IN THE SUPREME COURT OF FLORIDA

ROGER D. CHURCHILL, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO.: SC16-654

L.T. Case No.: 5D14-1081

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Discretionary Review from the District Court of Appeal,

Fifth District, State of Florida

EAKIN & SNEED

ROCCO J. CARBONE, III

599 Atlantic Boulevard, Suite 6
Atlantic Beach, Florida 32233
Telephone: (904) 247-6565
Email: rocco.carbone@comcast.net
Florida Bar No. 0095544
Attorney for Petitioner

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PRELIMINARY STATEMENT

Petitioner, ROGER D. CHURCHILL, JR., was the defendant in the trial court and the appellant before the Fifth District Court of Appeal. The Petitioner will be referred to herein by name or as "Petitioner." Respondent, State of Florida, was the prosecution in the trial court and the appellee before the Fifth District Court of Appeal. The Responded will be referred to herein by "the prosecution", "the State" or as "Respondent." The Record consists of four volumes. Volumes three and four are supplemental records. References to the record on appeal will be designated by reference to the record and volume on appeal followed by the specific page number of the volume references. This reference will be forth in parentheses as follows: (R. II 1-4). The Appendix is cited as "Pet.'s App." Petitioner's pro se Jurisdictional Brief is cited as "J.B." followed by a page number in parentheses. All emphases in quoted materials are supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The issue before this Court is whether an appellate court must accept a trial court's determination (and thereby accept jurisdiction) that a legal issue(s) was dispositive of a case when the parties have stipulated as such, even when the appellate court determines the legal issue is in fact not dispositive. *Finney v. State*,

420 So. 2d 639 (Fla. 3d DCA 1982), *contra, Churchill v. State*, 169 So. 3d 1260 (Fla. 5th DCA 2015).

A defendant is entitled to a direct appeal of a dispositive issue when he or she enters a *nolo contendere* plea reserving his or her right to appeal a legally dispositive issue. *State v. Ashby*, 245 So. 2d 225 (Fla. 1971); *Brown v. State*, 376 So. 2d 382 (Fla. 1979). Dispositive means that, regardless of whether the appellate court affirms or reverses the trial court's ruling, a trial could not occur. *Morgan v. State*, 486 So. 2d 1356 (Fla. 1st 1986). However, even where the legal issue is not strictly speaking "dispositive", if the parties stipulate, and the trial court accepts the stipulation that the legal issue(s) is dispositive, then the question turns to whether the appellate court is bound to review the merits of the appeal based on the "stipulation of dispositiveness exception". *Morgan*, 486 So. 2d at 1358-59. This exception is defined as "a stipulation which contemplates an intent to be foreclosed from the trial regardless of the outcome of an appeal in spite of a record which clearly shows that the state would be able to proceed to trial regardless of the admissibility of the disputed evidence." *Id.* If this stipulation of dispositivenss exception does not apply, then the issue turns to what avenue of relief should be afforded to a defendant. *Finney*, 420 So. 2d at 639, *contra*, *Churchill*, 169 So. 3d at 1260.

To assist the Court, the following two sections outline the factual and procedural history of the case at bar, as well as the jurisprudential history of "*Ashby* pleas" in the State of Florida prior to Petitioner's argument on the merits.

I. Trial Court and Fifth District Court of Appeal Proceedings

On August 7, 2013, the State filed an information charging Petitioner with one count of conspiracy to commit the manufacture of methamphetamine; one count of manufacturing of methamphetamine; and one count of possession of a listed chemical. (R. I 9-11). On January 23, 2014, the case was set for trial. (R. II 100-135). Prior to jury selection, the Petitioner's trial counsel argued an *ore tenus* Motion in Limine to exclude any testimony regarding the alleged methamphetamine on the basis no qualified expert was listed to testify regarding these facts. *Id.* The trial court noted its doubt whether the State could proceed to trial without a qualified expert witness, and allowed the parties to continue the trial over the Petitioner's objection. *Id.*

On February, 6, 2014, Petitioner filed a Motion in Limine seeking to prevent the State from offering testimony or evidence regarding the identification of the alleged illicit substances which are the basis for the charges. (R. I. 50-59). In the Motion, Petitioner argued that the law enforcement officer who tested the alleged methamphetamine with a presumptive field test kit failed to meet the standard of admissibility set out by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S.

579 (1993). *Id.* On March 6, 2014, following a hearing, the trial court denied the Motion in Limine finding the detective on the scene could rely on his training and experience to identify the alleged illicit substance. (R. II 1-99).

Following the trial court's decision, on March 21, 2014, Petitioner entered pleas of *nolo contendere* to the charged offenses while specifically reserving his right to appeal[1] the denial of his Motion to Suppress and Motion in Limine. (R. I 165-167). The Petitioner, his trial counsel, and the trial court signed a written plea agreement wherein it is noted the Petitioner was entering his plea and "Reserving [His] Right to Appeal his Motion to Suppress [and] Motion in Limine and State agrees this would be dispositive."[2] (R. I 165-167). During the plea colloquy, the State, Petitioner and the Court unequivocally stated on the record that the Motion in Limine was dispositive of the State's charges against Petitioner. (R. I 165-167);

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[1] *See* Fla. R. App. P. 9.140(b)(2)(A)(i):

(2) Guilty or Nolo Contendere Pleas.

