several times between October 1, 1999, and October 31, 2005, when the version of Section 800.04 classifying the offense as a first degree felony was in effect. The court

further held that the fact that Petitioner may have also molested the child on earlier dates when the offense was classified as a second degree felony did not entitle him to be sentenced under that version of the statute. In rejecting Petitioner's argument, the court attempted to distinguish the instant case from *Cairl v. State*, 833 So.2d 312 (Fla. 2<sup>nd</sup> DCA 2003) on the grounds that the court in *Cairl* found that neither the evidence nor the verdict pinpointed the date of the crime. Ultimately, the court found support for its decision in their previous decision in *Bradley v. State*, 971 So.2d 957 (Fla. 5<sup>th</sup> DCA 2007) where the defendant entered a plea to a specific sentence which was not supported by the allegations in the information. The Fifth District affirmed finding that by entering the plea the defendant consented to "the implicit amendment of the information" to include the missing elements.

Petitioner filed a timely motion for rehearing/rehearing en banc/certification requesting the court to certify conflict with *Cairl* and to reconsider its reliance on their prior decision in *Bradley* as this Court had rejected the language contained in the Fifth District's opinion in *Bradley*. The court denied the motion for rehearing. Petitioner filed a timely notice to invoke this Court's discretionary jurisdiction of the Supreme Court.

## SUMMARY OF THE ARGUMENT

The decision of the Fifth District herein directly and expressly conflicts with the prior decision of the Second District Court of Appeal in *Cairl v. State*, 833 So.2d 312 (Fla. 2<sup>nd</sup> DCA 2003) and misapplies this Court's decision in *Bradley v. State*, 3 So.3d 1169 (Fla. 2009).

## ARGUMENT

### ISSUE

THE DECISION OF THE FIFTH DISTRICT IN *McDONALD V. STATE*, 34 FLA.L.WEEKLY D 1308 (FLA. 5<sup>TH</sup> DCA 2009) DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT IN *CAIRL V. STATE*, 833 SO.2D 312 (FLA. 2<sup>ND</sup> DCA 2003) AND THIS HONORABLE COURT IN *BRADLEY V. STATE*, 3 SO.3D 1168 (FLA. 2009) SO AS TO ALLOW THIS COURT TO EXERCISE ITS DISCRETIONARY JURISDICTION AND ACCEPT THE CASE TO RESOLVE THE CONFLICT.

By information, the state charged Petitioner with criminal conduct which allegedly occurred “on or between 1998 through 2007.” The specific conduct was that Petitioner rubbed the clothed and unclothed breasts and vagina of a minor. The state charged the Petitioner with a single count. Petitioner entered a plea to this charge and at the colloquy, the trial court noted that it read the “798” to determine a factual basis for the plea. Subsequently, Petitioner was sentenced to fifteen years in state prison followed by lifetime sex offender probation. He appealed to the Fifth District Court of Appeal and during the pendency of the appeal, Petitioner filed a motion to correct the sentencing error arguing that the criminal conduct that was alleged to have occurred “on or between 1998 through 2007” was at the time of the initial allegation proscribed by Section 800.04, Florida Statutes (1997) which was designated as second degree felony for which the

maximum sentence was fifteen years in state prison. Additionally, the statute which allowed a court to impose a sentence of term of years plus life probation applied only to offenses committed after September 1, 2005, and therefore the imposition of lifetime probation was also error. The trial court granted the motion in part and denied it in part re-sentencing Petitioner to fifteen years in prison followed by fifteen years probation. On appeal, the Fifth District Court of Appeal affirmed noting that during the time framed alleged in the information, the statute underwent several revisions. The court acknowledged that during the initial portion of the time period alleged, the offense was indeed a second degree felony. It was later amended to make the offense a first degree felony and still later amended to make it a first degree felony punishable by life. The court affirmed holding that there was ample evidence to support the fact that the offense was committed during the time frame in which the offense was classified a first degree felony. The fact that Petitioner may have committed the same offense at a time when it was classified as a second degree felony was irrelevant. The court further held that by entering his plea, Petitioner consented to a implicit amendment of the information supporting the charge as a first degree felony.

In *Cairl v. State*, 833 So.2d 312 (Fla. 2<sup>nd</sup> DCA 2003) the defendant was charged with offenses alleged to have occurred on or between January 1, 1991 and

February 4, 1997. The dates straddled three different sentencing guideline time frames and neither the evidence nor the jury verdict actually pinpointed the date of the offenses. The District Court ruled that because of that, the defendant was entitled to be sentenced under the most lenient sentencing scheme that was in effect between the dates alleged in the information. In rejecting Petitioner's reliance on *Cairl*, the Fifth District attempted to distinguish it by noting that in *Cairl*, neither the evidence nor the jury verdict actually pinpointed the date of the offenses. However, the dates in the instant case were similarly vague. The 798, reportedly relied upon by the trial court for its factual basis, contained allegations beginning in 1998 and continuing up to and through 2007. Nothing in the plea colloquy actually pinpointed a date to be included as the specific date that the conduct occurred. Thus, Petitioner was similarly charged with an offense that straddled three different legislative versions of the statute involved. Certainly the state never attempted to amend the information to specifically charge a first degree felony. Therefore, the decision of the District Court herein specifically and expressly conflicts with the decision in *Cairl*.

The court further found support for its decision in its prior decision in *Bradley v. State*, 971 So.2d 957 (Fla. 5<sup>th</sup> DCA 2007) wherein the court held a defendant's explicit plea to the discharge of a firearm during the commission of a

robbery was sufficient to support the imposition of a mandatory twenty years under the 10/20/life statute even though the information did not allege the fact that the firearm was discharged. The Fifth District in affirming **Bradley** did indeed use the language to the effect that such an explicit plea constituted an implicit amendment of the information to support the imposition of the mandatory sentence. However, this Court accepted the **Bradley** case for review and although ultimately approved the result reached by the Fifth District did not approve the implicit amendment language. In **Bradley v. State**, 3 So3d 1169 (Fla. 2009), the Court held that by specifically pleading to the discharge of a firearm Bradley waived any defect in the charging information. Thus, the **Bradley** case has no application to the instant case since there is no allegation that there was any defect in the charging document. Additionally, the plea entered herein was an open plea not a plea to a specific sentence. By misapplying **Bradley**, the Fifth District has created conflict and therefore this Court has discretionary jurisdiction to resolve that conflict.

In summary, the decision of the district court of appeal below expressly and directly conflicts with the decision of the Second District in **Cairl v. State**, supra as well as this Court's opinion in **Bradley v. State**, supra. Therefore, this Court has discretionary jurisdiction to accept the case for review and resolve the conflict.

CONCLUSION

Based on the foregoing reasons and authorities cited herein, Petitioner respectfully request this Honorable Court to exercise its discretionary jurisdiction and accept the case for review.

Respectfully submitted,

JAMES S. PURDY  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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MICHAEL S. BECKER  
ASSISTANT PUBLIC DEFENDER  
Florida Bar No. 0267082  
444 Seabreeze Blvd. Ste. 210  
Daytona Beach, Florida 32118  
(386) 254-3758

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Bill McCollum., 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal, and mailed to Jeffrey McDonald, DOC #591002, Wakulla Correctional Institution, 110 Melaleuca Drive, Crawfordville, FL 32327, on this 5<sup>th</sup> day of October, 2009.

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MICHAEL S. BECKER  
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is 14 point Times New Roman font.

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MICHAEL S. BECKER  
ASSISTANT PUBLIC DEFENDER