

RECEIVED, 11/25/2014 17:08:57, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

EDUARDO A. HERNANDEZ,

Petitioner,

v.

CASE NO. SC14-2008

STATE OF FLORIDA

Respondent.

\_\_\_\_\_/

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

JURISDICTIONAL BRIEF OF RESPONDENT

PAMELA JO BONDI  
ATTORNEY GENERAL

TRISHA MEGGS PATE  
TALLAHASSEE BUREAU CHIEF,  
CRIMINAL APPEALS  
FLORIDA BAR NO. 0045489

MICHAEL McDERMOTT  
ASSISTANT ATTORNEY GENERAL  
FLORIDA BAR NO. 0593151

OFFICE OF THE ATTORNEY GENERAL  
PL-01, THE CAPITOL  
TALLAHASSEE, FL 32399-1050  
(850) 414-3300  
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

**TABLE OF CONTENTS**

**TABLE OF CITATIONS** . . . . . 3

PRELIMINARY STATEMENT . . . . . **4**

STATEMENT OF CASE AND FACTS . . . . . **4**

SUMMARY OF ARGUMENT . . . . . 5

ARGUMENT.....7

**ISSUE I** . . . . . 7

CONCLUSION .....10

CERTIFICATE OF SERVICE ..... 11

CERTIFICATE OF COMPLIANCE ..... 11

## TABLE OF CITATIONS

### Cases

<i>Estes v. City of North Miami Beach</i> , 227 So. 2d 33 (Fla. 1969) .....	9
<i>Hernandez v. State</i> , 135 So. 3d 352 (Fla. 1st DCA 2013) .....	passim
<i>Novack v. Novack</i> , 195 So. 2d 199 (Fla. 1967) .....	9
<i>Pirelli Armstrong Tire Corp. v. Jensen</i> , 777 So. 2d 973 (Fla. 2001) .....	7
<i>Shelley v. State</i> , 134 So. 3d 1138 (Fla. 2d DCA 2014) .....	5, 7, 8
<i>State v. Murphy</i> , 124 So. 3d 323 (Fla. 1st DCA 2013) .....	5, 7, 8
<i>The Florida Star v. B.J.F.</i> , 530 So. 2d 286 (Fla. 1988) .....	8, 9
<i>Zirin v. Charles Pfizer &amp; Co.</i> , 128 So. 2d 594 (Fla. 1961) .....	9

### Statutes

Art. V, § 3(b) (4), Fla. Const .....	7, 9
Article V, Section 3(b) (3) of the Constitution of the State of Florida	6, 8,
9, 10	

### Rules

Florida Rule of Criminal Procedure 3.850(1) .....	8, 9
Rule 3.850 .....	8

### **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, Eduardo A. Hernandez, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by his 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**

Petitioner was convicted and sentenced for both using a computer online service to solicit a person believed to be a child, to engage in unlawful sexual conduct, as well as for traveling for the purpose of engaging in unlawful sexual conduct with a person believed to be a child. *Hernandez v. State*, 135 So. 3d 352 (Fla. 1st DCA 2013). Petitioner raised two issues on his direct appeal, to wit: 1) that the trial court erred in denying his motion for judgment of acquittal; and 2) that the trial court erred in denying his motion to disqualify the trial judge. *Id.* Appellant's conviction was affirmed by the First District Court of Appeal in a written opinion filed on December 17, 2013. *Id.*

## SUMMARY OF ARGUMENT

### ISSUE I

While the First District Court cited *State v. Murphy*, 124 So. 3d 323 (Fla. 1st DCA 2013) in its opinion on Petitioner's direct appeal, it didn't cite the case for the legal proposition which is the basis of Petitioner's petition before this Court, i.e., that double jeopardy bars dual convictions for using a computer online service to solicit a person believed to be a child for sex and traveling for the purpose of engaging in unlawful sexual conduct with a person believed to be a child. *Hernandez v. State*, 135 So. 3d 352, 355 (Fla. 1st DCA 2013). In fact, Petitioner concedes that he didn't raise a double jeopardy claim in his initial brief or his reply brief on his direct appeal before the First District Court of Appeal. (PJB. 8).

Because Petitioner never raised double jeopardy as an issue in his direct appeal, the First District Court had no cause to consider whether or not a conflict existed. Therefore, this Court is without jurisdiction to review this case since the district court never "passed upon" the certified question. Even assuming that Petitioner's appellate counsel's performance was deficient for not raising a double jeopardy claim on his direct appeal, Petitioner wasn't prejudiced as a result, because he can file a petition for habeas corpus in the First District Court of Appeal if this Court ultimately affirms the Fourth District's decision in *Shelley v. State*, 134 So. 3d 1138 (Fla. 2d DCA 2014).

This Court is also without jurisdiction to review the First District Court's denial of Petitioner's motion to certify a question of "great public importance" because the decision to certify a question of great public importance is one solely for the district court to determine. Therefore, Petitioner wasn't prejudiced by his appellate counsel's failure to advise him that he could have filed a petition for certiorari review in this court in connection with that issue pro se. Also, this Court is without jurisdiction to review the First District Court's denial of Petitioner's motion to certify a question of "great public importance" because the First District Court didn't pass upon a question certified by it to be of great public importance.

Finally, this Court lacks jurisdiction pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida (i.e., *uncertified conflict*), because the First District Court's opinion didn't *directly* conflict with a decision of another district court of appeal or of the supreme court on the same question of law, since the conflict wasn't addressed in the court's opinion and Petitioner's motion to certify conflict was denied without comment. *Hernandez*, 135 So. 3d at 352.