(A) Pleas. A defendant may not appeal from a guilty or nolo contedere plea except as follows:

(i) Reservation of Right to Appeal. A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.

[2] This notation was handwritten on the first and second page of the Waiver of Rights and Open Plea to the Court form. *See* Appendix III.

(R. IV 15-16). Specifically, the following exchange occurred during the plea colloquy:

> The Court: Mr. Churchill, I have before me a waiver of rights form and I see that no contest has been circled and this is with the reservation of right to appeal the motion to suppress and/or motion in limine rulings and that the state has agreed this would be dispositive. That's actually written on the front of the document. Is that your plea, Sir?
>
> Defendant: Yes, Sir.
>
> The Court: And that is with that reservation, correct?
>
> Defendant: Yes, Your Honor.
>
> The Court: Very good. As I turn the pages over, I see the initials of it looks like RC or RDC, Roger Dennis Churchill, on Page 1, going into Page 2. On to Page 3 I see the – or on Page 2 I see the same signature reserving right to appeal the motion in limine. That's your handwriting, right, Ms. Militello?
>
> Ms. Militello (Defense Counsel): Yes, Sir.
>
> The Court: because of it's—it's very clear what the intention is and—with her signature and the state does agree that would be dispositive, correct?
>
> Mr. Foster (Prosecutor): Yes, Judge.

The Petitioner then entered an open plea to the trial court and the trial court adjudicated Petitioner guilty on all three counts. (R. I 168-92; R. III 1-34). The trial court sentenced Petitioner to five years (count one) consecutive to a sentence Petitioner was already serving; fifteen years (count two) consecutive to count one; and a concurrent seven years (count three). (R. I. 168-92; R. III 1-34).

On March 27, 2014, Petitioner filed a notice of appeal. (R. I 144). Following this notice, Petitioner and the State filed their respective briefs in this case. On July 24, 2015, the Fifth District declined to address the merits of Petitioner's brief finding it did not have jurisdiction because the issue on appeal was not dispositive. *Churchill*, 169 So. 3d at 1261. The Fifth District recognized the parties stipulated that the trial court's rulings on these motions would be dispositive; however, the Fifth District found it was not bound to accept this stipulation. *Churchill*, 169 So. 3d at 1261 n. 2 (citing *Ashley v. State*, 611 So. 2d 617, 618 (Fla. 2d DCA 1993)).

The Fifth District dismissed the appeal without considering the merits because "[a]n issue is legally dispositive only if, regardless of whether the appellate court affirms or reverses the lower court's decisions, there will be no trial of the case." *Id.* (citing *Levine v. State*, 788 So. 2d 379, 380 (Fla. 4th DCA 2001) (internal quotation marks omitted) (citing *Zambuto v. State*, 731 So. 2d 46 (Fla. 4th DCA 1999)). Although not specifically reaching the merits, the Fifth District stated the stipulation was based only on the exclusion of the deputy's testimony under *Daubert*, and Petitioner did not contest the trial court's ruling regarding the identification of the methamphetamine based on the law enforcement officers training and experience. *Churchill*, 169 So. 3d at 1261 n. 1. In limiting the argument to this basis, and not including the other arguments in the initial brief, the Fifth District stated Petitioner waived any argument regarding the additional issues

since these issues were not raised in his initial brief. *Id. Churchill*, 169 So. 3d at 1261 n. 2 (citations omitted). Because the Fifth District found the trial court's order was not dispositive, it held the Petitioner could not challenge the decision on direct appeal, and dismissed Petitioner's appeal. *Churchill*, 169 So. 3d at 1261.

On August 17, 2015, the Fifth District entered its mandate in this decision. Petitioner and the State filed their respective jurisdictional briefs[3] in this matter. In his brief, Petitioner argued this Court should exercise its discretionary jurisdiction and accept this matter because *Churchill* is in direct and express conflict with *Finney*, 420 So. 2d at 639. Additionally, in his brief he stated his intention to file a motion pursuant to Florida Rule of Criminal Procedure 3.850 against his trial and appellate counsel respectively. (J.B. 7-8).

On April 19, 2016, this Court accepted discretionary jurisdiction to review the Fifth District's order dated July 24, 2015. *Churchill v. State*, 2016 WL 1566521 (Fla. 2016). On July 5, 2016, Petitioner filed his Notice of Supplemental Authority citing *Beermunder v. State*, 2016 WL 2930515 (Fla. 1st DCA May 18, 2016).

The Fifth District erred. *Infra* Merits I (A)-(E) and II. To understand why, one must first understand the background and rationale for allowing a defendant to enter a plea of *nolo contendere* while reserving his right to appeal a dispositive

[3] Petitioner failed to file his notice to invoke discretionary jurisdiction; however, this Court accepted his jurisdictional brief as a belated notice.

issue leading up to this decision. The following outlines the jurisprudential history following this Court's decision in *Ashby*, 245 So. 2d at 225.

