IN THE SUPREME COURT OF FLORIDA

EVERETT WARD MILKS, **Petitioner,** **v.** **STATE OF FLORIDA,** **Respondent.**	**Case No. SC03-1321** **L.T. No. 2D02-460**

ON PETITION FOR DISCRETIONARY REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL STATE OF FLORIDA

AMENDED
JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

In Milks v. State, 848 So. 2d 1167 (Fla. 2d DCA 2003), the defendant/petitioner, Everett Ward Milks, appealed a post-judgment order that designated him a sexual predator under Florida's Sexual Predators Act, §775.21, Florida Statutes (2000). Milks argued that the Act violated both separation of powers and procedural due process. In affirming the petitioner's designation as a sexual predator, the Second District Court explained,

> 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. 5th 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, 155 L. Ed. 2d 98, 123 S. Ct. 1160 (Mar. 5, 2003).
>
> Before the circuit and appellate courts, Mr. Milks has argued that the Act violates procedural due process because it publicly labels him as a dangerous sexual predator without providing him a hearing as to his actual dangerousness. Mr. Milks has relied primarily on Doe v. Department of Public Safety, 271 F.3d 38 (2d Cir. 2001). In Doe, the Second Circuit held that a similar Connecticut act violated procedural due process because it deprived the defendant of a liberty or property interest by imposing a stigma upon him without providing a hearing to determine whether the defendant was dangerous. Doe, 271 F.3d 38 (citing Paul v. Davis, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1975)).

After the parties filed their briefs in this case, the United States Supreme Court reversed Doe in Connecticut Department of Public Safety v. Doe, 155 L. Ed. 2d 98, 123 S. Ct. 1160 (Mar. 5, 2003). The Supreme Court held that even if a liberty or property interest was implicated in the Connecticut act, due process did not entitle the defendant to a hearing to establish whether he or she was dangerous, as that fact was not material under the statute. Id. at 1164.

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.

The Supreme Court has not determined whether the Connecticut act or ones similar to it violate substantive due process. Id. at 1164-65. However, Mr. Milks, like Mr. Doe, has not raised that claim. Id. We therefore affirm the order designating Mr. Milks a sexual predator.

Milks, 848 So. 2d at 1169

Petitioner now seeks review of the decision of the Second District Court of Appeal in Milks v. State, 848 So. 2d 1167 (Fla. 2d DCA 2003).

SUMMARY OF THE ARGUMENT

In Milks v. State, 848 So. 2d 1167 (Fla. 2d DCA 2003), the defendant's dual constitutional challenges to Florida's Sexual Predator Act were rejected by the Second District Court. First, relief was denied on the petitioner's "separation of powers" claim under Kelly v. State, 795 So. 2d 135, 138 (Fla. 5th DCA 2001), review denied, 2003 Fla. LEXIS 1318, (Fla. Case No. SC01-2434, July 11, 2003). Second, the defendant's "procedural due process" claim was rejected in light of the United States Supreme Court's recent decision in Connecticut Department of Public Safety v. Doe, 155 L.Ed.2d 98, 123 S.Ct. 1160 (Mar. 5, 2003).

This Court should decline to exercise its discretionary jurisdiction to review the decision of the Second District Court in this case because the Petitioner has failed to sufficiently identify any misapplication of precedent or defect in the Second District's opinion which should be addressed by this Court. Moreover, this Court lacks subject-matter jurisdiction to review the decision of the Second District Court on the basis of "anticipatory" conflict.

ARGUMENT

ISSUE I

THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE SECOND DISTRICT COURT IN MILKS V. STATE, 848 So. 2d 1167 (Fla. 2d DCA 2003) WHICH FOLLOWED KELLY v. STATE, 795 So. 2d 135, 138 (Fla. 5th DCA 2001), review denied (SC 01-2434, July 11, 2003) and CONNECTICUT DEPARTMENT OF PUBLIC SAFETY V. DOE, 155 L. Ed. 2d 98, 123 S. Ct. 1160 (2003).

(As restated by Respondent)

The State recognizes that this Court has jurisdiction under Article V, section (3)(b)(3) of the Florida Constitution to review a decision of a district court which "expressly declares valid a state statute." See also, Fla. R. App. P. 9.030(a)(2)(A)(i). However, such jurisdiction is not mandatory, but rather discretionary.

