IN THE SUPREME COURT OF FLORIDA

VINCENT ANTHONY SAIYA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 84,412

DCA Case No. 93-2690

PETITIONER'S BRIEF ON DISCRETIONARY JURISDICTION

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida

ANTHONY CALVELLO
Assistant Public Defender
Florida Bar No. 266345
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(407) 355-7600

Attorney for Vincent Anthony Saiya

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and the appellee below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

The Petitioner, Vincent A. Saiya, was charged with one count of aggravated stalking in violation of § 784.048. *Florida Statutes* (1993). Petitioner filed a motion to dismiss this charge on the grounds that said statute is unconstitutional on its face. At the conclusion of the hearing, the court determined that it was necessary to review the facts of each of the five (5) cases individually to determine if the statute was indeed unconstitutional. TR 37.

The trial judge issued a written order denying Petitioner's motion to dismiss on August 5, 1993. The Petitioner pled nolo contendere to the charge of aggravated stalking on August 9, 1993, expressly reserving his right to appeal the denial of his motion to dismiss. He was placed on probation for three (3) years with special conditions. R 61-62. A factual basis was stated for the trial court, "Mr. Saiya, on January 15, [19]93, through February 9, [19]93, did willfully, maliciously, repeatedly follow, harass, did make credible threats with the intent to place Ms. Lipkowski in reasonable fear of death or bodily harm." SR 9. The Court found that this was a sufficient factual basis for his plea to the charge. Defense Counsel indicated earlier that no physical violence was involved in this case and that the charges stem from the disintegration of their romantic relationship. Petitioner followed Ms. Lipkowski and made numerous phone calls, and had other people watch her. Ms. Lipkowski felt comfortable leaving her children with Petitioner. SR 4-5.

Notice of Appeal was filed the same day and this appeal follows.

The Fourth District in a written opinion rendered on September 9, 1994, *Saiya v. State*, 19 Fla. L. Weekly D1933 (4th DCA Sept. 9, 1994)[See Appendix 1], rejected Petitioner's numerous constitutional challenges to § 784.048 and affirmed his conviction for aggravated stalking on the authority of *State v. Kahles*, Fla. L. Weekly D 1778 (4th DCA August 24, 1994); *Blount v. State*, Fla. L. Weekly D1790 (4th DCA August 24, 1994); *Kostenski v. State*, Fla. L. Weekly D1790 (4th DCA August 24, 1994); *Pallas v. State*, 636 So. 2d 1358 (Fla. 3d DCA 1994); *Bouters v. State*, 634 So. 2d 246 (Fla. 5th DCA 1994), *review granted*, No. 83,558 (Fla. June 21, 1994).

Timely Notice of Discretionary Review was filed by Petitioner to this Honorable Court [See Appendix 2].

SUMMARY OF ARGUMENT

Petitioner respectfully submits that this Honorable Court has discretionary jurisdiction over the instant case on three (3) separate grounds. First, the Fourth District Court of Appeal affirmed Petitioner's conviction on the authority of a case pending before this Court, *Bouters v. State*, Case No. 83,558 (Fla. June 21, 1994). Hence, discretionary jurisdiction is provided under the "citation PCA" rule. Second, the Fourth District, based on its two (2) cited opinions, expressly declared valid a Florida State Statute, § 784.048, *Fla. Stat.* (1993). And finally, based on the two (2) opinions cited, the Fourth District ***interpreted*** the First and Fourteenth Amendments to the United States Constitution, which this Court has discretionary jurisdiction to review.

ARGUMENT

THE INSTANT OPINION AFFIRMING PETITIONER'S CONVICTION FOR AGGRAVATED STALKING, IN VIOLATION OF § 784.048, *FLA. STAT.* (1993) EXPRESSLY DECLARES VALID A FLORIDA STATUTE AND CITES TO A DECISION PRESENTLY PENDING FOR REVIEW BEFORE THIS HONORABLE COURT.