II. Background of *Ashby* Pleas

In *Ashby*, 245 So. 2d a 225, this Court held a defendant in a criminal case may plead *nolo contendere* conditioned on the right to preserve a question of law for appellate review. The Court reasoned that there was not an issue with allowing this avenue of relief "since it expedites resolution of the controversy and narrows the issues to be resolved." *Id.* at 228. Additionally, the Court noted that "[t]he *practice is conceptually similar to that of stipulation* of facts or law, not uncommon in civil and criminal trials." *Id.* (emphasis added). Later, this Court narrowed *Ashby* by holding a "*nolo contendere* plea is permissible only when the legal issue to be determined on appeal is dispositive of the case." *Brown v. State*, 376 So. 2d 382, 384 (Fla. 1979). In *Brown*, this Court explained its rationale for this decision as follows:

> The practice of allowing an appeal after a plea of *nolo contendere* is grounded upon the belief that "it expedites resolution of the controversy and narrows the issues to be resolved." These purposes are poorly served and, indeed, thwarted when a defendant is permitted to appeal nondispositive pretrial rulings. Instead of expediting resolution of the controversy, the procedure prolongs litigation by sanctioning, in effect, an interlocutory appeal. Because of the nondispositive nature of the appeal, the defendant faces the prospect of a trial even if he prevails on appeal. The inevitable is not avoided but merely postponed, thus further burdening the already severely taxes [sic] resources of our courts. The more logical and efficient procedure to follow in this situation is to proceed to trial and fully

> ventilate all of the issues. In this way the matter will reach the appellate court in a familiar posture and with a full record upon which to base an intelligent decision.

376 So. 2d at 384 (footnote omitted).

Although *Brown*, required the legal issue be dispositive, neither *Brown* (nor any other Florida Supreme Court case) has specifically defined the term "dispositive."

Following *Brown*, throughout Florida, the district courts have uniformly held that "[a]n issue is dispositive only if, regardless of whether the appellate court affirms or reverses the lower court's decision, there will be no trial of the case." *Morgan v. State*, 486 So. 2d 1356, 1357 (Fla. 1st DCA 1986); *Jones v. State*, 806 So. 2d 590 (Fla. 5th DCA 2002). Based on the rationale articulated in *Brown*, whether a legal issue is dispositive has consistently been considered a jurisdictional question. *See* Fla. R. App. P. 9.140(b)(2)(A)(i).

When evaluating the dispostiveness of a legal issue, courts have found some issues are presumptively dispositive. *See*, *e.g.*, *Tiller v. State*, 330 So.2d 792 (Fla. 1st DCA 1976) (where the trial court has entered a pretrial order denying a motion to suppress drugs in a drug case; such a ruling is dispositive if the state has no other evidence with which it can proceed to trial against the defendant). In other cases, when the question of dispositiveness arises, the majority of trial courts throughout Florida have either held or noted its ability to authorize the parties ability to stipulate to whether a legal issue is dispositive. *Zeigler v. State*, 471

So.2d 172, 175 (Fla. 1st DCA 1985); *White v. State*, 830 So. 2d 944, 944 (Fla. 4th DCA 2002); *Ruilova v. State*, 125 So.3d 991, 996 (Fla. 2d DCA 2013); *Wilson v. State*, 885 So.2d 959, 959–60 (Fla. 5th DCA 2004). When a matter is before an appellate court, and there is uncertainty regarding whether an issue is dispositive, and there is no clear stipulation, some courts have remanded to the trial court with direction for the court to conduct an evidentiary hearing for the purposes of determining whether the issue is dispositive. *Sommers v. State*, 404 So. 2d 366 (Fla. 2d DCA 1981).

When considering stipulated agreements, various district courts have considered whether a stipulated agreement to the dispositiveness of a motion confers binding jurisdiction on the appellate court which it must accept, even where the appellate court believes the issue is itself not dispositive. *Jackson v. State*, 382 So.2d 749 (Fla. 1st DCA 1980), *aff'd*, 392 So.2d 1324 (Fla.1981).

In *Jackson*, the First District found a stipulation clearly existed, and even in light of *Brown*, the court held "we do not consider [the *Brown*] decision as precluding a stipulation, by the State and the defendant, such as we have in the record here, in which both sides agree that the State has no case and would be unable to proceed with the prosecution without the confession. Under these circumstances we concluded that the ruling on the admissibility of a confession would be 'dispositive of the appeal'. Having so considered it, we reviewed the

appeal on the merits, and affirmed the ruling of the trial court." *Jackson*, 382 So. 2d at 750, *aff'd*, 392 So. 2d 1324 (Fla. 1981). Since *Jackson*, this Court has not weighed in on whether stipulations confer binding jurisdiction. However, the Third and the First District have each addressed the issue with an *en banc* panel on at least three occassions.

