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IN THE SUPREME COURT OF FLORIDA

Case No. SC13-1828
Lower Court Case No. 3D11-2023

VICTOR VILLANUEVA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

JURISDICTIONAL BRIEF OF RESPONDENT

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INTRODUCTION

Petitioner, Victor Villanueva, was the Defendant and Appellant below. Respondent, the State of Florida, was the Prosecution and Appellee below. The parties shall be referred to as they stand in this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner appealed from his conviction and sentence for misdemeanor battery as a lesser included offense of the charge of lewd and lascivious molestation of a child. *Villanueva v. State*, 118 So. 3d 999, 1001 (Fla. 3d DCA 2013). The Third District Court of Appeal, in its opinion, stated the pertinent facts of this case as follows:

> Villanueva was charged with one count of lewd and lascivious molestation of a child older than twelve, but less than sixteen years old. The victim, Y.V., was Villanueva's daughter, from whom he had become estranged by the time the girl was nine. When Y.V. was twelve, her family ran into Villanueva and arrangements were made for Villanueva to visit with Y.V. During the visit, Villanueva touched Y.V.'s breast. Y.V. testified that the touching of her breast was not accidental and lasted for several seconds. When she reacted, he laughed. Later, in Villanueva's car, he again put his hand on her breast. Finally, while Y.V. was in a bathing suit at a swimming pool, he reached out and put his hand on her buttocks which caused her to exclaim, "hey, you touched me." He apologized. Y.V. told her mother and, later, a teacher, who notified the police. Villanueva testified that he never touched Y.V.'s breasts.
>
> The jury acquitted Villanueva of the charge of lewd and lascivious molestation of a child, but found him guilty of the lesser included offense of misdemeanor battery. The trial judge sentenced Villanueva

> to one year of probation, subject to the special condition that Villanueva undergo sex offender therapy.

Villanueva, 118 So. 3d at 1001. Following the recitation of the facts, the Third District Court framed the issues as follows:

> (1) whether sex offender therapy as a condition of probation is restricted by statute to only certain enumerated sexual offenses; and (2) whether the imposition of that condition here comports with the standards governing probation announced by the Florida Supreme Court in *Biller v. State*, 618 So.2d 734, 734-35 (Fla. 1993).

Villanueva, 118 So. 3d at 1001. On appeal, Petitioner challenged the trial court's decision in ordering him to undergo mentally disordered sex offender therapy as a special condition of his probation. *Id*. at 1001. Specifically, Petitioner, *inter alia*, argued "that sex offender therapy as a condition of probation is restricted by statute to certain enumerated sexual offenses." *Id.* The Third District found Petitioner's argument unpersuasive, stating:

> Even though a statute includes sex offender treatment as one of a roster of mandatory conditions of probation for certain specified sexual offenses, the statute does not prohibit a judge from selectively requiring sex offender therapy as a special condition of probation for other offenses where appropriate.

Villanueva, 118 So. 3d at 1001. In doing so, the Third District set forth the pertinent language of § 948.30, Fla. Stat., which list the conditions for "sex offender probation." *Id.* at 1002. The Third District noted that "sex offender therapy," among others, is one of the "mandatory conditions" in § 948.30. *Id.*

Recognizing further that the section clearly legislative intent mandates the imposition all the conditions listed therein on convicted sexual offenders that "are granted probation," the Third District stated:

> But it contains no language that prohibits these conditions from being selectively imposed on the probation for other crimes.

Id. at 1002. The Third District then noted that not only courts have already imposed some of the individual conditions listed in § 948.30 on other offenses not listed in the statute, but "the Legislature itself" had "authorize[d]" some of them "to be imposed for offenses other than those listed in the statute." *Villanueva*, 118 So. 3d at 1002.

In further rejecting the proposition that the special conditions listed in § 948.30 apply only to the enumerated sexual offenses in the statute, the Third District stated:

> . . . reading such a restrictive inference into the statute runs contrary to the policy of the probation statutes, which encourage trial judges to exercise broad discretion in tailoring the probation conditions to a defendant's rehabilitation. The probation statutes mandate certain conditions of probation for certain crimes, but otherwise recognize that trial judges have broad discretion to fashion conditions of probation that promote rehabilitation.

Villanueva, 118 So. 3d at 1002. (citation omitted).

Lastly, the Third District acknowledged the Fourth and Fifth Districts' decisions in *Sturges v. State*, 980 So. 2d 1108, 1109 (Fla. 4th DCA 2008) and *Arias v. State*, 65 So. 3d 104 (Fla. 5th DCA 2011) had held that:

> *all* of the conditions listed in the sex offender probation statute could not be imposed on persons who were convicted of a crime other than those crimes enumerated in the statute.

