

IN THE SUPREME COURT OF FLORIDA

Case No. SC03-1321

EVERETT WARD MILKS,  
Petitioner,

v.

STATE OF FLORIDA,  
Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF  
FLORIDA, SECOND DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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## INTRODUCTION

Petitioner Everett Ward Milks was the defendant in the trial court and the appellant on appeal. Respondent State of Florida was the prosecution in the trial court and the appellee on appeal. The parties will be referred to in this brief as "Mr. Milks" and "the state." The symbol "A" will constitute a reference to the appendix being filed along this brief.

## STATEMENT OF THE CASE AND FACTS

As stated by the Second District Court of Appeal in its opinion in this cause (A 2; footnote omitted):

Mr. Milks entered a no contest plea to a charge of lewd and lascivious molestation and was sentenced to six and one-half years' imprisonment. Approximately four months later, the State sought to have Mr. Milks designated a sexual predator pursuant to section 775.21 [, Florida Statutes (the Florida Sexual Predators Act)]. Mr. Milks objected, arguing that the Act violated constitutional principles of separation of powers and procedural due process. The trial court overruled Mr. Milks' objections and held the Act constitutional. By order dated January 2, 2002, Mr. Milks was designated a sexually violent predator. Mr. Milks has appealed this postjudgment order.

The Second District affirmed the order under review (A 4), rejecting Mr. Milks' contention that the Florida Sexual Predators Act violated procedural due process and the separation of powers provision of the Florida Constitution. Specifically, the court stated:

We must reject Mr. Milks' argument that the Act violates constitutional principles of separation of powers. See *Kelly v. State*, 795 So. 2d 135 (Fla. 5<sup>th</sup> DCA 2001); cf. *State v. Cotton*, 769 So. 2d 345 (Fla. 2000) (holding Prison Releasee Reoffender Punishment Act, which took all sentencing discretion away from trial court and placed it in hands of prosecutor, did not violate separation of powers). With respect to Mr.

Milks' procedural due process claim, we also affirm in light of the United States Supreme Court's decision in *Connecticut Department of Public Safety v. Doe*, 123 S.Ct. 1160 (Mar. 5, 2003).

(A 2-3)

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The reporting requirements of Florida's act, like Connecticut's, are determined solely by a defendant's conviction for a specified crime. See § 775.21. The conviction itself is "a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." *Doe*, 123 S. Ct. at 1164. Florida, like Connecticut, has decided that the public must have access to information about all convicted sex offenders, currently dangerous or not, and that those convicted sex offenders must face certain sanctions. Thus, procedural due process does not require a hearing to prove a fact irrelevant to the statutory scheme. *Id.*

(A 3-4)

Mr. Milks' motion for rehearing was denied (A 5). Mr. Milks then filed a notice invoking the discretionary jurisdiction of this court.

#### **SUMMARY OF ARGUMENT**

The decision under review expressly declares valid the Florida Sexual Predators Act (Section 775.21, Florida Statutes (2000)). The court specifically rejected Mr. Milks' contentions that the Act violates procedural due process and the separation of powers provision of the Florida Constitution.

The decision under review is also in express and direct conflict with the decision of the Third District Court of Appeal in *Espindola v. State*, \_\_\_ So. 2d \_\_\_, 28 Fla. L. Weekly D222 (Fla. 3d DCA Jan. 15, 2003). In the present case, the court specifically concluded that procedural due process does not require that offenders receive hearings on the issue of whether they are a danger to commit future offenses. Considering the exact same question in *Espindola*, the Third District held that the failure of the Act to provide for such hearings rendered it unconstitutional on procedural due process grounds.

#### **ARGUMENT**

##### **I**

**THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THE PRESENT CASE EXPRESSLY DECLARES VALID THE FLORIDA SEXUAL PREDATORS ACT (SECTION 775.21, FLORIDA STATUTES (2000)).**

In the present case, the Second District Court of Appeal expressly declares the Florida Sexual Predators Act (Section 775.21, Florida Statutes (2000)) to be valid in two respects. Specifically, the court rejected Mr. Milks' contentions that the Act violates procedural due process and the separation of powers provision of the Florida Constitution. The court stated:

We must reject Mr. Milks' argument that the Act violates constitutional principles of separation of powers. See *Kelly v. State*, 795 So. 2d 135 (Fla. 5<sup>th</sup> DCA 2001); cf. *State v. Cotton*, 769 So. 2d 345 (Fla. 2000) (holding Prison Releasee Reoffender Punishment Act, which took all sentencing discretion away from trial court and placed it in hands of prosecutor, did not violate separation of powers). With respect to Mr. Milks' procedural due process claim, we also affirm in light of the United States Supreme Court's decision in *Connecticut Department of Public Safety v. Doe*, 123 S.Ct. 1160 (Mar. 5, 2003).

