IN THE SUPREME COURT OF FLORIDA

RONALD WAYNE HENDRICKS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC10-1275

# JURISDICTIONAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

## PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Ronald Wayne Hendricks, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name. "PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number. A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

The history and facts are set out in the decision of the lower tribunal, *Hendricks v. State*, 34 So. 3d 819 (Fla. 1st DCA 2010).

The State of Florida charged the Petitioner with "four counts of sexual battery on a child less than twelve years of age." *Hendricks* at 821. As to Counts I and II, the jury found the Petitioner guilty as charged; as to Count III, the jury found the Petitioner guilty of the lesser included offense of battery; as to Count IV, the jury found the Petitioner not guilty. *Ibid* at 821-22.

The Petitioner's assertion of express and direct conflict pertains a juror request to review a transcript of the victim's testimony regarding the allegation contained in Count III. See *Hendricks* at 820 ("Appellant argues that the trial court fundamentally erred in

denying the jury's request to view a portion of the transcript without advising the jury that it could request a 'read-back.'"); see also *ibid* at 832 ("In this case, the testimony the jury requested was material to count III."); see also PJB-4:

> The Court should grant review on the basis of the First District's express and direct conflict in this case with the law of the Second District as to whether a violation of Fla.R.Crim.P. 3.410 constitutes reversible error where the trial court did not permit trial counsel an opportunity to be heard on a jury request to review a portion of trial testimony.

The decision below describes the victim's testimony regarding the allegation contained in Count III as follows:

> In testifying about this offense, the victim stated that this memory bothered her, that it was "probably ... the hardest for [her] to talk about," that it disturbed her, and that it was "horribly vivid in [her] head." The incident occurred on the bed Appellant shared with the victim's mother, and the victim recalled that Appellant first attempted to "force ... his penis into [her] vagina" and that "it wasn't working because [she] was so small." She explained that he then "started rubbing ... his penis against [her] vagina until ... he ejaculated on [her]."

*Hendricks* at 821.

During deliberations, the jury submitted the following, written request to the trial court: "May we see the transcript of the testimony of [the victim] regarding the third charge related to the allegation about [Appellant's] placing his penis on [the victim] and ejaculating[?]" *Hendricks* at 821.

Outside the presence of the jury but in the presence of the parties, the trial court stated: "I think the answer is no, rely on your memory." *Hendricks* at 821. Neither Petitioner's counsel nor the

prosecutor lodged any objection. *Ibid*. The trial court then brought the jury into the courtroom and informed the jury as follows: "Ladies and gentlemen, I have your question about the transcript, and the short answer is, no. You have to rely on your recollection and reach your decision based on that. Thank you." *Ibid*. The jury retired to the deliberation and, regarding Count III, returned with a verdict of guilty as to the lesser included offense of battery. *Ibid*.

## SUMMARY OF ARGUMENT

The Petitioner fails to satisfy the jurisdictional requirement for express and direct conflict because the Petitioner fails to establish any conflict between the actual decisions at issue. In the case at bar, the First District examined the record as a whole and determined that fundamental error did not occur during the Petitioner's trial. Under a completely different set of facts, the Second District examined the record as a whole in the case of *LaMonte v. State*, 145 So. 2d 889 (Fla. 2d DCA 1962) and determined that fundamental error did occur. However, in the absence of a *per se* rule, the fact that one court found fundamental error when the other did not does not necessarily mean that the two decisions expressly and directly conflict on the same question of law.

## ARGUMENT

### ISSUE

DOES THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICT WITH THE SECOND DISTRICT'S DECISION IN *LaMonte V. State*, 145 So. 2d 889 (Fla. 2d DCA 1962) ? (Restated)

The Petitioner contends that this Court enjoys jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, §3(b)(3), Fla. Const. Compare Rule 9.030(a)(2)(A)(iv)

> The discretionary jurisdiction of the supreme court may be sought to review... decisions of the district courts of appeal that... expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law.

with Article V, §3(b)(3):

> The supreme court ... [m]ay review any 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 on the same question of law.

In order to qualify as express and direct, the conflict must remain readily apparent simply by examining the four corners of the majority decisions at issue; a petitioner cannot rely upon the record, a concurring opinion, or a dissenting opinion in order to establish conflict jurisdiction. See *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986) ("Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction."); see also *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) ("[T]he language and expressions found in a

dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the decision of the district court of appeal."). Additionally, inherent or implied conflict cannot suffice. See *Department of Health and Rehabilitative Services v. National Adoption Counseling*, 498 So. 2d 888, 889 (Fla. 1986) ("[I]nherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction."). Furthermore, the decisions themselves must conflict; conflicting opinions or the reasons therefor remain insufficient as well. See *Jenkins* at 1359, quoting *Gibson v. Maloney*, 231 So. 2d 823, 824 (Fla. 1970) ("[I]t is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari.").

