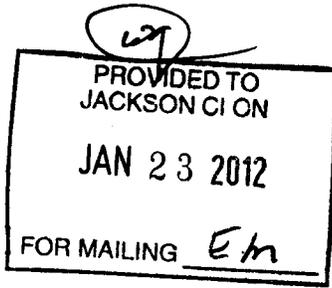


IN THE SUPREME COURT OF THE STATE OF FLORIDA

EDWIN MURPHY,
Petitioner

v.

STATE OF FLORIDA,
Respondent



Case No.: SC12-27
Lower Tribunal Nos.: 5D09-3771
07-CF-678

PETITIONER'S BRIEF ON JURISDICTION

On Review from the Fifth District Court of Appeal of the State of Florida

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STATEMENT OF THE CASE AND FACTS

The Petitioner, Edwin Murphy, pro se, was convicted by a jury on April 22, 2008, of attempted sexual battery (count one), the lesser included offense of the charged capital sexual battery (F.S. section 794.011(2)), and lewd or lascivious molestation as charged (F.S. section 800.04(5)) (count three). The trial court sentenced petitioner in count three to 30 years prison with a 25 year mandatory minimum, and took no action on count one, citing a potential double jeopardy violation. Petitioner appealed to the Fifth District Court of Appeal.

Appointed counsel on appeal filed an Anders Brief. Petitioner filed a pro se brief and argued that the trial court erred 1) when it failed to take action on count one, and 2) when it instructed the jury on attempted sexual battery. The Fifth District Court held that the trial court erred when it failed to take action on count one and remanded for the court to enter an appropriate order. See *Murphy v. State*, 16 So.3d 269 (Fla. 5th DCA 2009). In a concurring opinion, Judge Griffin suggested that this Court's decision in *State v. Meshell*, 2 So.3d 132 (Fla. 2009) "may inform the trial court's decision on remand."

On remand, the trial court conducted a hearing without appointing counsel to Petitioner. The court held that based on the Fifth District's remand decision and this Court's decision in *Meshell*, Petitioner's convictions for both counts one and three do not violate double jeopardy. The court then adjudicated Petitioner guilty

of count one and imposed a 15 year concurrent sentence. Petitioner then filed his second (pro se) appeal to the Fifth District Court.

The Petitioner argued in this second appeal that 1) the trial court erred when it failed to appoint counsel at the hearing and 2) the convictions for both counts one and three violate double jeopardy pursuant to this Court's decision in *State v. Paul*, 934 So.2d 1167 (Fla. 2006), because the "acts" occurred within the same spatial and temporal zone without a break to have allowed Petitioner to reflect and form a new criminal intent for each offense. Petitioner also argued that this Court's decision in *Meshell* does not apply because the court explicitly held that its double jeopardy analysis, consisting of the "same character and type of crime" analysis, is limited solely to Florida Statutes section 800.04(4).

In its written opinion, the Fifth District Court held that Petitioner was entitled to the appointment of counsel at the hearing and remanded for the trial court to conduct a new hearing and to appoint counsel to represent petitioner at the hearing. See *Murphy v. State*, 49 So.3d 295 (Fla. 5th DCA 2010) (Appendix). The court also held that the convictions for both counts one and three do not violate double jeopardy because analysis of the differences in the character and type of crime, according to *Meshell*, "are as important as the spatial and temporal aspects when considering whether multiple punishments are appropriate."

Petitioner filed a motion for rehearing and certification. He suggested that the district court overlooked or misapprehended the fact that in *Meshell*, this Court explicitly limited its “separate character and type of crime” double jeopardy analysis to section 800.04(4), Florida Statutes, and that *Paul* is controlling authority. Petitioner also asked the court to certify a question to this Court, and to certify conflict with the Second District Court of Appeals’ decision in *Brown v. State*, 25 So.3d 78 (Fla. 2d DCA 2009), which held that this Court’s decision in *Meshell* does not apply to section 800.04(5). The Fifth District Court denied the motion for rehearing and certification. Mandate issued December 30, 2010. The Petitioner filed a notice to invoke this Court’s discretionary jurisdiction. This notice was dismissed as untimely. This Court subsequently granted belated discretionary review in an order dated January 10, 2012. In a separate order rendered the same date, this Court allowed Petitioner to and including January 25, 2012 to serve the instant brief on jurisdiction.

SUMMARY OF THE ARGUMENT

In this case, the district court of appeal held that the “separate character and type of crime” analysis employed by this Court in *Meshell* leads to the conclusion that Petitioner’s convictions for attempted sexual battery and lewd or lascivious molestation do not violate double jeopardy. The decision of the district court cannot be reconciled with *Meshell*, where this Court explicitly stated that its

decision is limited solely to section 800.04(4), Florida Statutes. It also cannot be reconciled with *Brown v. State*, 25 So.3d 78 (Fla. 2d DCA 2009), wherein the Second District Court held that the reasoning in *Meshell* does not apply to convictions under section 800.04(5), Florida Statutes. Furthermore, the district court's decision in this case cannot be reconciled with court's decision in *State v. Paul*, 934 So.2d 1167 (Fla. 2006), wherein this Court employed the "Blockburger" "same elements" test to determine whether multiple conviction under sections 800.04(5), (6), and (7) violate double jeopardy. Thus, the Petitioner contends that the decision of the district court here expressly and directly conflicts with previous decisions of this Court and of the Second District Court of Appeals.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art. V., §. 3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv). As shown herein, the facts of this case meet this limited criterion.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN STATE V. PAUL AND STATE V. MESHELL, AND EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEALS IN BROWN V. STATE.

