IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2163
DCA CASE NO. 3D08-1094

ALFREDO MORENO-GONZALEZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW TO THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner, Alfredo Moreno-Gonzalez, was the defendant in the trial court and Appellee in the District Court of Appeal, Third District. Respondent, the State of Florida, was the prosecution in the trial court and the Appellant in the District Court of Appeal, Third District.

The following facts are taken from the Third District's majority opinion in Moreno-Gonzalez v. State, 18 So. 3d 1180 (Fla. 3d DCA 2009). In its opinion, the district court noted that although the affidavit was not signed, it was undisputed that probable cause was shown by the officer swearing to the allegations in the affidavit under oath before the judge, initialing each of the pages of the affidavit, and also initialing each of the three pages of the search warrant. Id. at 1180-81. The district court noted that under the 1982 amendments to article I, section 12 of the Florida Constitution, the court was required to construe the right against unreasonable searches and seizures in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Moreno-Gonzalez, 18 So. 3d at 1181-1183.

The district court noted that the in construing the Fourth Amendment, the United States Supreme Court has stated that that "courts should not invalidate the warrant by interpreting the affidavit in a hypertechinical, rather than a

commonsense, manner." Id. at 1183 (citing to United States v. Ventresca, 380 U.S. 102, 109, 85 S.Ct. 741, 13 L.Ed. 2d 684 (1965). The court found that it would be entirely unrealistic and lacking in common sense to find that the technical deficiency of failing to sign a document, the contents of which were sworn to under oath and initialed on each page, was fatal to the question of probable cause for the issuance of a search warrant. Moreno-Gonzalez, 18 So. 3d at 1184. Furthermore, although the Florida Constitution provides that probable cause is to be "supported by affidavit," under Florida Statute sections 92.525 and 92.50(1), the affidavit at issue was sufficient to support the issuance of the warrant and the absence of a signature was not fatal. Moreno-Gonzalez, 18 So. 3d at 1184-85. The court held that the trial court erred in finding that the lack of signature on the affidavit was fatal and suppressing the evidence as a result. Moreno-Gonzalez, 18 So. 3d at 1185.

Petitioner now seeks review in this Court.

SUMMARY OF THE ARGUMENT

Petitioner fails to invoke any proper basis for this Court's jurisdiction. The decision of the Third District Court does not in expressly construe the state or federal constitution. Further, the majority's opinion does not render Florida Statute section 933.06 invalid. Accordingly, this Court should decline to exercise its jurisdiction to review the lower court's decision

ARGUMENT

THE COURT DOES NOT HAVE MANDATORY JURISDICTION AS THE DISTRICT COURT'S OPINION DOES NOT INVALIDATE A STATE STATUTE. THIS COURT SHOULD ALSO DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION AS THE DISTRICT COURT'S OPINION DOES NOT EXPRESSLY CONSTRUE THE STATE OR FEDERAL CONSTITUTION.

Petitioner fails to establish any basis for this Court to exercise its jurisdiction. In his brief on jurisdiction, Petitioner argues that that the Third District Court of Appeal's opinion in Moreno-Gonzalez v. State, 18 So. 3d 1180 (Fla. 3d DCA 2009), renders Florida Statute section 933.06 invalid. For the following reasons there is no basis to invoke this Court's mandatory jurisdiction. Petitioner also attempts to invoke this Court's discretionary jurisdiction. The Court should also decline to exercise its discretionary review jurisdiction in this matter.

The jurisdiction of this Court is limited to a narrow class of cases enumerated in the Florida Constitution. As this Court explained in The Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988), the state constitution creates two separate concepts regarding this Court's discretionary review. The first concept is the broad general grant of subject-matter jurisdiction. The second more limited

concept is a constitutional command as to how this Court may exercise its discretion in accepting jurisdiction. 530 So. 2d at 288.

Petitioner attempts to invoke this Court's mandatory review jurisdiction by alleging that the Third District Court of Appeal's opinion in Moreneno-Gonzalez holds Florida Statute section 933.06 invalid. Florida Rule of Appellate Procedure 9.030(a)(1)(A)(ii) mirrors article V, section 3(b)(1) of the Florida Constitution. It states that "[t]he supreme court shall review, by appeal ... decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution." However, despite the Petitioner's arguments to the contrary, the district court has not rendered Florida Statute section 933.06 invalid. The majority's opinion never even cites Florida Statute section 933.06. Indeed, this Court lacks jurisdiction over the instant matter as the language warranting jurisdiction must be included in the majority opinion. See Bryd v. State, 880 So. 2d 615 (Fla. 2004)(where this Court determined that it lacked jurisdiction over a case in which a concurring opinion declared a statute invalid, because Jenkins v. State, 385 So. 2d 1356 (Fla. 1980), required that the language warranting jurisdiction be included in the majority opinion.) Therefore, this Court does not have mandatory appellate jurisdiction to review the opinion below because the district court of appeal did not invalidate any state statute.

Petitioner next tries to invoke the discretionary jurisdiction of this Court. Specifically, article V, section 3(b)(3), Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(ii), which provide that the discretionary jurisdiction of the jurisdiction may be sought to review decisions of the district court of appeal that expressly construe a provision of the state or federal constitution. Again, the basis for this Court to exercise its discretionary jurisdiction must appear within the four corners of the majority decisions. See e.g. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986); Jollie v. State, 405 So. 2d 418 (Fla. 1981).

This Court has held that for discretionary review to be applicable, the opinion must "expressly" construe language or terms of the federal or state constitution. Armstrong v. City of Tampa, 106 So. 2d 407 (Fla. 1958). Therefore, a decision of a district court of appeal is not reviewable under article V, section 3(b)(3) of the Florida Constitution merely because it has the practical effect of construing a provision of the state or federal constitution. See Miami Herald Publishing Co. v. Brautgam, 121 So. 2d 431 (Fla. 1960)(where this Court rejected jurisdictional arguments based on an "inherent construction" even before the insertion of the term "expressly" in article V, section 3(b)(3)). "Section 3(b)(3) plainly requires a written statement explaining or defining the disputed

constitutional language." Florida Appellate Practice, § 3.8 (2010).

The Third District's opinion in the case below does cite to article I, section 12 of the Florida Constitution. However, the district court is not construing the terms or language of the provision. Rather, the court is acknowledging that the provision specifically states that the right of the people to be secure in their persons, houses, papers, and effects shall be construed in conformity with the 4th Amendment to the United State Constitution, as interpreted by the United States Supreme Court. The district court then applied the facts in this matter to federal case law. Therefore, while the district court's decision in Moreno-Gonzales turned on the application of constitutional principles to the facts of the case, this is not enough to furnish a basis to invoke the discretionary jurisdiction of the Supreme Court under section 3(b)(3). Page v. State, 113 So. 2d 557 (Fla. 1959) (where this Court found that a lower court's application of facts to a constitutional principle does not result in jurisdiction.). Petitioner's disagreement with the Third District's opinion is not a basis to invoke this Court's discretionary jurisdiction. Accordingly, the petition to invoke this Court's review should be denied.

CONCLUSION

On the basis of the foregoing, this Court should decline to exercise its jurisdiction to review the lower court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on Jurisdiction was mailed this day of December to Martin L. Roth, One East Broward Blvd., suite 700, Fort Lauderdale, FL 33301.

_____

NIKOLE HICIANO
Assistant Attorney General

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing Brief of Respondent on Jurisdiction has been typed in Times New Roman, 14-point type.

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NIKOLE HICIANO
Assistant Attorney General