The constitutionality of the Florida stalking statute, § 784.048, *Fla. Stat.* (1993) is now presently pending before this Court in *Bouters v. State*, 634 So. 2d 246 (Fla. 5th DCA 1994), *review granted*, Case No. 83,558 (Fla. June 21, 1994). Because the instant decision of the Fourth District is a "citation PCA," jurisdiction is established by reference to the cited case. See *Jollie v. State*, 405 So. 2d 418 (Fla. 1981). In *Jollie*, this Court recognized that the "randomness of the District Court's processing" should not control a party's right to Supreme Court review. *Jollie*, 405 So. 2d at 421. Hence, this Honorable Court has discretionary jurisdiction to accept review of the instant case from the Fourth District because the cited authority, *Bouters*, is presently pending before this Court.

The Fourth District's decision, by reference to the two cited opinions, expressly declared ***valid*** a Florida state statute, § 784.048, *Fla. Stat.* (1993). This Court has the power to review a district court decision that declares a state statute valid. Article V, Section 3(b)(3), Florida Constitution (1980), which states: "[The Supreme Court] may review any decision of a district court of appeal that expressly declares valid a state statute." This is an independent basis of accepting discretionary jurisdiction over this cause.

A decision expressly construing a provision of the state or federal constitution is also subject of the discretionary review of this court. See Article V, Section 3(b)(3), Florida Constitution (1980); *Fla. R. App. P.* 9.030(a)(2)(A)(ii). Here, the decision of the Fourth District by reference to the cited opinions of *Bouters* and *Pallas* expressly construed, explained or defined the disputed constitutional language of the First and the Fourteenth Amendments to the United States Constitution.

The importance of taking the instant case lies in the fact that Petitioner was convicted of violating an extremely vague and overbroad penal statute, § 784.048, *Florida Statutes* (1993). Said statute is unconstitutional on its face and as applied to Petitioner.

Therefore, on the basis of any and/or all three (3) grounds cited by Petitioner, this Honorable Court has discretionary jurisdiction over the instant case. Petitioner requests this Court to grant his petition for discretionary review, declare § 784.048 unconstitutional and vacate Petitioner's conviction for aggravated stalking.

CONCLUSION

Petitioner requests this Court to accept jurisdiction to review the merits of this case.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida

ANTHONY CALVELLO
Assistant Public Defender
Florida Bar No. 266345
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(407) 355-7600

Attorney for Vincent Anthony Saiya

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joan Fowler, Senior Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 and by U.S. Mail to Michael Niemand, Esquire, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida, 33101, this 3rd day of October, 1994.

Attorney for Vincent Anthony Saiya

IN THE SUPREME COURT OF FLORIDA

VINCENT ANTHONY SAIYA, Petitioner, v. STATE OF FLORIDA, Respondent.	)	CASE NO. 84,412 DCA Case No. 93-2690

ITEM **PAGE(S)**

A P P E N D I X 1

22394 CF10A. Opinion filed September 9, 1994. Appeal of order denying rule 3.850 motion from the Circuit Court for Broward County; Richard D. Eade, Judge. Counsel: Joseph Walker a/k/a Joseph Williams, Arcadia, pro se appellant. No appearance required for appellee.

(PER CURIAM.) Affirmed, without prejudice to Appellant refiling his petition as to that part of his claim of ineffective counsel relating to his counsel's failure to investigate whether a third party, Tom Morgan, had confessed to committing the offense, if accompanied by a sworn statement by Appellant demonstrating a factual basis for Appellant's allegations. (DELL, C.J., STONE and STEVENSON, JJ., concur.)

* * *

BORDO, INC. v. BOARD OF COUNTY COMMISSIONERS BROWARD COUNTY. 4th District. #s 93-2895 and 93-2902. September 9, 1994. Consolidated appeals of a non-final order from the Circuit Court for Broward County. Affirmed. *See 3299 N. Federal Highway, Inc. v. Board of County Comm'rs*, No. 93-2888 (Fla. 4th DCA Sept. 9, 1994) [19 Fla. L. Weekly D1881].

CATLETT v. STATE. 4th District. #94-1908. September 9, 1994. Appeal of order denying rule 3.850 motion from the Circuit Court for Broward County. AFFIRMED. *Rodriguez v. State*, 637 So. 2d 934 (Fla. 2d DCA 1994).