The full Third District in *Finney v. State*, 420 So.2d 639, 643 (Fla. 3d DCA 1982) (en banc) came to a similar conclusion as *Jackson* that stipulations confer binding jurisdiction on the appellate court. Specifically, the panel held:

> Where a stipulation has been entered into by both sides, the court will not be called upon to hear testimony as to the dispositive nature of the evidence. *A stipulation is the parties' recognition that,* for whatever reason, they have presented all of the evidence that they care to and *each is willing to abide the appellate consequences regarding the grant or denial of the motion to suppress.* Because this case falls squarely in line with *Jackson* ... we must conclude that by virtue of the stipulation, the present motion to suppress is dispositive of the issue on appeal.

Finney, 420 So.2d at 643 (emphasis added).

In discussing its decision, Judge Pearson aptly noted in his special concurrence the confusion that arises between what a trial court considers dispositive and what an appellate court considers dispositive when he stated:

> Today's [en banc] decision should put an end to the unseemly spectacle of the State, having agreed through its representative at the trial level (the State Attorney) that a matter is dispositive, later arguing, through its representative in the appellate court (the Attorney General) that the matter is not dispositive and that we are without jurisdiction to hear the defendant's appeal. This difference in position

> was never, in my view, attributable to an act of bad faith by the State. Instead, the difference in position is accounted for by the difference between *Jackson v. State, supra,* and *Brown v. State, supra.* Thus, when the State Attorney said "dispositive," he was talking *Jackson*—that is, committing the State not to prosecute further in the event the defendant prevailed on appeal; when the Attorney General said "not dispositive," he was talking *Brown*—that is, contending that even if the defendant prevailed on appeal, it was still *legally* possible for the State to continue with the prosecution. But what the Attorney General ignored is that where there is an agreement on dispositiveness, *Brown's* "legal dispositiveness" is, by definition in *Jackson,* irrelevant.
>
> *Jackson* is a welcome retreat from *Brown.* The concern in *Brown* that the expeditious resolution of the controversy would be thwarted by permitting a defendant to appeal legally nondispositive pre-plea rulings is obviated where the parties agree that the appellate court's decision will end the case one way or another. When they so agree, the defendant does *not* face the prospect of a trial if he prevails on appeal; the appellate decision concludes the matter, and the precious resources of the courts are saved by not forcing the defendant to go through a trial for the singular purpose of preserving an issue for review.

420 So.2d at 643–44 (Pearson, J., specially concurring) (emphasis added) (footnotes omitted). This decision, and this line of reasoning, was further continued in the First District's decision of *Zeigler v. State,* 471 So.2d 172, 175 (Fla. 1st DCA 1985), in which an en banc panel majority stated:

> We focus first upon the fact ... that this case is here by way of a joint stipulation between appellant and the state that the issue of the voluntariness of the confession absent the presence of counsel was in fact dispositive of the prosecution's case. *This court has previously held that such a stipulation is sufficient to establish the dispositiveness of an issue concerning a confession, even though such issue would otherwise be deemed not dispositive as a matter of law. Jackson v. State,* 382 So.2d 749 (Fla. 1st DCA 1980), *aff'd,* 392 So.2d 1324

> (Fla.1981). Therefore, *unless this court is prepared to "go behind" the stipulation of the parties in an effort to ascertain whether the issue is truly dispositive, we would be bound to decide the issue reserved for review by the defendant*, and thus would have no occasion for independent examination of the record to determine whether, even if the trial court erred in denial of the motion to suppress, other evidence in the record could be used equally as well to establish guilt.

Id. at 175 (emphasis added).

Following *Zeigler*, the First District decided *Morgan v. State*, 486 So.2d 1356 (Fla. 1st DCA 1986) shortly thereafter, which held a stipulation was not binding on the appellate court.

In *Morgan*, contrary to *Ziegler*, a separate en banc panel concluded a stipulation was not dispositive of the case, and the court decided not to exercise jurisdiction to hear the merits of the case. *Morgan,* 486 So.2d at1359. In deciding *Morgan*, when the First District found the stipulated dispositive legal issue was not actually dispositive, the court held that an appeal may be dismissed and remanded to the trial court with direction that "If the defendant so moves, the trial court shall vacate and set aside the judgment and sentence and shall allow the defendant to withdraw his plea of *nolo contendere* and reinstate his not guilty plea." *Morgan*, 486 So. 2d 1356, 1359. In the accompanying footnote, the court noted, "Fairness dictates that the defendant should be given the opportunity to withdraw his plea of *nolo contendere*." *Morgan*, 486 So. 2d 1356, 1359 n. 3. However, the Morgan court did not go as far as deciding whether it was "*bound* to consider an appeal on

the merits where the state has stipulated to dispositiveness[.]" *Morgan*, 486 So. 2d at 1358–59. But the court noted, "One could certainly reasonably take the position that this pretermitted question has already been authoritatively answered by this Court in *Ziegler*[.]" *Morgan*, 486 So. 2d 1359 n. 2. However, the court also noted that such a stipulation may not be binding in all circumstances. *Id.*

In the case at bar, when deciding *Churchill*, the Fifth District relied on *Ashley v. State*, 611 So. 2d 61, 618 (Fla. 2d DCA 1993) and *Garcia-Roque v. State*, 120 So. 3d 618, 619 (Fla. 5th DCA 2013) for its definition of dispositive and its authority to dismiss Petitioner's appeal. *Churchill*, 169 So. 2d at 1261 n. 2. When the precedent for both of these cases is analyzed, it appears the dismissal of a nondispositive issue without allowing a defendant leave to withdraw a plea is internally inconsistent with prior precedent.

