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IN THE SUPREME COURT OF FLORIDA

NELSON DELGADO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-1363

L.T. 4D13-2288

**ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA**

JURISDICTIONAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE#
TABLE OF CONTENTS.....	ii
TABLE OF CITATIONS.....	iii
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	

**THE FOURTH DISTRICT COURT OF APPEAL'S ORDER DOES
NOT PRESENT A BASIS FOR THIS COURT'S CONFLICT
JURISDICTION2**

CONCLUSION.....	5
CERTIFICATE OF SERVICE AND TYPE PLACE COMPLIANCE.....	6

TABLE OF CITATIONS

CASES

PAGE

Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983)3
Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)2
Florida Bar v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988).	2
Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980)3
Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975)	3
Reaves v. State, 485 So.2d 829, 830 (Fla. 1986)	2
State v Drawdy, 136 So. 3rd 1209 (Fla. 2014)2,4

OTHER AUTHORITIES

Art. V, Section 3(b)(3) of the Florida Constitution (1980).2	
Florida Rule of Appellant Procedure 9.0305

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, "DELGADO" the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the Order of the lower tribunal, attached as Appendix (A).

ORDERED that this Court previously stayed this case pending the Florida Supreme Court's decision in *State v. Drawdy*, SC12-2012. The Florida Supreme Court has decided the matter which controls the outcome in this proceeding. The petition is denied on the merits. *State v. Drawdy*, 39 Fla. L. Weekly S209 (Fla. April 10, 2014).

SUMMARY OF THE ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL'S ORDER DOES NOT PRESENT A BASIS FOR THIS COURT'S CONFLICT JURISDICTION

Petitioner seeks review of the Fourth District Court of Appeals Order denying his post conviction Habeas Corpus, alleging ineffective assistance of appellate counsel. The district court denied relief based on this Court's opinion in State v Drawdy, 136 So. 3d 1209 (Fla. 2014), which addressed the same double jeopardy issue central to petitioner's Habeas claim. Petitioner does not argue that the district court's order presents a conflict with Drawdy or any other district court or supreme court case, but argues grounds not cognizable under this Court's discretionary jurisdiction. Therefore, jurisdiction should be denied.

ARGUMENT

Standard of Review

This Honorable Court has authority pursuant to Article V, Section 3(b)(3) of the Florida Constitution (1980) to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. See Florida Bar v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988).

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986) (rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980) ("regardless of whether they are accompanied by a dissenting or concurring opinion").

This Court in Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975) made it clear that its "jurisdiction to review decisions of courts of appeal on the basis of alleged conflict is invoked by (1) the announcement of a rule of law to produce a different result in a case which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case.

In this second situation, the facts of the case are of the utmost importance." [Emphasis added]. See also Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983) ("cases which

are cited for conflict that are distinguishable on their facts will not vest this Court with jurisdiction").

Merits

Petitioner seeks review of the District Court's Order denying his post conviction Habeas Corpus, alleging ineffective assistance of appellate counsel. The district court denied relief based on this Court's opinion in State v Drawdy, 136 So. 3d 1209 (Fla. 2014), which addressed the same double jeopardy issue central to petitioner's Habeas. In Drawdy, this Court held that when charges for sexual battery and lewd and lascivious molestation are found to be distinct criminal acts of a separate character and type, convictions for both does not violate double jeopardy. Id.

Petitioner does not argue that the district court's order conflicts with this Court's Drawdy holding or any other district court or any supreme court case. Instead, he argues that the district's court's reliance on Drawdy was erroneous because the trial court vacated one of his convictions, due to pre Drawdy double jeopardy concerns. (PJB Page 2-3). He then asks this Court to review the trial court record to clarify that he was only convicted of one count. (PJB Page 3).

Florida Rule of Appellate Procedure 9.030(2) (A) (iv) limits this court's conflict jurisdiction to review of district court

opinions which expressly and directly conflict with a decision of another district court or of the Supreme Court on the same question of law. As outlined above, Petitioner has not asserted any basis that would entitle him to this Court's jurisdiction. Therefore, this Court should dismiss this Petition.

CONCLUSION

Based on the foregoing reasons, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

Respectfully submitted and certified,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Extension of Time to Respond to Petitioner's Jurisdictional Brief was sent on October 9, 2014 by U.S. Mail to Nelson Delgado, DG No: B08193, Martin C.I., 1150 S.W. Allapattah Road, Indiantown, Florida 34956 and electronically filed at the Florida Portal.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,

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