(A 2-3)

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The reporting requirements of Florida's act, like Connecticut's, are determined solely by a defendant's conviction for a specified crime. See § 775.21. The conviction itself is "a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." *Doe*, 123 S. Ct. at 1164. Florida, like Connecticut, has decided that the public must have access to information about all convicted sex offenders, currently dangerous or not, and that those convicted sex offenders must face certain sanctions. Thus, procedural due process does not require a hearing to prove a fact irrelevant to the statutory scheme. *Id.*

(A 3-4)

Because the Second District expressly declared valid the Florida Sexual Predators Act, this court has jurisdiction in this

cause. Article V, Section (3)(b)(3), Florida Constitution;  
Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i).

II

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN *ESPINDOLA V. STATE*, \_\_\_ SO. 2D \_\_\_, 28 FLA. L. WEEKLY D222 (FLA. 3D DCA JAN. 15, 2003).

In its decision in the present case, the Second District Court of Appeal rejected Mr. Milks' contention that the Florida Sexual Predators Act violates procedural due process because it does not provide a hearing on the issue of whether offenders pose a danger of committing future offenses. The court stated:

With respect to Mr. Milks' procedural due process claim, we also affirm in light of the United States Supreme Court's decision in *Connecticut Department of Public Safety v. Doe*, 123 S.Ct. 1160 (Mar. 5, 2003).

(A 2-3)

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The reporting requirements of Florida's act, like Connecticut's, are determined solely by a defendant's conviction for a specified crime. See § 775.21. The conviction itself is "a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." *Doe*, 123 S. Ct. at 1164. Florida, like Connecticut, has decided that the public must have access to information about all convicted sex offenders, currently dangerous or not, and that those convicted sex offenders must face certain sanctions. Thus, procedural due process does not require a hearing to prove a fact irrelevant to the statutory scheme. *Id.*

(A 3-4)

Considering the exact same issue in *Espindola v. State*, \_\_\_ So. 2d \_\_\_, 28 Fla. L. Weekly D222 (Fla. 3d DCA Jan. 15, 2003), the Third District Court of Appeal reached exactly the opposite



conclusion, stating, 28 Fla. L. Weekly at D223 (citations omitted):

Thus, as several courts of other jurisdictions have done before us, we find that this total failure to provide for a judicial hearing on the risk of the defendant's committing future offenses, makes it violative of procedural due process and therefore unconstitutional.

\* \* \*

... [W]e find that in the absence of a provision allowing for a hearing to determine whether the defendant presents a danger to the public sufficient to require registration and public notification, the Florida Sexual Predators Act violates procedural due process.

It is clear that the two decisions are in express and direct conflict.<sup>1</sup> Therefore, this court has jurisdiction in this cause. Article V, Section (3)(b)(3), Florida Constitution; Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

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<sup>1</sup> Indeed, the Second District implicitly recognized the existence of the conflict by indicating that the reason it was not certifying conflict was the fact that *Espindola* was not final and was therefore subject to withdrawal or revision (A 3, n. 2). While this recognition by the court underscores the existence of conflict, Mr. Milks would in fairness point out that, as of approximately 1:30 p.m. on July 29, 2003, when his counsel contacted the clerk's office of the Third District, *Espindola* is still not final. While any future action by the Third District might have an impact on the question of whether there exists a basis for conflict jurisdiction in the present case, Mr. Milks notes that such action would in no way change the fact that for the reasons set forth in Point I, *supra*, this court possesses discretionary jurisdiction due to the Second District expressly declaring valid the Florida Sexual Predators Act. Thus, regardless of what, if any, action the Third District might take, this court should accept jurisdiction in this cause.

**CONCLUSION**

Based upon the foregoing argument and authorities, Mr. Milks respectfully submits that this court should accept jurisdiction in the present case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to Charles Crist, Attorney General, Concourse Center #4, 3507 E. Frontage Rd., Ste. 200, Tampa, FL 33607 this \_\_\_ day of \_\_\_\_\_, 2003.

\_\_\_\_\_  
ANTHONY C. MUSTO

**CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS**

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

\_\_\_\_\_  
ANTHONY C. MUSTO

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APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION

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