Far from an arbitrary rule, the requirement for express and direct conflict: (1) prevents the District Courts of appeal from devolving into intermediate courts of appeal; and, (2) preserves this Court's ability to devote its limited resources to maintaining uniformity of decisions. See *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958):

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

In the case *sub judice*, the Petitioner fails to satisfy the jurisdictional requirement for express and direct conflict amongst decisions. Although the decision below expresses its disagreement with the Second District's decision in *LaMonte v. State*, 145 So. 2d 889 (Fla. 2d DCA 1962), the First District declined to declare express and direct conflict. See *Hendricks* at 831 ("We disagree with *LaMonte*.").

In reaching its decision below, the First District faulted the Second District for failing to consider "the possibility that defense counsel's silence may have been strategic." *Hendricks* at 831. Given the evidence adduced at trial, the First District concluded a readback of the requested testimony might have hurt the defense case by clarifying a point of apparent ambiguity or dispute; consequently, the First District declined to find the existence of fundamental error. See *ibid* at 832:

> The facts of the instant case illustrate the point that the failure of a defense attorney to request instructions on the availability of a read-back may be strategic. In this case, the testimony the jury requested was material to count III. However, the testimony was detailed, descriptive, and disturbing, and if the jury remembered and believed that testimony, it established the crime of sexual battery on a child. See §794.011(1)(h), Florida Statutes (1993) (defining sexual battery, in pertinent part, as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another") (emphasis added). Additionally, the testimony included the victim's statements that she had a vivid memory about this incident and that it was the offense that bothered her the most. While we do not know the defense counsel's reasons for failing to request that the jury be informed that this testimony could be read back, we cannot ignore the fact that defense counsel may have believed that it was not in

> Appellant's best interests to have this testimony emphasized. For this reason, we decline to find fundamental error in the trial court's failure to advise the jury, sua sponte, of the availability of a read-back at the court's discretion.

In other words, the First District examined the record as a whole and concluded that the Petitioner failed to meet the "very high threshold" of fundamental error. See *Section 924.051(2), Florida Statutes*:

> A judgment or sentence may be reversed on appeal only when an appellate court determines ***after a review of the complete record*** that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error. (Emphasis added)

See also *Calloway v. State*, Case No. 1D08-2987 *8 (Fla. 1st DCA Apr. 28, 2010) ("Obviously, the only way to determine if error is fundamental is to engage in a weighing process. The defendant would have us circumvent this process and find his proposed error in the jury instructions to be fundamental per se."); see generally *Nicholson v. State*, 33 So. 3d 107, 111-12 (Fla. 1st DCA 2010):

> The use of such instructions, however, does not necessarily meet the very high threshold for fundamental error. In *Garzon v. State*, 980 So. 2d 1038, 1045 (Fla. 2008), the Florida Supreme Court stated that absent a misinstruction or failure to instruct on a disputed element of a crime, the proper test for assessing the effect of the instruction is the one set forth in the Fourth District Court's opinion in *Garzon v. State*, 939 So. 2d 278, 282-83 (Fla. 4th DCA 2006), which analyzed the instruction "in the context of the other jury instructions, the attorneys' arguments, and the evidence in the case to decide whether the 'verdict of guilty could not have been obtained without the assistance of the alleged error.'" 939 So. 2d at 283 (quoting *State v. Delva*, 575 So. 2d 643, 645 (Fla. 1991)); see *Hunter v. State*, 8 So. 3d 1052, 1070 (Fla. 2008). We find no support for appellant's suggestion the Garzon contextual analysis

should be limited to cases involving a "principal" theory of guilt.

Similar to the decision below, the Second District, when it decided *LaMonte*, also examined the record as whole. See *LaMonte* at 893 ("We conclude, therefore, that the trial court erred in refusing the jury's request, and after examination of the entire record, we find that this error injuriously affected the substantial rights of the defendant."). Importantly, the Second District did not hold that the trial court's failure to provide a readback of the requested testimony constitutes fundamental error *per se*.

In conclusion, the Second District in *LaMonte* and the First District below each conducted a contextual analysis in order to determine whether or not the trial court's decision to forego a readback of requested testimony constituted fundamental error that completely destroyed the fairness of the proceedings. See generally *Sparks v. State*, 740 So. 2d 33, 35 (Fla. 1st DCA 1999) ("Fundamental error has been defined as error that goes to the essence of a fair and impartial trial, error so fundamentally unfair as to amount to a denial of due process." The First District, under a unique set of facts, examined the record and determined that fundamental error did not occur; the Second District, under a completely different set of facts, examined the record and determined that fundamental error did occur. In the absence of a *per se* rule, the fact that one court found fundamental error when the other did not does not necessarily mean

that the two decisions expressly and directly conflict on the same question of law. Thus, the Petitioner fails to satisfy the jurisdictional requirement for express and direct conflict.

## CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

## SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to William J. Sheppard, Esq., and D. Gray Thomas, Esq., Sheppard, White, Thomas & Kachergus, P.A., 215 Washington Street, Jacksonville, Florida 32202, by MAIL on July 29, 2010.

Respectfully submitted and served,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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Michael T. Kennett
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