## **ARGUMENT**

### **ISSUE I**

Petitioner argues, *inter alia*, that this Court should accept jurisdiction because the First District Court's opinion cited *State v. Murphy*, 124 So. 3d 323 (Fla. 1st DCA 2013), which is pending review before this Court and because *Murphy* conflicts with other cases pending before this Court, including *Shelley v. State*, 134 So. 3d 1138, 1141 (Fla. 2d DCA 2014). However, while it's true that the First District Court cited *Murphy* in its opinion, it didn't cite the case for the legal proposition which is the subject of Petitioner's claim for relief, i.e., that double jeopardy bars dual convictions for using a computer online service to solicit a person believed to be a child for sex and traveling for the purpose of engaging in unlawful sexual conduct with a person believed to be a child. *Hernandez v. State*, 135 So. 3d 352, 355 (Fla. 1st DCA 2013).

In fact, Petitioner concedes that he didn't raise a double jeopardy claim in his initial brief or his reply brief on his direct appeal before the First District Court of Appeal. (PJB. 8). Therefore, the First District Court had no cause to consider whether or not a conflict existed. In the context of certified *questions*, and pursuant to Art. V, § 3(b)(4), Fla. Const., this Court is without jurisdiction to review a case unless the district court has "passed upon" the certified question. *Pirelli Armstrong Tire Corp. v. Jensen*, 777 So. 2d 973 (Fla. 2001) ("Because in rendering its decision, the Second District did not pass upon the question certified to

this Court, we are without jurisdiction to review this case.") By analogy, a certified *conflict* pertaining to an issue not addressed by the district court would be no more appropriate for discretionary review. Also, pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida, this Court's jurisdiction is dependent upon the district court having expressly addressed the pertinent question of law. *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988) ("This Court does not, however, have subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued without opinion or citation.")

Even assuming that Petitioner's appellate counsel's performance was deficient for not raising a double jeopardy claim on his direct appeal or for not telling Petitioner that he could seek discretionary review in this Court pro se based upon the double jeopardy or conflict issues, Petitioner wasn't prejudiced as a result. That's because certification of conflict was unnecessary to provide him with grounds for relief should this Court ultimately affirm the Fourth District's decision in *Shelley* and disapprove the First District's holding in *Murphy* when this Court decides *Shelley*, which is currently pending in this Court on a certified conflict and set for oral argument on December 2, 2014. (i.e., Case No. SC14-755). In that event, Petitioner could file a petition for habeas corpus in the First District Court of Appeal pursuant to Florida Rule of Criminal Procedure 3.850(1), on the ground that due to the timing of his direct appeal and



this Court's ruling in *Shelley* (assuming this Court affirms *Shelley*), filing a Rule 3.850 motion in the trial court would be ". . . inadequate or ineffective to test the legality . . . ." of his detention. Fla. R. Crim. P. 3.850(1).

Similarly, this Court is without jurisdiction to review the First District Court's denial of Petitioner's motion to certify a question of "great public importance." Art. V, §3(b)(4). *Novack v. Novack*, 195 So. 2d 199, 200 (Fla. 1967) (" . . . the proposition of whether a decision of a district court decides a question of great public importance is one *solely for the district court to determine . . . .*" ) (quoting *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 597 (Fla. 1961). (emphasis supplied). See also *Estes v. City of North Miami Beach*, 227 So. 2d 33, 34 (Fla. 1969) (certification by the District Court is ". . . a prerequisite to our n of filing a petition for certiorari review in this Court pro se to appeal any of the First District's opinions or orders. (PJB. 9). Even assuming that appellate counsel's failure to advise Petitioner that he could file a petition for certiorari review in this Court pro se constituted deficient performance, Petitioner wasn't prejudiced as a result of that either, because the First District Court didn't ". . . [pass] upon a question certified by it to be of great public importance . . . ." Art. V, §3(b)(4); *The Florida Star*, 530 So. 2d at 288; *Hernandez*, 135 So. 3d at 352.

Because this Court lacks jurisdiction to review the First District Court's denials of Petitioner's motions to certify question and to certify

conflict for the reasons discussed above, the only jurisdictional basis remaining for this Court to accept Petitioner's case for discretionary review would be pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida (i.e., *uncertified* conflict). However, this basis for jurisdiction is also inapplicable to Petitioner's case. That's because the First District Court's opinion didn't ". . . directly [conflict] with a decision of another district court of appeal or of the supreme court on the same question of law," since the conflict wasn't addressed in the court's opinion and Petitioner's motion to certify conflict was denied without comment. Art. V, §3(b)(3), Fla. Const; *Hernandez*, 135 So. 3d at 352.

#### **CONCLUSION**

Based on the foregoing discussions, the State respectfully requests this Honorable Court determine that it does not have jurisdiction.

**CERTIFICATE OF SERVICE**

I certify that a copy hereof has been e-mailed to Michelle P. Smith, Esq. at michellesmith@mpsmithlegal.com on November 25, 2014.

**CERTIFICATE OF COMPLIANCE**

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

Respectfully submitted and certified,

PAMELA JO BONDI  
ATTORNEY GENERAL

/s/ Trisha Meggs Pate  
TRISHA MEGGS PATE  
Tallahassee Bureau Chief,  
Criminal Appeals  
Florida Bar No. 0045489

/s/ Michael McDermott  
By: Michael McDermott  
Florida Bar No. 0593151  
Office of the Attorney General  
PL-01, The Capitol  
Tallahassee, Fl 32399-1050  
(850) 414-3300 (VOICE)  
(850) 922-6674 (FAX)  
AGO#: L14-1-4856

Attorneys for the State of Florida