

IN THE SUPREME COURT OF FLORIDA

DUNCAN JASON SMITH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC15-782

**ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL,
STATE OF FLORIDA**

JURISDICTIONAL BRIEF OF RESPONDENT

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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 or the State. Petitioner, Smith, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

STATEMENT OF THE CASE AND FACTS

After entering a plea of guilty to twenty counts of transmitting child pornography to an undercover police officer via the internet, Petitioner filed a three-claim motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850. In one claim, Petitioner argued he was denied due process by being convicted of a non-existent crime, relying on *Biller v. State*, 109 So. 3d 1240 (Fla. 5th DCA 2013). Petitioner's motion was denied after an evidentiary hearing. On appeal, the Fourth District Court of Appeal affirmed, certifying conflict with *Biller. Smith v. State*, 40 Fla. L. Weekly D738 (Fla. 4th DCA Mar. 25, 2015).

The Fourth District's opinion summarized the facts of Petitioner's case as follows:

Smith used a file-sharing program that was designed to allow one-on-one access to stored data. Smith loaded pornographic images into a specific computer file. Authorization was required to gain access to it. Smith

sent a “friend” request to a Palm Beach County undercover detective, which authorized the detective to access certain of Smith's files that Smith had chosen to share with other users. The detective downloaded various images of child pornography from these files. Apart from the “friend” request, Smith did not know that the files were actually downloaded. Smith was arrested, and in a post-*Miranda* statement admitted that he had been trading in child pornography for ten years.

Id.

SUMMARY OF ARGUMENT

Notwithstanding the district court’s certification of conflict, this Court should exercise its discretion to deny jurisdiction because Petitioner would not be entitled to postconviction relief even if this Court sided with *Biller*.

ARGUMENT

JURISDICTION SHOULD BE DENIED BECAUSE THE OUTCOME WOULD NOT BE DIFFERENT UNDER EITHER INTERPRETATION OF THE STATUTE.

Petitioner requests this Court accept jurisdiction pursuant to Article V, §3(b)(4), Fla. Const. and Fla. R. App. P. 9.030(a)(2)(A)(vi), which provides: “The supreme court . . . [m]ay review any decision of a district court of appeal . . . that is certified by it to be in direct conflict with a decision of another district court of appeal.”

Here, the Fourth District certified conflict with *Biller*. In *Biller*, the defendant pled guilty to transmission of child pornography, reserving the right to appeal the denial of a motion to dismiss. The defendant sought dismissal of the charge on grounds there was no evidence he transmitted child pornography as defined by the statute, as he merely authorized other users to download files through Limewire. The Fifth District ruled that the word “send” in the definition of “transmit” in section 847.0137(2), Florida Statutes (2010)¹, means “to cause to go or be carried.” *Biller*, 109 So. 3d at 1241 (quoting Webster’s New World College Dictionary 1305

¹ Defined as “the act of sending and causing to be delivered any image, information, or data from one or more persons or places to one or more other persons or places over or through any medium, including the Internet, by use of any electronic equipment.” § 847.0137(2), Florida Statutes.

(4th ed. 2001)). The Fifth District held this required a purposeful act to deliver child pornography, not merely allowing access to child pornography through a shared network. *Id.* In contrast, the Fourth District in this case determined that the Fifth District overlooked the phrase “cause to be delivered” in the definition of transmit. When read together with “send,” the Fourth District held the definition encompasses acts that make it reasonably foreseeable that child pornography will be accessed and downloaded.

Notwithstanding the Fourth District’s certification of conflict, this Court should decline to accept jurisdiction because the result below would not be different under either interpretation of the statute. Petitioner did not reserve the right to appeal a motion to dismiss on grounds of lack of evidence; he argued in a 3.850 motion that he was convicted of a non-existent crime. But *Biller* did not hold that transmission of child pornography was a non-existent crime; *Biller* merely held conviction of transmission of child pornography requires some purposeful act to deliver files and reversed because there was no evidence the defendant in *Biller* engaged in a purposeful act. *Biller*, 109 So. 3d at 1241. A crime does not become a non-existent crime simply because a court finds a particular factual scenario does not qualify as a crime under the statute. *Cf. Hollingshead v. State*, 80 So. 3d 424 (Fla. 4th DCA 2012) (trafficking in hydrocodone not a non-existent crime after supreme court held some pills with

insufficient dosage were not subject to trafficking charge). Thus, Petitioner would not be entitled to relief even if this Court sided with the Fifth District's interpretation of the statute. Respondent would respectfully suggest this Court decline jurisdiction until it is presented with a case where the different interpretations proposed by the Fourth and Fifth Districts would actually affect the result of the trial court proceeding.

CONCLUSION

WHEREFORE, based on the arguments and authorities cited in this brief, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

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CERTIFICATE OF TYPEFACE COMPLIANCE AND SERVICE

I CERTIFY that (1) this brief has been prepared in Times New Roman font, 14 point, and double spaced, and (2) a true and accurate copy of this brief was served through the Florida Courts E-Filing Portal on Louis G. Carres, Special Assistant Conflict Counsel, 401 S. Dixie Hwy, Second Floor, West Palm Beach, FL 33401 by email at lcarres@gate.net and rc-4appellatefilings@rc-4.com on May 20, 2015.

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