IN THE SUPREME COURT
OF FLORIDA

CASE NO. SC06-1884

MARK HAWKINS

Petitioner,

vs.

THE STATE OF FLORDA

Respondent.

On discretionary conflict review of a decision
of the Fourth District Court of Appeal

PETITIONER'S BRIEF ON JURISDICTION

ROBERT C. BUSCHEL, Esq.
ROTHSTEIN ROSENFELDT ADLER
401 East Las Olas Blvd. Suite 1650
Fort Lauderdale, FL 33301
(954) 522-3456
(954) 527-8663

ERIC T. SCHWARTZREICH, Esq.
CARTER SCHWARTZREICH
& YATES, P.A.
1225 S.E. 2ND Avenue
Fort Lauderdale, FL 33316
(954) 525-8000

Counsel for Petitioner
Mark Hawkins

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

CASES
PAGE

STATEMENT OF THE CASE AND FACTS

Petitioner Mark Hawkins appeals his convictions of one count of the unlicensed practice of medicine causing serious bodily injury (death), one count of felony third degree murder, and one count of culpable negligence. The convictions occurred from Hawkins' alleged injection of silicone into the buttocks of the decedent, which the state claimed caused her death. Among his many claims of error in his trial and sentence, Hawkins contends that the trial court erred in allowing the medical examiner to testify that the decedent's death was caused by the injection given by Hawkins, because the examiner had no expertise as to the migration of silicone in the body. *Hawkins v. State,* 933 So. 2d 1186, 1187 (Fla. 4th DCA 2006). The Fourth District agreed that the medical examiner was "unqualified to render the opinion on causation." *Id.*

On April 26, 2006, the Fourth District Court issued an opinion ("*Hawkins I*") reversing and discharging Hawkins' convictions for felony third degree murder and unlicensed practice of medicine causing serious bodily injury (death). Subsequent to the State's motion for rehearing, the Court withdrew its first opinion and on June 21, 2006 issued a second one ("*Hawkins II*" 933 So. 2d at 1186), relying on two United States Supreme Court cases, *Lockhart v. Nelson,* 488 U.S. 33, 109 S. Ct. 285, 102 L.Ed 2d

265 (1988), and *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), reversed and remanded with instructions to grant Hawkins a new trial, not a discharge. Hawkins asserts that when the Fourth District Court of Appeal issued its first opinion (*Hawkins I)* the Court acquitted him of the most serious of charges. When the Fourth District, subsequently "withdrew" its opinion and issued a different second opinion, one granting a different remedy of a new trial, it violated the double jeopardy principles of the Fifth Amendment to the United States Constitution and Article I, § 9 of the Florida Constitution.

SUMMARY OF THE ARGUMENT

The Fourth District wrote and publicly distributed two opinions in this case. The Fourth District made findings of fact that were consistent in both opinions, but the conclusion of law and the remedy granted were extremely different – acquittal versus new trial.

This Court has jurisdiction to review a decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal. . . on the same question of law," pursuant to Article V, § 3(b)(3), Florida Constitution, and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. Hawkins requests this Court consider the following question:

> MAY A DISTRICT COURT THAT HAS APPLIED § 924.34 TO REDUCE AN ADJUDICATION TO A LESSER INCLUDED OFFENSE AND THEREAFTER WITHDRAWS THAT OPINION AND ORDERS A RETRIAL ON THE GREATER OFFENSE, CONSISTENT WITH THE PROHIBITION AGAINST DOUBLE JEOPARDY?

I. THE FOURTH DISTRICT COURT'S FIRST OPINION, "CORRECT OR NOT," WAS AN ADJUDICATION OF INSUFFICIENT EVIDENCE, AND IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF DISTRICT COURTS OF APPEAL.

In the first opinion (*Hawkins I*) the Court held:

> As Dr. Price could not competently give an opinion that the silicone could migrate with sufficient rapidity to cause an acute embolism**, the state failed to prove that the act of the defendant caused the death of Lawrence.**

(emphasis added).

The District Court also concluded the following about Dr. Price's testimony:

> Further, Dr. Price actually equivocated in her testimony, refusing to rule out the possibility that prior silicone injections which Lawrence received contributed to causing her death in an acute fashion. . . .

(*Hawkins I*, p.6).

In *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S. Ct. 1349 (1977), a judicial decision that the evidence was insufficient, "correct

or not," requires a judgment of acquittal. That principle has been recognized by the First District.

> [W]hen the trial judge grants a motion for judgment of acquittal under Florida Rule of Criminal Procedure 3.380(a), "the ruling of the judge . . . actually represents a resolution, ***correct or not***, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S. Ct. 1349, 1354, 51 L.Ed.2d 642 (1977). In such cases, ***"[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'*** *United States v. Ball*, 163 U.S. 662, 670-71, 16 S. Ct. 1192, 1195, 41 L.Ed. 300 (1896)." *Id.*; *see Lee v. United States*, 432 U.S. 23, 29-30, 97 S. Ct. 2141, 2145, 53 L.Ed.2d 80 (1977).

Hudson v. State, 711 So. 2d 244, 247 (Fla. 1st DCA 1998) (emphasis added).