First, *Ashley* was decided based on *Morgan*, a case as described above, wherein the appeal is remanded to the trial court with direction that authorized the defendant leave to withdraw his or her plea. In both *Ashley* and *Churchill*, the court provided no avenue of relief for a defendant to withdraw his or her plea. Rather, in *Ashley*, the Court noted, "we dismiss the appeal without prejudice to the appellant to raise a Florida Rule of Criminal Procedure 3.850 motion" *Ashley*, 611 So. 2d at 618, while in *Churchill* the Petitioner's appeal was plainly dismissed without any guidance for a potential avenue of relief pursuant to either a motion to withdraw a

plea or Florida Rule of Criminal Procedure 3.850. *Churchill*, 169 So. 3d at 1261. Both of these decisions are not in accord with the precedent of *Morgan*.

Second, when analyzing *Garcia-Roque*, this decision relied on *Levine v. State*, 788 So.2d 379, 380 (Fla. 4th DCA 2001), for its holding authorizing a dismissal of a nondispositive appeal. When reviewing the Fourth District's decision in *Levine*, the court relied on *Zambuto v. State*, 731 So. 2d 46, 46 (Fla. 4th DCA 1999), wherein the Fourth District found the appellant's issue was not dispositive and dismissed; but, the dismissal was "without prejudice to Zambuto's right to file a motion in the lower court seeking to withdraw his plea." *Id.* (citing *Carlisle v. State*, 687 So.2d 929 (Fla. 4th DCA 1997)). As such, in both cases relied on by the Fifth District (*Ashley* and *Garcia-Roque*) the prior cases authorizing a dismissal for a nondispositive issue, also authorized a defendant leave to withdraw his or her plea.

Recently, Judge Makar of the First District authored a concurring opinion outlining the First District's jurisprudence on this issue. *Beermunder v. State*, 191 So. 3d 1000 (Fla. 1st DCA 2016) (Makar, J. concurrence). In his concurrence, Judge Makar evaluates and opines on the line of cases following *Zeigler* and *Morgan*. *Beermunder*, 191 So. 3d at 1002. In evaluating the First District's jurisprudence on this issue, Judge Markar concluded that between *Zeigler* (requiring the stipulation to control) and *Morgan* (allowing the appellate court to

reject jurisdiction) that *Ziegler* seems to control more often and is the more appropriate line of cases to adopt. *Id.* ("Because the *Zeigler* line of cases appear to be most germane, the merits of the trial court's rulings should be addressed, even if those rulings are not legally dispositive of the criminal charges[.]"). However, at the conclusion of his concurrence, he does state this Court's guidance would be appropriate to clarify this issue. *Id.*

With this background, the majority position in Florida appears to be that "[t]he operative principle is that a stipulation of dispositiveness is sufficient to establish a basis for appellate review 'even though such issue would otherwise be deemed not dispositive as a matter of law.' The parties have agreed the case is over and that there will be no trial thereby establishing the finality necessary for review." *Beermunder*, 191 So. 3d at 1002 (quoting *Zeigler*, 471 So.2d at 175). Thus the courts in *Jackson*, *Ziegler*, and *Finney* all concluded that stipulations as to dispositiveness are binding on the appellate courts conferring jurisdiction, while *Morgan* held that while not binding, fairness requires the defendant receive an opportunity to withdraw his plea. Alternatively, in the case at bar, the Fifth District outright rejected the Petitioner's brief because it was not dispositive, dismissing his appeal without ever reaching the merits, nor allowing him an opportunity to withdraw his plea.

SUMMARY OF THE ARGUMENT

This Court should quash and remand the decision of the Fifth District in *Churchill*. Two overriding public policy issues should control: judicial economy and ensuring a defendant receives due process. The public policy considerations of judicial economy run through the entire basis for an *Ashby* plea as demonstrated in its progeny (including *Finney*). Additionally, as evidenced by the case at bar, the public policy of ensuring a defendant receives due process with effective representation when deciding whether to enter a plea knowingly and intelligently is at issue. The touchstone when evaluating the acceptance of a defendant's plea is that it must be knowing, intelligent, and voluntary. Allowing a defendant to enter a plea of *nolo contendere* while expressly reserving his right to appeal a dispositive issue, and then later refusing to consider the merits of his argument because the appellate court determines the issue is not dispositive, is counter to this bedrock principle.

