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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77834

STATE OF FLORIDA,

Petitioner.

vs.

FRANCISCO HERNANDEZ,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

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PRELIMINARY STATEMENT

The State of Florida, the prosecuting authority and Appellee below in Hernandez v. State, 16 FLW D537 (Fla. 4th DCA February 20, 1991), Motion for Rehearing and/or Motion to Certify Question of Great Public Importance denied April 4, 1991, and the Petitioner here, will be referred to as "the State." Francisco Hernandez, the criminal defendant, Appellant below, and the Respondent here, will be referred to as "Respondent."

Pursuant to Rule 9.120(d) and 9.220 Fla.R.App.P. conformed copies of the decision under review and the post-decisional paperwork in the Fourth District Court of Appeal are appended to this brief to demonstrate timeliness. References to the opinion will be by "PA." No references to the record on appeal will be either necessary or appropriate. See: Jenkins v. State, 385 So.2d 1356 (Fla. 1980) and Reaves v. State, 485 So.2d 829 (Fla. 1986).

Any emphasis will be supplied by the State unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Fourth District Court of Appeal stated the facts as follows:

The victims, two girls, ten and eleven-years-old, were playing in a public library garden. Both girls testified that the Appellant, a gardener, exposed his penis and masturbated in front of them. They additionally testified that Hernandez lifted up one of the girls shirts and fondled her breasts. The state charged Hernandez with one count of lewd assault by fondling a child's breasts and two counts of lewd act by exposing himself and masturbating in front of the two girls. At trial, the trial court allowed two police officers and one teacher to testify as to the victim's truthfulness. Additionally, the trial court admitted testimony that another child observed Hernandez attempt to fondle one of the victim's breasts the prior Spring. Hernandez testified that the allegations were false and that he knew the girls because he frequently chased them out of the garden. (PA2).

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction pursuant to Article V, Section 3 of the Florida Constitution and Rule 9.030(a)(2)(A)(iv). The opinion of the Fourth District Court of Appeals conflicts with this Court's decision in Roman v. State, 475 So.2d 1228 (Fla. 1985) and Armstrong v. State, 566 So.2d 1369 (Fla. 1990). In that in those cases it was held that a defendant's failure to object to erroneous jury instructions, or when a defendant takes affirmative acts which result in erroneous jury instructions, he has waived or invited error; here the Fourth District held that notwithstanding Respondent's failure to object to the erroneous instructions, and his refusal of a curative instruction, the incorrect instructions warranted reversal.

The Fourth District's decision in the instant case also conflicts with the decision of the Second District in Bergen v. State, 552 So.2d 262 (Fla. 2nd DCA 1989), wherein the Court held that the defendant was properly convicted of multiple counts of performing a lewd act where he masturbated in front of 5 children, wherein the, the Fourth District held that Respondent could only be convicted of 1 count of lewd act for masturbating in front of two children.

ARGUMENT

POINT

THIS COURT HAS, AND SHOULD ACCEPT, JURISDICTION TO REVIEW THE DECISION OF THE FOURTH DISTRICT IN HERNANDEZ V. STATE.

Petitioner seeks to establish this Court's "conflict" jurisdiction in accordance with Article 5, §3(b)(3) Fla. Const. (1980), by arguing that the decision below conflicts with the decisions announced in Roman v. State, 475 So.2d 1228 (Fla. 1985), Armstrong v. State, 566 So.2d 1369 (Fla. 5th DCA 1990) and Bergen v. State, 552 So.2d 262 (Fla. 2nd DCA 1989).

Under Article V, Section 3(b)(3) of the Florida Constitution this Court may review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the day question of law. (Emphasis added). Thus, "conflict" jurisdiction is properly invoked when: 1) the district court announces a rule of law which conflicts with a rule previously announced by the Supreme Court or by another district, or 2) the district court applies a rule of law to produce a different result in a case which involves substantially the same facts as another case. Mancini v. State, 312 So.2d 732, 733 (Fla. 1975).

Conflict jurisdiction exists in the instant case because the Fourth District Court's opinion below applies a rule of law which conflicts with a rule previously announced by this Court in Romas v. State, and because the Fourth District's opinion below applies a rule of law to produce a different result on substantially the same facts as in Armstrong v. State, and Bergen v. State.

In Roman the Court held that the defendant's failure to object to the jury instructions given by the trial court waived any error on appeal, likewise below, there was no objection to the trial court's jury instructions; indeed, in this case the prosecutor called the trial court's attention to the erroneous jury instructions and Appellant's trial counsel expressly rejected the trial court's offer to correct the instructions. This is precisely the circumstances in Armstrong, supra, where the Fifth District held that where defense counsel takes affirmative acts which result in an erroneous jury instruction, he has waived or invited error and cannot be heard to complain on appeal, notwithstanding the error being fundamental. Id. at 2372. Since the Fourth District's opinion in this case conflicts with Roman, supra and Armstrong,¹ supra by differently applying a rule of law previously announced by this Court and by applying a rule of law to produce a different result on substantially the same facts, this Court has discretionary jurisdiction to hear this case.

Conflict jurisdiction also exists in the instant case because the Fourth District's opinion applies a rule of law which conflicts with a rule previously announced by the Second District in Bergen v. State, supra. In Bergen, the Court affirmed the Defendant's multiple convictions for lewd act which arose from his having masturbated in front of five children, citing Judge

¹ In Armstrong, the Fifth District certified the following as a question of great public importance: "Does trial counsel for a defendant waive for his client future objection to an erroneous jury instruction where he specifically requests the Court not reinstruct the jury correctly?"

Booth's partially concurring and partially dissenting opinion in Lifka v. State, 530 So.2d 371 (Fla. 1st DCA 1988), that "Section 800.04, Florida Statutes, was specifically designed to protect children under the age of sixteen". Bergen at 263. In the instant case, the Fourth District held that under nearly identical facts, the Respondent masturbated in front of two children, the Respondent could not be convicted by more than one count of lewd act. Clearly, as these two opinions conflict, this Court has discretionary jurisdiction to hear this case.


Further, this issue is a recurring legal problem, and this Honorable Court needs to resolve the issue so that appellate and trial courts will have a well-defined and workable rule of law to guide them. Petitioner therefore respectfully requests this Honorable Court accept jurisdiction in this case.

CONCLUSION


WHEREFORE, Petitioner, the State of Florida, respectfully submits that this Honorable Court should **GRANT** its petition for writ of certiorari review and then, following briefing on the merits, **REVERSE** the Fourth District's decision in Hernandez v. State and **REMAND** this case with directions that the judgment and sentence entered by the trial judge be **AFFIRMED**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Brief of Petitioner on Jurisdiction" has been forwarded by United States Mail to: DOUGLAS N. DUNCAN, ESQUIRE, P.O. Box 3466, West Palm Beach, Florida 33402, this 6th day of May, 1991.



Of Counsel

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