SAIYA v. STATE. 4th District. #93-2690. September 9, 1994. Appeal from the Circuit Court for Broward County. Affirmed. *See State v. Kahles*, No. 93-0957 (Fla. 4th DCA August 24, 1994) [19 Fla. L. Weekly D1778]; *Blount v. State*, No. 93-0461 (Fla. 4th DCA August 24, 1994) [19 Fla. L. Weekly D1790]; *Kostenski v. State*, No. 93-1630 (Fla. 4th DCA August 24, 1994) [19 Fla. L. Weekly D1790]; *Pallas v. State*, 636 So. 2d 1358 (Fla. 3d DCA 1994); *Bouters v. State*, 634 So. 2d 246 (Fla. 5th DCA 1994), *review granted*, No. 83,558 (Fla. June 21, 1994).

IN RE: THE FORFEITURE OF FOUR THOUSAND NINE HUNDRED THIRTY NINE DOLLARS ($4,939.00) IN UNITED STATES CURRENCY. 4th District. #93-2329. September 9, 1994. Appeal from the Circuit Court for Broward County. AFFIRMED. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979).

* * *

Criminal law—No error in denial of motion to correct illegal sentence where trial court imposed legal sentence to which defendant agreed—Defendant's substantial interests not adversely affected by discrepancy as to which of two pending cases would carry mandatory minimum sentence

LUIS FELIPE CORTES, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 94-1388. Opinion filed September 7, 1994. An Appeal under Fla.R.App.P. 9.140(g) from the Circuit Court for Dade County, Robbie M. Barr, Judge. Counsel: Luis Felipe Cortes, in proper person. Robert A. Butterworth, Attorney General, and Paulette R. Taylor, Assistant Attorney General, for appellee.

(Before SCHWARTZ, C.J., and BASKIN and COPE, JJ.)

(PER CURIAM.) Luis Felipe Cortes appeals an order denying his motion to correct illegal sentence. The sentencing order imposes a legal sentence. Although there is a discrepancy as to which of the two pending cases would carry the mandatory minimum sentence of 3 years, it is abundantly clear that defendant agreed to a 12-year sentence with a concurrent 3-year mandatory minimum, and that is what he received.* We fail to see that defendant's substantial interests have been adversely affected.

Affirmed.

---

*Defendant expressly states that he does not seek withdrawal of his plea.

* * *

Criminal law—Sentencing—Consecutive mandatory minimum sentences for first degree murder and for offenses for which defendant was classified as habitual violent felony offender are permissible

CHARLES CHEATHAM, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 94-343. Opinion filed September 14, 1994. An Appeal from the Circuit Court for Dade County, Fredricka Smith, Judge. Counsel: Bennett H. Brummer, Public Defender and Ada Manzano Avallone, Special Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General and Michael J. Neimand, Assistant Attorney General, for appellee.

(Before SCHWARTZ, C.J., and HUBBART and JORGENSON, JJ.)

(SCHWARTZ, Chief Judge.) Cheatham was convicted of first degree murder, armed burglary of an occupied conveyance and armed robbery. Because the crimes were all part of the same transaction, he claims that he was erroneously sentenced to consecutive, rather than concurrent, minimum mandatory terms of twenty-five years of a life sentence for the murder charge and fifteen years as a habitual violent felony offender on the armed burglary and armed robbery convictions. *See Hale v. State*, 630 So. 2d 521 (Fla. 1993), pet. for cert. filed (U.S. Aug. 8, 1994) (No. 94-5612); *McGouirk v. State*, 493 So. 2d 1016 (Fla. 1986); *Palmer v. State*, 438 So. 2d 1 (Fla. 1983). We disagree.

In our view, the consecutive minimum mandatory terms were permissible under *Downs v. State*, 616 So. 2d 444 (Fla. 1993) because the statutory provisions in question address "separate and distinct evils." *Downs*, 616 So. 2d at 446—that is, "killing someone," 616 So. 2d at 446, as to the murder conviction, and recidivism, *see Hicks v. State*, 595 So. 2d 976 (Fla. 1st DCA 1992), as to the defendant's status as a habitual offender. See *Downs*, 616 So. 2d at 444 (consecutive minimum mandatory sentences for first degree murder and using a firearm in the commission of aggravated assault permissible); *Bonaventure v. State*, 637 So. 2d 55 (Fla. 5th DCA 1994) (consecutive minimum mandatory sentences for first degree murder and possession of a firearm by a convicted felon permissible).