When a jury acquits, "there is ***no exception*** [to the prohibition against trying the same person again for the same offense] permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous,'" *Sanabria v. United States*, 437 U.S. 54, 75, 98 S. Ct. 2170, 2184, 57 L.Ed.2d 43 (1978) (*quoting Fong Foo v. United States*, 369 U.S. 141, 143, 82 S. Ct. 671, 672, 7 L.Ed.2d 629 (1962)), the acquittal may have been. ***The same rule applies when acquittal rests on a judicial determination***, after jeopardy has attached and before a verdict is returned, that the evidence does not

establish the fact of the crime. *Hudson*, 711 So. 2d at 247 (Fla. 1st DCA 1998); *see also Freer v. Dugger*, 935 F.2d 213, 217-18 (11th Cir. 1991) (distinction between "insufficiency" and "weight" on what basis the trial judge made its ruling, is crucial).

In *Hawkins I*, The District Court invoked Florida Statute Section 924.34, the Fourth District "reverse[d] the convictions for third degree murder and for the unlicensed practice of medicine causing serious bodily injury, with directions to reduce the latter conviction to the lesser included offense of unlicensed practice of medicine not causing serious bodily injury." (*Hawkins I p.5*).

Florida Statute Section 924.34 states:

> When evidence sustains only conviction of lesser offense.-- When the appellate court **determines that the evidence does not prove** the offense for which the defendant was found guilty but does establish guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall **reverse the judgment** and direct the trial court **to enter judgment for the lesser degree** of the offense or for the lesser included offense. (emphasis added).

Section 924.34 thus gives the appellate courts the power to make factual conclusions and to adjudicate. *See, e.g., Jones v. State*, 885 So. 2d 466, 469 n.1 (Fla. 4th DCA 2004) (holding section 924.34 can be applied in

this case without creating any Sixth Amendment concerns).[1] *See also Santiago v. State*, 874 So. 2d 617 (Fla. 5th DCA 2004) (finding of insufficient evidence to prove felony third-degree murder requires defendant's discharge not new trial). When the Court issued *Hawkins I* it **adjudicated** Hawkins of a lesser included offense, therefore under *Burks*, retrial is prohibited by the Double Jeopardy Clause. 437 U.S. at 10-11.[2]

The Fourth District relied upon *Pacheco v. State*, 698 So. 2d 593 (Fla. 2d DCA 1997). The way the Fourth District relied upon *Pacheco*, conflicts with the First District's *Hudson* opinion. The *Pacheco* opinion remanded

---

[1] The one case that discusses withdrawn appellate opinions not invoking the Double Jeopardy Clause is *Lewis v. State*, 285 S.E.2d 179 (Ga. 1981) (relying on *Burks*, 437 U.S. at 1 and *Greene v. Massey*, 437 U.S. 19, 98 S. Ct. 2151, 57 L.Ed.2d 15 (1978)). The *Lewis* opinion does not, however, interpret Florida Statute Section 924.34, nor does it consider *Martin Linen Supply Co.*'s, 430 U.S. at 564 "correct or not" language regarding application of the Double Jeopardy Clause.

[2] Other courts have recognized the obligation to examine the sufficiency of all the evidence when the issue has been raised. *Municipal Court v. Lydon*, 466 U.S. 294, 321-22, 104 S.Ct. 1805, 1820, 80 L.Ed.2d 311 (1984) (Brennan, J., concurring) (citations omitted); *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States v. Quinn*, 901 F.2d 522, 529 n.5 (6th Cir. 1990) ("the reversal on trial error here does not necessarily obviate the need to review the sufficiency of the evidence"); *Delk v. Atkinson*, 665 F.2d 90, 93 n.1 (6th Cir. 1981); *United States v. Orrico*, 599 F.2d 113, 116 (6th Cir.1979)); *cf. United States v. Aarons*, 718 F.2d 188, 189 n. 1 (6th Cir.1983). The Fourth District failed to review the evidence again, or did so and granted retrial rather than discharge. A conflict exists to the extent the Fourth District reviewed the sufficiency of the evidence, considered the evidence insufficient, and granted only a new trial.

for retrial based upon inadmissible hearsay. 698 So. 2d at 596. But the *Pacheco* court reviewed the evidence and determined that with the inadmissible evidence, there was sufficient evidence. In *Hawkins* there was insufficient evidence even with the inadmissible expert opinion. *Hudson*, interpreting the United States Supreme Court precedent would require the Fourth District to have analyzed the inadmissible evidence and determine if there was sufficient evidence to bar retrial.

CONCLUSION

This Court should require the State of Florida to respond and then grant review on the merits of this petition.

Respectfully submitted,

R Buschel

By: _____

Robert C. Buschel
Fla. Bar No. 0063436

ERIC T. SCHWARTZREICH
CARTER SCHWARTZREICH
& YATES, P.A.
Eric T. Schwartzreich
Fla. Bar No. 0086452
1225 S.E. 2ND Avenue
Fort Lauderdale, FL 33316
(954) 525-8000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on the 26th day of September, 2006, to Joseph Tringali, Esq. Office of the Attorney General, 1515 N. Flagler Drive , 9th Floor, West Palm Beach, FL 33401-3432.

R Buschel

By: _____

Robert C. Buschel

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that the brief is Times New Roman 14-point font.

R Buschel

By:_____

ROBERT C. BUSCHEL