

IN THE SUPREME COURT OF FLORIDA

CASE NO.

MICHAEL HERNANDEZ,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

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

BRIEF OF PETITIONER ON JURISDICTION

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit
Of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

MANUEL ALVAREZ
Assistant Public Defender
Florida Bar No. 0606197

Counsel for Petitioner

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

**THE DECISION OF THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT, IN THE PRESENT CASE DIRECTLY
CONFLICTS WITH THE DECISIONS IN *COLE v. STATE*, 280
So. 2d 44 (Fla. 4th DCA 1973) AND *STANEK-COUSINS v.*
STATE, 896 So. 2d 865 (Fla. 5th DCA 2005).**

CONCLUSION 6

CERTIFICATE OF SERVICE 7

CERTIFICATION OF FONT 7

TABLE OF CITATIONS

PAGE

CASES

Cole v. State,

280 So. 2d 44 (Fla. 4th DCA 1973) 2, 4-5

Stanek-Cousins v. State,

912 So. 2d 43 (Fla. 4th DCA 2005) 2, 5

Vasilinda v. Lozano,

631 So. 2d 1082 (Fla. 1994) 4

INTRODUCTION

This is a petition for discretionary review of the decision of the Third District Court of Appeal in *Hernandez v. State*, ___ So. 2d ___, 34 Fla. L. Weekly D2269 (3d DCA Nov. 4, 2009), on the grounds of direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the attached appendix, paginated separately and identified as “A” followed by the page number.

STATEMENT OF THE CASE AND FACTS

Mr. Hernandez was indicted for first degree murder and attempted first degree murder in Miami-Dade County on February 18, 2004.

On June 24, 2008, the defense attorney filed a motion seeking a change of venue. The trial court granted the motion on July 1, 2008 and the venue was subsequently transferred to Orange County. The Honorable John Schlesinger, Circuit Court Judge of the Eleventh Judicial Circuit, presided over the trial in the Ninth Judicial Circuit in accordance with Rule 2.260(b), Florida Rules of Administrative Procedure (2009).¹

The trial was heard in the Orange County Courthouse commencing on September 8, 2008 until a guilty verdict was reached on September 24, 2008. The trial court adjudicated the defendant on September 24, 2008 in Orange County.

The defendant was later sentenced to life imprisonment in Miami-Dade County, on November 7, 2008. A timely notice of appeal was filed with the Court on November 7, 2008.

¹Rule 2.260(b) states: “The presiding judge from the originating court shall accompany the change of venue case, unless the originating and receiving courts agree otherwise.”

On September 1, 2009, the appellant filed a motion seeking to transfer the appeal to the Fifth District. The Third District denied the motion and certified a conflict to this Court based on the fact that its decision is in direct conflict with *Cole v. State*, 280 So. 2d 44 (Fla. 4th DCA 1973) and *Stanek-Cousins v. State*, 896 So. 2d 865 (Fla. 5th DCA 2005).

A notice invoking this Court's discretionary jurisdiction based on conflict was timely filed.

SUMMARY OF THE ARGUMENT

In this case, Mr. Hernandez was tried and convicted in Orange County after a transfer of venue. The fact that he was later sentenced in Miami-Dade County should not affect the jurisdiction of the appeal which, according to the prevailing case law, resides in the appellate court which has jurisdiction over the transferee court.

ARGUMENT

**THE DECISION OF THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT, IN THE PRESENT CASE DIRECTLY
CONFLICTS WITH THE DECISIONS IN *COLE v. STATE*, 280
So. 2d 44 (Fla. 4th DCA 1973) AND *STANEK-COUSINS v.
STATE*, 896 So. 2d 865 (Fla. 5th DCA 2005).**

In *Vasilinda v. Lozano*, 631 So. 2d 1082, 1085 (Fla. 1994), this Court held that it is “a generally accepted principle that when venue is transferred to another jurisdiction and the case is *concluded* in the new jurisdiction, review of the final order is properly commenced in the appellate court which has jurisdiction over the transferee court.” (Emphasis added). The use of the word “*concluded*” appears to create an ambiguity because Mr. Hernandez was tried and adjudicated in the Ninth Judicial Circuit, but he was sentenced in the Eleventh Judicial Circuit. The decision does not specify whether “*concluded*” refers to the adjudication or the sentence. This apparent vagueness, however, is resolved by *Cole v. State*, 280 So. 2d 44 (Fla. 4th DCA 1973), which was cited by this Court in *Vasilinda* in support of its holding.

In *Cole*, a criminal defendant was charged with robbery in Broward County and the venue was transferred to Polk County, where the defendant was convicted. The case was then transferred back to Broward for sentencing. The Fourth District Court held that:

[O]nce the cause was transferred to and actually tried in the Criminal Court of Record for Polk County, jurisdiction remained in that court for the purpose of adjudication and sentencing. For the purpose of convenience we hold that the order transferring the cause back to the Court of Record for Broward County shall be given effect only as an administrative order for the convenience of the trial judge and the

adjudication and sentence shall be treated as an adjudication and sentence of the Court of Record of Polk County, Florida.

Cole, 280 So. 2d at 45 (citation omitted); *see also*, *Stanek-Cousins v. State*, 912 So. 2d 43, 46-47 (Fla. 4th DCA 2005).

The Third District's decision expressly conflicts with the above-cited precedent and has unnecessarily created an uncertainty with the respect to the effect of changes in venue which must be corrected by this Court.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

Carlos J. Martinez
Public Defender
1320 N.W. 14th Street
Miami, Florida 33125
Telephone: (305) 545-1958

BY: _____
MANUEL ALVAREZ
Assistant Public Defender
FL Bar No. 0606197

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on this 7th day of December, 2009.

BY: _____
MANUEL ALVAREZ, ESQ.

CERTIFICATION OF FONT

Undersigned counsel certifies that the font used in this brief is 14 point proportionately spaced Times Roman.

BY: _____
MANUEL ALVAREZ, ESQ.