Furthermore, the trial court, as opposed to the appellate court, is in a better position to evaluate the factual basis which relates to whether a legal issue is dispositive. Thus, a trial court's determination that an issue is dispositive should control. Additionally, the fulfillment of any plea bargain which included the trial court's acceptance of a stipulated agreement should be set aside for a mutual mistake of a material fact if the issue is not dispositive, as was the case here.

Finally, regardless of whether this Court holds that an appellate court is or is not bound by an express stipulation, when an appellate court finds it does not have jurisdiction because the preserved issue is not dispositive, the appellate court should remand the case to the trial court with instructions that the defendant has leave to file a motion to withdraw his plea.

This Court should quash the decision of the Fifth District Court in *Churchill* and remand to the Fifth District with the direction to remand to to the trial court with direction to authorize Petitioner to file a motion to withdraw his plea, or in the alternative, grant Petitioner leave to file a new direct appeal on the merits.

ARGUMENT

Issues presented.

> **I. When an express stipulation exists, must an appellate court accept a trial court's determination (and thereby accept jurisdiction) that a motion was dispositive of a case, even when the appellate court determines the legal issue is in fact not dispositive?**
>
> **II. If an express stipulation exists, but this Court holds that an appellate court is not bound to adhere to this stipulation, what remedy (if any) should be available to the defendant?**

Preliminary matters.

i. Jurisdiction. The Fifth District in *Churchill* denied Petitioner's direct appeal finding the stipulated agreement regarding his Motion in Limine was not

dispositive. This Court accepted discretionary jurisdiction to review this decision because it expressly and directly conflicts with, *Finney v. State*, 420 So. 2d 639 (Fla. 3d DCA 1982), a decision of another district court of appeal on the same point of law. Art. V. (b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(2)(A)(iv).

ii. Standard of review. The standard of review in this matter is a showing of a clear abuse of discretion. *Brown v. State*, 376 So. 2d 382, 385 (Fla. 1979).

Merits.

I. When an express stipulation exists, an appellate court should accept a trial court's determination (and thereby accept jurisdiction) that a motion was dispositive of a case, even when the appellate court determines the legal issue is in fact not dispositive.

A defendant in a criminal case may plead *nolo contendere* conditioned on the right to preserve a question of law for appellate review so as to expedite a resolution and narrow the scope of issues, *Ashby*, 245 So. 2d at 225, as long as the legal issue is "dispositive of the case." *Brown*, 376 So. 2d 382 at 384. The various district courts have uniformly held that "[a]n issue is dispositive only if, regardless of whether the appellate court affirms or reverses the lower court's decision, there will be no trial of the case." *Morgan*, 486 So. 2d 1356 at 1357. This requirement is codified in section 924.06(3), Florida Statutes, and Florida Rule of Appellate Procedure 9.140(b)(2)(A)(i), and failure to expressly reserve a right to appeal a

dispositive issue at the time a plea is entered has led to a dismissal of the appeal. *See, e.g.*, *State v. Carr*, 438 So. 2d 826 (Fla. 1983).

When a defendant pleads *nolo contendere* and reserves his right to appeal a dispositive issue, there are generally three possible outcomes: (1) the court will approve the order denying the specific dispositive motion and affirm the judgment and sentence, (2) the court will reverse the order, requiring the defendant to be discharged on remand, or (3) the court will determine the issue is not dispositive and either dismiss the appeal affirming the lower court's decision, remand the decision to the trial court so the defendant may withdraw his or her plea, or dismiss for lack of jurisdiction altogether. *See Ruilova v. State,* 125 So. 3d 991, 994-95 (Fla. 2d DCA 2013). The issue before this court relates to the third potential outcome, and whether a stipulation should bind the appellate court to accept jurisdiction where it may not otherwise.

Three contrary positions exist regarding the use of stipulations when a legal issue is questionably dispositive. *See Zeigler*, *Morgan*, *Churchill*. The first focuses on a party-centric position which defers to the parties and the trial court's determination of dispositiveness. *Jackson, Finney, Ziegler*. In this position, the appellate court is bound to accept jurisdiction, and either affirms or reverses the stipulated dispositive legal issue. *Id.* The second position stresses an appellate court's authority to reject stipulations that are nondispositive, but allows the

defendant to withdrawal his or her plea on remand. *Morgan*. In this situation, the court rejects jurisdiction, dismisses the case without considering the merits, and remands the matter to the trial court allowing the defendant leave to withdraw his or her plea. *Id.* The third position, which occurred in this case, stresses an appellate court's authority to reject a stipulation that is nondispositive, and dismissed the appeal without considering the merits of the case and without remanding to the trial court providing the defendant leave to withdraw his plea. *Churchill.*

These three positions are essentially differentiated based on whether the parties or appellate court may control the determination of a dispositive issue, and the remedies available to a defendant if the court finds the issue is not dispositive. *Jackson, Finney.* This Court should hold (as decided by *Jackson*, *Finney*, and *Zeigler*) that the party centric decision, *i.e.*, the stipulation, controls whether a legal issue is dispositive. In the alternative this Court should authorize parties who enter into stipulated agreements regarding a dispositive issue to withdraw his or her plea on remand following the appellate court' determination that the issue is not dispositive.