In the instant case, the Second District Court affirmed the trial court's order designating the petitioner as a sexual predator, and rejected the petitioner's dual claims that the Act violates the constitutional principles of separation of powers and procedural due process. Milks v. State, 848 So. 2d 1167 (Fla. 2d DCA 2003). Respondent questions whether the Second District Court "expressly" declared the Florida's Sexual Predator Act valid. However, the Court did reject the dual

constitutional challenges to application of Florida's Sexual Predator Act to petitioner, and the rejection of the petitioner's constitutional challenges is in accord with state and federal precedent. Relief was denied on the petitioner's 'separation of powers' claim in accordance with Kelly v. State, 795 So. 2d 135, 138 (Fla. 5th DCA 2001), review denied, 2003 Fla. LEXIS 1318 (Fla. Case No. SC01-2434, July 11, 2003). Relief was denied on the petitioner's "procedural due process" claim in light of the U.S. Supreme Court's recent decision in Connecticut Department of Public Safety v. Doe, 155 L. Ed. 2d 98, 123 S. Ct. 1160 (2003).

Inasmuch as this Court did not deem it appropriate to review Kelly, and inasmuch as Petitioner has failed to identify any misapplication of relevant precedent or any particular defect in the Second District's decision which would render this case more worthy of review than Kelly, the State submits that the petitioner has failed to demonstrate that the instant case warrants further review by this Court.

Most recently, in Reyes v. State, 2003 Fla. App. LEXIS 13617 (Fla. 4th DCA, Opinion filed September 10, 2003), the Fourth District Court agreed with both Kelly and Milks and also held that the Act does not facially violate separation of powers principles. And, as the Fourth District Court further

explained, "[I]n fact, as the supreme court has made clear, the separation of powers clause itself precludes our review of legislative policy that does not violate constitutional principles:

> Where a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power, and do not assume to regulate state policy; but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law."
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> Reyes, citing Sebring Airport Authority v. McIntyre, 783 So. 2d 238, 244-45 (Fla. 2001).

In Jenkins v. State, 385 So. 2d 1356, 1357-1358 (Fla. 1980), this Court discussed the creation of the district courts of appeal and quoted from Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958):

> It was never intended that the district courts of appeal should be intermediate courts. . . . To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

Ultimately, what has occurred in this case is that one of the final courts of appellate jurisdiction has simply determined

that the legislature has passed a statute which is constitutional. This Court should decline to exercise its discretionary jurisdiction to further review the decision of the Second District Court in Milks v. State, 848 So. 2d 1167 (Fla. 2d DCA 2003).

ISSUE II

THIS COURT LACKS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION IN MILKS V. STATE, 848 So. 2d 1167 (Fla. 2d DCA 2003) BASED ON "ANTICIPATORY" CONFLICT OF DECISIONS.

(As restated by Respondent)

Petitioner concedes that the Second District Court declined to certify conflict with Espindola V. State, 2003 Fla. App. LEXIS 270, 28 Fla. L. Weekly D 222 (Fla. 3d DCA Jan. 15, 2003), inasmuch as Espindola was not final and it was subject to withdrawal or revision. See, Milks, 848 So. 2d at 1169, n. 2. The original opinion in Espindola was issued in January of 2003, approximately six weeks before the issuance of the U.S. Supreme Court's decision in Connecticut Department of Public Safety v. Doe, *supra*. As of this date, Espindola still remains pending on rehearing. Essentially, petitioner asks this Court to exercise its discretionary jurisdiction based on *anticipatory* conflict. However, under Article V, §3(b)(3), Florida Constitution, this Court has subject matter jurisdiction to only 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 of Florida on the same question of law. Because the petitioner does not present the necessary prerequisite of an "express and direct conflict," this Court lacks discretionary jurisdiction to review this case. See also,

Times Publishing Co. v. Russell, 615 So. 2d 158 (Fla. 1993).

CONCLUSION

Based on the foregoing facts, arguments, and citations of authority, Respondent respectfully requests that this Court deny review in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Answer Brief on Jurisdiction has been furnished by U.S. mail to Anthony C. Musto, Assistant Public Defender, P. O. Box 9000 - Drawer PD, Bartow, Florida 33831, this ____ day of September, 2003.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this pleading is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(*l*).

_____

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