Villanueva, 118 So. 3d at 1002. (citation omitted). The Third District, however, distinguished the decisions in *Surges* and *Arias*, reasoning that the decisions "did not address situations where the court selectively imposed only one of the listed conditions, such as the sex offender therapy imposed here." *Villanueva*, 118 So. 3d at 1002. Thus, the Third District held that:

> while there are circumstances in which sex offender therapy is a statutorily-required condition of probation, sex offender therapy can still be imposed as a special condition of probation outside of those statutorily-required circumstances when the facts of the crime so warrant.

Villanueva, 118 So. 3d at 1002. Subsequently, the Third District addressed the application of the factors announced by the Supreme Court in *Biller* to determine the validity of a special condition of probation. *Villanueva*, 118 So. 3d at 1003-04. Applying *Biller* to this case, the Third District "conclude[d] that the special condition that Villanueva attend sex offender therapy comport[ed] with that decision's standards governing probation because it [was] reasonably related to

rehabilitation." *Id.* 118 So. 3d at 1004. Thus, the Third District upheld the lower's decision to impose a special condition on Petitioner. *Id*.

Petitioner seeks this Court's discretionary jurisdiction based on an alleged conflict with the Fifth District's decision in *Arias.*

SUMMARY OF THE ARGUMENT

There is no basis upon which discretionary review can be granted in this case. Petitioner's assertions that the Third District misread the holding in *Arias*, and thus, its distinction of the *Arias* decision from the instant case are improper. Petitioner argues the merits of the Third District's decision rather than any lawful basis for the Court's jurisdiction. Further, there is no direct and express conflict between the Third District's decision in this case and the decision in *Arias* as they are factually distinguishable.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S DECISION IN *VILLANUEVA V. STATE*, 118 SO. 3D 999 (FLA. 3D DCA 2011) DOES NOT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIFTH DISTRICT IN *ARIAS V. SATE,* 65 SO. 3D 104 (FLA. 5TH DCA 2011).

The Petitioner argues that the third District's decision expressly and directly conflicts with the decision of the Fifth District, in *Arias v. Sate*, 65 So. 3d 104 (Fla.

5th DCA 2011). The Petitioner predicates this assertion on the following interpretation of *Arias*:

> The Fifth District Court of Appeals [sic] 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.

(Brief of Petitioner on Jurisdiction, p. 4.) Most emphatically, the Fifth District Court of Appeal did not hold that conditions of sex offender probation could not be imposed where defendants were not convicted of sex offenses enumerated in § 948.30. Rather, the Fifth District held that based on the facts of that case, the condition of sex offender probation was not rationally related to the offense for which the defendant was convicted.

The Fifth District's holding in that regard is identical to that of the Third District in the instant case, and is further consistent with the general principles routinely articulated by this case - that any special condition of probation imposed on a defendant must be reasonably related to the offense for which the defendant was convicted. Under the facts of *Arias*, as detailed in the Fifth District's opinion, there was no such reasonable relationship; under the facts of the instant case, as detailed in the Third District's opinion, such a reasonable relationship did exist.

The facts of the instant case reflected that on three distinct occasions, the defendant touched the breasts of the victim. As the touching of breasts, regardless

of the offense for which the defendant was convicted, has a sexual component, the imposition of the special condition of probation requiring sex offender therapy was reasonably related to the offense for which there was a conviction.

In *Arias*, the defendant entered the girlfriend's home at 3:00 a.m., without permission, to retrieve his wallet. At that time, he entered the bedroom of the girlfriend's 13-year-old daughter, who was home alone, and "petted her hair without her permission." 65 So. 3d at 104. There was no touching of the breasts or genitalia.

Arias pled no contest to the offense of burglary with an assault or battery. The Fifth District noted the general propositions set forth by this Court, in *Biller v. State*, 618 So.2 d 734 (Fla. 1993), that a special condition of probation must be reasonably related to rehabilitation, and that there must be a "relationship to the crime of which the offender was convicted." 65 So. 3d at 104-105.

In *Arias*, the Fifth District found that the reasonable relationship to the offense for which the defendant was convicted did not exist.

Accordingly, since Petitioner has not shown any express and direct conflict of decisions within the four corners of the district court's opinion, this Court's jurisdiction has not been established. *Reaves v. State*, 485 So. 2d at 830; *Jenkins v.*

State, 385 So. 2d 1356, 1359 (Fla. 1980). Therefore, there is no express and direct conflict, and this Court must dismiss this case for lack of jurisdiction.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was e-mailed to Assistant Public Defender James Moody, Esquire, at appellatedefender@pdmiami.com, and e-mailed to JMoody@pdmiami.com, this 31st day of October, 2013.

/s/ *Magaly Rodriguez*
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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ *Magaly Rodriguez*
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