IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2177
DCA CASE NO. 3D07-2103

RICHARDO JOSE DAVILA,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Petitioner, Ricardo Jose Davila, was the defendant in the trial court and the appellant in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The parties shall be referred to as they stand in this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted on thirty counts of aggravated child abuse, one count of child abuse, one count of child neglect, and three counts of kidnapping. He filed a direct appeal, which was affirmed. *Davila v. State*, 829 So. 2d 995 (Fla. 3d DCA 2002).

He filed a motion for post conviction relief pursuant to rule 3.850, Florida Rules of Criminal Procedure. The trial court denied some of the claims raised, and ordered the state to file a response to other claims. After the state's supplemental response, the trial court entered an omnibus order denying all of Petitioner's claims. Petitioner filed a motion for rehearing, in which he raised new claims for relief. This motion was also denied.

Petitioner appealed the denial of his motion for post conviction relief to the Third District Court of Appeal. In the brief filed with the court, among other claims, he argued that the three counts of kidnapping should be vacated because, as a parent of the victim, he could not be convicted of kidnapping his own child.

On October 21, 2009, the district court affirmed the denial in part, and reversed in part. *Davila v. State,* 26 So. 3d 5 (Fla. 3d DCA 2010). In its opinion, the court stated

> We have recognized an exception, however, to the general rule where the parent "does not simply exercise his rights to the child, but takes her for an ulterior and unlawful purpose which is specifically

> forbidden by the kidnapping statute itself." *Lafleur v. State*, 661 So. 2d 346, 349 (Fla. 3d DCA 1995).

Davila, 26 So. 3d at 7. The court acknowledged that this exception was in conflict with the Second District Court of Appeal's holding in *Muniz v. State*, 764 So. 2d 729 (Fla. 2d DCA 2000), and certified conflict. For the other claims, the court either affirmed the denial of the claim or remanded for the trial court to hold an evidentiary hearing. *Davila*, 26 So. 3d at 8.

On January 19, 2010, Petitioner filed a motion for rehearing and rehearing en banc. The motion was denied on February 10, 2010. Petitioner now seeks discretionary review in this Court.

SUMMARY OF THE ARGUMENT

There is no basis upon which discretionary review can be granted in this case. While the Third District Court of Appeal certified direct conflict with *Muniz v. State*, 764 So. 2d 729 (Fla. 2d DCA 2000), a review of the decision demonstrates that the cases are readily distinguishable and are not in express and direct conflict. Consequently, conflict jurisdiction does not exist for the exercise of this Court's discretionary jurisdiction to review the decision below. This Court should therefore deny Petitioner's petition to review the decision of the district court.

ARGUMENT

PETITIONER'S APPLICATION FOR DISCRETIONARY REVIEW MUST BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL'S DECISION DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OR THIS COURT.

Although the Third District Court of Appeal certified conflict with the decision in *Muniz v. State*, 764 So. 2d 729 (Fla. 2d DCA 2000), an examination of this decision demonstrates that a conflict does not exist.

The Third District Court of Appeal relied on *LaFleur v. State*, 661 So. 2d 346 (Fla. 3d DCA 1995), and found that Petitioner could be found guilty of kidnapping his own child. *Davila v. State*, 26 So. 3d 5 (Fla. 2009). The section under which kidnapping was charged in *LaFleur* was section 787.01(1)(a)1, Florida Statutes, which defines kidnapping as "[h]old[ing] for ransom or rewards or as a shield or hostage." *LaFleur*, 661 So. 2d at 348.

The opinion in *Muniz*, does not identify which subsection the defendant was charged under, nor does the opinion in the instant case. Section 787.01, Florida Statutes, concerns the aggravated kidnapping of a child under the age of thirteen, and states that,

> (1)(a) The term "kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to:
>
> 1. Hold for ransom or rewards as a shield or hostage.

2. Commit or facilitate commission of any felony.
3. Inflict bodily harm upon or to terrorize the victim or another person.
4. Interfere with the performance of any governmental or political function.

(b) Confinement of a child under the age of 13 is against his or her will within the meaning of this subsection if such confinement is without the consent of her or his parent or legal guardian.

§ 787.01, Fla. Stat. (2000). Thus, a distinction could be reached between the opinions based on the specific subsection charged, since subsections (1) and (3) are based on the threat or infliction of harm on the victim or another, and subsections (2) and (4) criminalize behavior that does not involve the threat of physical harm. § 787.01, Fla. Stat. (2000). However, since the opinions in *Muniz* and *Davila* do not specify the specific subsection that was charged in the information, direct and express conflict does not exist as there could be plausible explanation for the differences in the outcome depending on the specific subsection charged. Thus, a possible distinction might be that a parent or legal guardian does not have the right to confine a child against his will when it is for the purpose of holding the child hostage, with the threat of violence against the child, or with the intent to terrorize the child, but that a parent does have the right when the charge is based on the other subsections which do not involve a threat of physical harm to the child.

Additionally, even if direct and express conflict exists, this Court should decline jurisdiction because Petitioner is not entitled to any relief because the claim

of fundamental error was raised in a motion for post conviction relief filed pursuant to rule 3.850, Florida Rules of Criminal Procedure. Pursuant to *Hughes v. State,* 22 So. 3d 132 (Fla. 2d DCA 2009), an allegation of fundamental error cannot be raised in a post conviction motion because it should have been either raised at trial or on direct appeal. *Id.* at 135 (*citing Franqui v. State,* 965 So. 2d 22, 35 (Fla. 2007); *Brudnock v. State,* 16 So. 3d 839 (Fla. 5th DCA 2009)). The Second District Court of Appeal found that in order to be raised in a rule 3.850 motion, a claim of fundamental error must involve a substantive due process violation, and violate the Constitution or law of the United States or the State of Florida. *Hughes,* 22 So. 3d at 136-37. In the instant case, Petitioner's claim of fundamental error does not allege a violation of the Constitution or law of the United States or the State of Florida, it involves an issue of statutory interpretation. Thus, a rule 3.850 motion for post conviction relief was not the proper forum for such a claim, the claim should have been raised on direct appeal, and the claim should have been denied as procedurally barred.

Thus, the opinion rendered by the Third District Court of Appeal is not in express and direct conflict with *Muniz v. State,* 764 So. 2d 729 (Fla. 2d DCA 2000), and even if express and direct conflict exists, the claim was not raised in the proper motion and was procedurally barred.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that this Court decline jurisdiction to review this cause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed to Marti Rothenberg, Office of the Public Defender, 1320 NW 14th Street, Miami, Florida 33125 on this ___ day of April, 2010.

_____
ANSLEY B. PEACOCK
Assistant Attorney General

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing Response was written using 14 point Times New Roman in compliance with Fla. R. App. P. 9.210(a)(2).

_____
ANSLEY B. PEACOCK
Assistant Attorney General