A. Public policy considerations of judicial economy and ensuring a defendant receives due process when entering a plea require this Court to reverse the Fifth District's decision in *Churchill*.

i. Judicial Economy

In *Ashby*, this Court allowed a defendant to reserve his or her right to plead *nolo contendere* conditioned on the right to preserve a question of law for appellate review "since it expedites resolution of the controversy and narrows the issues to be resolved." *Id.* at 228. This concern for expediting litigation is at the core of the *Ashby* decision, and its progeny. *See Brown*, *Jackson*, *Ziegler*, *Finney*. The explanation for why this policy is appropriate was best described in this Court's majority decision and by Justice Hatchett's dissenting opinion in *Brown*.

In *Brown*, when this Court narrowed *Ashby* by holding the legal issue must be dispositive, this Court explained its rationale that the intention of this plea is to expedite litigation and to avoid appealing nondipositive issues which would result in prolonging the matter even longer. *Brown*, 376 So. 2d at 384. In response to the majority, Justice Hatchett authored a dissent disagreeing that the legal issues should be limited to only dispositive issues stating that the "rule announced by the majority serves no purpose other than to require thousands of unnecessary trials." *Brown*, 376 So. 2d at 385 (Hatchett, J. dissent). He additionally questioned the following:

> Why require the taxpayers to furnish full jury trials to defendants who are willing to admit all essential elements of the crime charged, but who wish to reserve for review a single pre-trial ruling on a question of law? Does the majority really intend to require trials where no facts are in dispute? Must we have a trial on the facts to test the correctness of a court's pre-trial ruling on the lawfulness of a search, where the defendant is ready to begin serving the sentence if the court's ruling is upheld?

Id. at 386.

Justice Hackett ultimately dissented because "rehabilitation begins with the admission of guilt, and because *nolo contendere* pleas move dockets, save money, and get rulings on legal issues that are genuinely in dispute[.]" *Id.*

Here, allowing stipulations to bind an appellate court is in line with the policy of expediting litigation to ensure judicial economy cited by *Ashby*, the majority in *Brown*, and the questions raised by Justice Hatchett's dissent. As Justice Hatchett, noted these pleas "move dockets" and "save money", allowing the courts to focus on issues really in dispute. Allowing the appellate court to find there is no jurisdiction because the issue is not dispositive will have a chilling effect on defendants entering into these agreements, thereby requiring more trials, slowing dockets, and costing taxpayers more. Additionally, where stipulations to dispositiveness are entered, but where an appellate court finds the issue is not dispositive, if *Churchill* is accepted, this will likely result in more judicial inefficiency when a defendant's only possible relief is to file an additional brief requesting relief for ineffective assistance of counsel, or seeking to file a motion to

withdraw his or her plea. *Infra*. By authorizing stipulations that bind the appellate court, this Court will ensure greater judicial efficiency, while also protecting a defendant's due process rights.

ii. Due process

When a defendant enters a plea he or she must do so intelligently, knowingly, and voluntarily under the guidance of the trial court. Fla. R. Crim. P. 3.170(k). When a plea is entered reserving the right to appeal a dispositive issue, the defendant does so under the advice of counsel. *Holden v. State*, 90 So. 3d 902, 904 (Fla. 1st DCA 2012) (Benton, C.J., concurring) ("It is important that the defendant understands the consequence of his or her appeal at the time the plea is entered."). Failure to advise a defendant regarding the actual dispostiveness of a legal issue may be a basis for a claim of ineffective assistance of counsel. *White v. State*, 967 So. 2d 388, 390 (Fla. 4th DCA 2007) (When a defendant enters a plea conditioned on his right to appeal the ruling on the motion to suppress which was not dispositive, "then his plea was the product of misadvice of counsel and such misadvice constitutes a legally sufficient basis for 3.850 relief."); *see also*

When a defendant enters a plea that is not intelligent and knowing, he or she may withdraw this plea subject to Florida Rule of Criminal Procedure 3.170 pursuant to a motion to withdraw a plea; however, a defendant may only file a "motion to withdraw the plea within thirty days after rendition of the sentence".

Fla. R. Crim. P. 3.170(l). By the time the appellate court weighs in and finds that the legal issue is not dispositive, the defendant is time barred and not entitled to this relief. However, when such a motion is not available as an available avenue of relief, Florida Rule of Criminal Procedure 3.850 contemplates collateral relief from convictions predicated on pleas that are not voluntary and intelligent. Fla. R. Crim. P. 3.850(a)(1) and (5); *see also Williams v. State*, 135 So. 3d 975 (Fla. 4th DCA 2006).