Citing *Meshell*, the district court above employed the “separate character and type of crime” analysis to determine that Petitioner’s convictions do not violate double jeopardy. As explained below, the decision of the district court conflicts with the decision of this Court in *State v. Meshell*, 2 So.3d 132 (Fla. 2009), which limited its “separate character and type of crime” analysis to section 800.04(4), Florida Statutes.

The decision of the district court also conflicts with this Court’s decision in *Paul*, which held that the “Blockburger” “same elements” test pursuant to section 775.021(4) is the sole method of determining whether multiple punishments for crimes under section 800.04, Florida Statutes, violate double jeopardy.

Finally, the decision of the district court conflicts with *Brown v. State*, 25 So.2d 78 (Fla. 2d DCA 2009), which held that the reasoning of *Meshell* does not apply to convictions under section 800.04(5)(a). The Petitioner respectfully submits that this Court should grant discretionary review and resolve the conflict by quashing the decision of the district court below.

In the decision of the district court, *Murphy v. State*, 49 So.3d 295 (Fla. 5th

DCA 2010) (Appendix), the court held:

The differences in the character and type of crime proven are as important as the spatial and temporal aspects when considering whether multiple punishments are appropriate. An analysis of those differences, as noted by Judge Griffin in her concurring opinion in the defendant's initial appeal, leads to the conclusion that the defendant's convictions for attempted sexual battery and lewd and lascivious molestation did not violate his double jeopardy rights. See also *State v. Meshell*, 2 So.3d 132, 135 (Fla. 2009) (Holding that acts of oral, anal, and vaginal penetration, as prescribed by statute defining lewd and lascivious battery, are distinct criminal acts, such that separate punishments for these acts do not violate double jeopardy, despite the fact that they occurred in the same criminal episode).

Thus, the district court expressly held that *Meshell* stands for the proposition that the separate character and type of crime double jeopardy analysis is the appropriate method of determining whether multiple punishments violate double jeopardy, despite whether the offenses occurred in the same criminal episode, and that the standards explicated in *Paul*, which are routinely re-affirmed by this Court, are abrogated by *Meshell*.

The district court decision is in direct conflict with the decision of this Court in *Meshell*, wherein this Court explicitly limited Its "separate character and type of crime" double jeopardy analysis to section 800.04(4), Florida Statutes:

"Because the Fifth District only had section 800.04(4) at issue before it, and ruled only on that statute, we limit our review to the certified question as it pertains to section 800.04(4)[...]." *Id* at 134

The certified question in *Meshell* asked whether the sex acts under sections 794.011 and 800.04(4), Florida Statutes, are distinct criminal acts for double jeopardy purposes, so that a defendant can be separately convicted for each act committed during a single episode. See *Id.* at 133. (Each of these subsections specifically addressed sexual penetration – oral, anal, or vaginal.)

This Court properly limited the scope of applying the “separate character and type of crime” analysis to sections 800.04(4) and 794.011, Florida Statutes, with due consideration of the “Blockburger” “same elements” test, and Its decision in *Paul*. (Incidentally, there seems to be a tendency by the courts of this state to read more into this Court’s *Meshell* opinion than what this Court intended. See, e.g., *Comas v. State*, 45 So.3d 49 (Fla. 1st DCA 2010).) This Court should now reaffirm that limited scope by accepting discretionary review and quashing the contrary decision of the district court below.

The district court decision is also in conflict with the decision of the Second District Court of Appeals in *Brown v. State*, 25 So.3d 78 (Fla. 2d DCA 2009), wherein the court held that *Brown* was entitled to a new appeal to argue his double jeopardy claim because:

[...] The reasoning *Meshell* does not apply to convictions under section 800.04(5)(a) because that section prohibits lewd and lascivious touching and proscribes sexual acts that are different from the acts proscribed by the sexual battery statute.

Id. At 80. The Second District properly determined that this Court's decision in *Meshell* does not apply to section 800.04(5). This Court should accept discretionary review, approve *Brown*, and quash the contrary decision of the district court below.

The district court decision is also in conflict with this Court's decision in *State v. Paul*, 934 So.2d 1167 (Fla. 2006), wherein this Court considered sections 800.04(5), (6), and (7) and held:

The prevailing 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. [...] [A]bsent an explicit statement of legislative intent to authorize separate punishments for two crimes, application of the Blockburger 'same elements' test pursuant to section 775.021(4)...is the sole method of determining whether multiple punishments are double-jeopardy violation. [...] In reviewing section 800.04, we do not find a clear statement of legislative intent, and thus we must employ the Blockburger test as codified in section 775.021, Florida Statutes (2005), to determine whether separate offenses exist.

Id. At 1171, 1172. (Internal citations omitted.)

This Court properly applied the legislative intent standard and 'same elements' test in *Paul*, and reiterated in *Meshell* at 136, and this Court should clarify that *Paul* is not abrogated by its decision in *Meshell* by accepting discretionary review and quashing the contrary decision of the district court below.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and should exercise that jurisdiction to consider the merits of the Petitioner's argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I hand-delivered a true copy of this brief to institution personnel for service by U.S. Mail delivery on the Office of the Attorney General, *444 Seabreeze Blvd., Suite 500,* ~~300 South Beach St.~~, Daytona Beach, Florida 32114, this 23rd day of January, 2012.

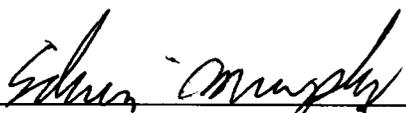


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CERTIFICATE OF FONT COMPLIANCE

I hereby certify that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.



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