Affirmed.

* * *

Torts—Immunity—Workers' compensation—Factual issue exists as to whether defendant company which arranged to provide city with stage concert and defendant company hired to supply sound system for concert were statutory employers of plaintiff who was employed by company which provided labor for assembling the stage and who received workers' compensation benefits from that company—Factual issue exists as to whether company providing labor for construction of stage was subcontractor or whether plaintiff was performing agreed-upon work when he was injured—Trial court properly denied defendants' motion for summary judgment

J.C. CONCERT SOUND & LIGHTING, INC., Appellant, vs. DAVID GOLD, et al., Appellees. 3rd District. Case Nos. 94-209, 94-243. Opinion filed September 14, 1994. An Appeal from a nonfinal order of the Circuit Court for Dade County, Arthur Rothenberg, Judge. Counsel: Conroy Simberg & Lewis and Hinda Klein, for appellant. Sellars Supran Cole & Marion and Daniel M. Bachi and Bard D. Rockenbach, for appellees.

(Before BARKDULL, JORGENSON, and GERSTEN, JJ.)

(PER CURIAM.) J.C. Concert Sound & Lighting and Garrett Sound & Lighting appeal from an order determining that they are not entitled to worker's compensation immunity. We have jurisdiction pursuant to Fla. R. App. P. 9.130(a)(3)(C)(vi), and affirm.

J.C. arranged to provide the City of Boca Raton with a stage for a concert at Florida Atlantic University; the agreement between J.C. and the City of Boca Raton was not reduced to writing. By a separate oral agreement, the City hired Garrett Sound & Lighting to supply the sound system for the concert. Both J.C. and Garrett have the same president, Kenneth Watkivs. Backstage Productions provided the labor for assembling the stage; the agreement between J.C., Garrett, and Backstage also was oral.[1] David Gold, an employee of Backstage Productions, was injured when a portion of the stage collapsed during construction. Gold sued J.C. and Garrett for negligence. Both companies asserted the affirmative defense of worker's compensation immunity, and alleged that Gold had received worker's compensation benefits from Backstage. J.C. and Garrett argued that Backstage was their subcontractor, and that they therefore shared Backstage's immunity from suit. The trial court denied J.C. and Garret's motion for summary judgment. We affirm, as genuine issues of material fact remain regarding the relationship between the parties.

APPENDIX 2

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

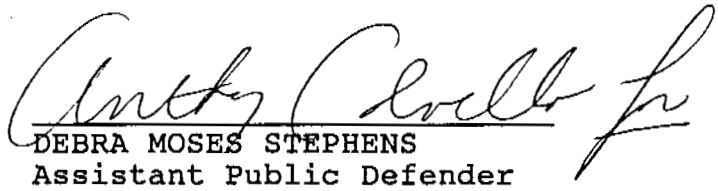
VINCENT ANTHONY SAIYA, Appellant, v. STATE OF FLORIDA Appellee.	)	CASE NO. 93-2690

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that Vincent Anthony Saiya, Defendant-Appellant-Petitioner, invokes the discretionary jurisdiction of the Florida Supreme Court to review the decision of this Court rendered on September 9, 1994. The decision expressly construes a provision of the state or federal constitution and expressly declares valid a state statute. See Rule 9.030(a)(2)(a).

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender



DEBRA MOSES STEPHENS
Assistant Public Defender
Florida Bar No. 709890
15th Judicial Circuit of Florida
9th Floor, Governmental Center
421 3rd Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Attorney for Vincent Anthony Saiya

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to Joan Fowler, Senior Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401 and by U.S. Mail to Michael Niemand, Assistant Attorney General, Department of Legal Affairs, 401 NW 2nd Avenue, N 921, Miami, FL 33128, this 20th day of September, 1994.

Attorney for Vincent Anthony Saiya

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Appendix has been furnished by courier to Joan Fowler, Senior Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 and by U.S. Mail to Michael Niemand, Assistant Attorney General, Department of Legal Affairs. 401 NW 2nd Avenue, N921, Miami, Florida 33128, this 3rd day of October 1994.

ANTHONY CALVELLO
Assistant Public Defender
Counsel for Vincent Anthony Saiya