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IN THE SUPREME COURT OF FLORIDA

CASE NO.

**VICTOR VILLANUEVA,**

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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# BRIEF OF PETITIONER ON JURISDICTION

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

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## STATEMENT OF CASE AND FACTS[1]

The Third District's opinion, *Villanueva v. State*, 3D11-2023 (Fla. 3d DCA August 21, 2013), sets forth the case facts (A. 1-3). Victor Villanueva made plans to visit his daughter, Y.V., from whom he had been estranged for approximately three years (A.2). Y.V. claimed that during that visit Victor touched her breast twice and her buttocks once (A. 2-3). She later told her mother and a teacher, and Victor was arrested and charged with one count of lewd and lascivious molestation (A. 1-3). Victor testified that he did not touch Y.V.'s breast (A. 3).

Mr. Villanueva was acquitted of molesting Y.V., but was convicted of a simple battery (A. 3). Regardless of the fact that he was not convicted of a sexual crime, the trial court sentenced him to one year of probation with the special condition that he attend sex offender therapy (A. 3). In doing so, the court said:

> I ordered...[sex offender] therapy because he was found guilty of battery which is an illegal touching of someone else. That's what he was charged with, was the illegal touching of someone else. *They just didn't find it the same degree that the charging people did.* Okay. That being the case, it was still an improper touching of his daughter, and he can acknowledge that in the sense of what it was and what he was found guilty of and go do

[1]This is a petition for discretionary review on the ground that the Third District Court of Appeal's decision, *Villanueva v. State*, 3D11-2023 (Fla. 3d DCA August 21, 2013), conflicts with Florida law. Attached to this brief is the appendix, paginated separately and identified herein as "A."

> the therapy, because he needs to learn that he can't do that to children and family.

(A. 3) (emphasis added). Mr. Villanueva appealed, arguing that the requirement to attend sex offender therapy - *one* of the conditions of wider "sexual offender probation" - was illegal when he was not convicted of a sexual offense (A. 4). In support of that argument, Mr. Villanueva relied upon *Arias v. State,* 65 So. 3d 104 (Fla. 5th DCA 2011), in which the Fifth District Court of Appeals struck sexual offender special probation conditions under similar circumstances (A. 6-7). The Third District, however, distinguished that case, reasoning that in *Arias* the trial court erroneously imposed *all* of the conditions of "sex offender probation" upon a defendant who was not convicted of a sexual offense, rather than just *one* condition as in the case at bar (A. 7). Based upon that distinction, the Third District affirmed the imposition of the special condition (A. 12).

Mr. Villanueva now contends that the Third District Court of Appeals narrow interpretation of *Arias* was in error, and that their decision in *Villanueva* stands in direct conflict with the established law of the Fifth District. Appellant filed a notice to invoke this Court's discretionary jurisdiction to review the Third District's decision on September 6, 2013. This jurisdictional brief follows.

## SUMMARY OF ARGUMENT

The Fifth District Court of Appeals decided in *Arias v. State,* 65 SO. 3d 104 (Fla. 5th DCA 2011) that it was reversible error to impose conditions of sexual offender probation on a defendant who had not been convicted of one of the offenses enumerated in Florida Statutes § 948.30. Conflictingly, the Third District decided in *Villanueva v. State,* 3D11-2023 (Fla. 3d DCA August 21, 2013) that imposition of *one* such condition was permissible. The Third District attempted to distinguish *Arias*, stating that it only applies to cases in which a court imposes *all* the conditions of sexual offender probation. This distinction, however, was not actually present in *Arias.* As such, *Villanueva* stands in direct conflict with the established law of the Fifth District.

## ARGUMENT

### THE THIRD DISTRICT'S OPINION CONFLICTS WITH ESTABLISHED LAW IN ALLOWING THE IMPOSITION OF SPECIAL CONDITIONS OF SEX OFFENDER PROBATION UPON PEOPLE NOT CONVICTED OF SEX CRIMES.

**The Law of the Fifth District**

In *Arias v. State,* 65 So. 3d 104 (Fla. 5th DCA 2011) the defendant Daniel Arias plead to one count of burglary with a battery. It was alleged that in the course of the burglary, he inappropriately touched a 13-year-old girl. *Id* at 104. Due to the "sexual motive" of his actions, the court imposed conditions of sex offender probation as part of his sentence. *Id.* The Fifth District Court of Appeals reversed, holding that because Arias was not convicted of a sex offense enumerated in Florida Statutes § 948.30, the imposition of conditions of sex offender probation under that statute was improper. *Id.* at 104-105.

**The Third District's Holding and Basis for Conflict**

Conflictingly, the Third District held in *Villanueva* that imposition of *one* condition of sexual offender probation out of § 948.30 was proper, even if the defendant was not convicted of one of the enumerated sexual offense (A. 12). This holding is in direct conflict with the holding of *Arias*. The Third District attempted to distinguish *Arias* by stating that the holding only applied to situations in which the trial court imposed the *entire panoply* of sexual offender conditions as terms of

probation (A. 6-7). This is plain misreading of *Arias,* and no such distinction exists. At no point in the holding of *Arias* did the Fifth District state that the trial court had imposed *all* of the conditions of sexual offender probation, nor did they intimate that their holding would have been different based upon the number of conditions imposed. Indeed, the Court's holding turned on the principle that trial courts cannot circumvent the statutory scheme[2] that conditions of sexual offender probation may only be imposed upon convicted sex offenders by referring to those same restrictions as "special conditions." That is *exactly* what the trial court in *Villanueva* did, and the logic of the Fifth District applies with equal force to a case in which only one condition is imposed.

Given that *Arias* sought to close a loophole that was used by trail courts, the holding can *only* be read to apply broadly to the imposition of *any* conditions of sexual offender probation. The reading of the Third District cannot be correct as it would effectively eviscerate the holding of the Fifth District. According to *Villanueva*, a court could impose *all but one* of the conditions of sexual offender

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[2] The statute reads: "Effective for probationers or community controlees whose crime was committed on or after October 1, 1995 and who are placed under supervisions for violation of chapter 974, s. 800.04, 827.071, s. 847.0135(5), or s. 847.0145, the court must impose the following conditions in addition to all other standard and special conditions imposed...." § 948.30(1), Fla. Stat. (2010). One of the "following" conditions is the sexual offender treatment program imposed by the trial court. § 948.30(1)(c), Fla. Stat. (2010).

conditions upon a defendant never convicted of a sexual offense. *Arias* could not possibly have stood for such an impotent principle. As such, this Court should exercise its discretionary jurisdiction to settle the clear conflict between the holdings of *Villanueva* and *Arias*.

## 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,

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BY: */s/ James Moody*
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## CERTIFICATE OF FONT

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

*/s/ James Moody*
JAMES MOODY
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was emailed to the Office of the Attorney General, Criminal Division, at CrimAppMia@myfloridalegal.com this 11th day of September, 2013.

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