Appellate courts have routinely held that when it finds that an issue is not dispositive at the trial court level that that was believed to be dispositive, then the case should be remanded to the trial court allowing the defendant leave to withdraw his plea. *Finney*, 420 So.2d at 643; *Leisure v. State*, 429 So. 2d 434 (1983) (remanded to trial court to determine if issue was dispositive, if not, then the appeal would be dismissed and "the trial court shall allow appellant 30 days from the date of our mandate within which to file a motion with withdraw his plea."). However, other courts have held that the only avenue of relief at this point is for a defendant to file a claim pursuant to Florida Rule of Criminal Procedure 3.850 for ineffective assistance of counsel. *See Humphrey v. State*, 909 So. 2d 938, 938-39 (2005) (although defendant sought relief to file motion to withdraw his plea, defendant's only recourse is to file a motion pursuant to Florida Rule of Criminal Procedure 3.850).

Dismissing an appeal following the appellate court determining the issue is not dispositive is counter to the public policies of due process and judicial efficiency. In dismissing an appeal without hearing the merits of the case following a stipulated agreement, the defendant has not entered a knowing and intelligent plea because he or she was under the belief that the issue was dispositive. *See White*, 967 So. 2d at 390. As such, the defendant, in relying on the advice of counsel, has been deprived due process when he received ineffective assistance of counsel following a stipulated agreement as to the dispositiveness of the issue. *Id.*

Additionally, such a holding would be in contravention to the stated purpose of an *Ashby* plea which is intended to expedite litigation. As a result of this dismissal, the only avenue of stated relief for a defendant in this position is to file an additional motion pursuant to Florida Rule of Criminal Procedure 3.850. Rather than expedite litigation, affirming the Fifth District decision in *Churchill* only creates additional appeals.

Here, in Petitioner's *pro se* Jurisdictional Brief, he has already stated his intention to file a motion pursuant to Florida Rule of Criminal Procedure 3.850 against his trial and appellate counsel respectively. (J.B. 7-8). Because the stated purpose of an *Ashby* plea is to expedite litigation, and a defendant may only enter a plea that is intelligent and knowing, this Court should quash the Fifth District's decision in *Churchill* as this decision is in contravention to both public policy

concerns of judicial economy and due process, and remand the case with direction for the court to allow Petitioner to file a motion to withdraw his plea.

B. The trial court is in a superior position to determine whether a legal issue is dispositive, and this decision should not be disturbed by the appellate court following a stipulation between the parties.

A plea of *nolo contendere* shall not be accepted by a court without the court first determining "that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness and that there is a factual basis for the plea[.]" Fla. R. Crim. P. 3.170(k). The trial court has "wide discretion to accept or reject an *Ashby* nolo plea based upon his [or her] perception of the dispositive nature Vel non of the legal issue reserved for appeal." *Brown*, 376 So. 2d at 385. In making this determination, the trial court may often need to determine both factual and legal issues when evaluating whether the issue framed in a motion to suppress or motion in limine are indeed dispositive. *See Phuangnong v. State*, 714 So. 2d 527, 529 (Fla. 1st DCA 1998) ("The appellate courts role is a limited one. On review of the trial court's order on the suppression motion, 'legal questions are subject to *de novo* review, while factual decisions by the trial court are entitled to deference commiserate with the trial judge's superior vantage point for resolving factual disputes.'") (quoting *State v. Setler*, 667 So. 2d 343, 344-45 (Fla. 1st DCA 1995).

Several appellate courts have affirmatively placed the decision whether an issue is dispositive on the trial court stating that "the trial court is obligated to determine the dispositive nature of the reserved question." *Everett v. State*, 535 So. 2d 667, 669 (Fla. 2d DCA 1988); *Hawk v. State*, 848 So. 2d 475, 478 (Fla. 2d DCA 2003). "It is the trial court's duty to announce whether preserved issues are dispositive." *Ramsey v. State*, 766 So. 2d 397, 397 n. 1 (Fla. 2d DCA 2000); *see also Moore v. State*, 586 So. 2d 64 (Fla. 2d DCA 1991) ("the trial court is obligated to determine whether the issue reserved for appeal is dispositive."). This "duty" and "obligation" in determining whether the preserved issue is dispositive should be the province of the trial court for at least two reasons. "First, it enhances the likelihood that a meritless appeal will not be pursued, and second it pretermits the potentially misleading information of a belief in the defendant this relief from the judgment and sentence can be achieved in the appellate court." *Everett*, 535 So. 2d at 669. Additionally, by evaluating the issue at the trial court level, this "insure[s]a timely opportunity for the defendant to evaluate withdrawal from the plea agreement." *Id.* When the trial court adequately informs a defendant of his or her right to appeal a dispositive motion, and also clearly informs a defendant on the record regarding the trial court's determination when an issue is or is not dispositive, then an appellate court would not need to struggle in re-weighing the factual issues presented to the trial court when considering the dispositive nature of

the legal issue. *See, e.g., Jones v. State*, 86 So. 2d 590, 592 (Fla. 5th DCA 2002) (trial judge provided the defendant with a "detailed explanation regarding the right to appeal a dispositive motion … and explained that [the defendant's] motion was not dispositive[.]").

All cases vary in both the factual and legal complexity. Without a stipulation of dispositiveness, the trial court is left to conduct a mini-trial and weigh the evidence and testimony when coming to its decision whether the legal issue is in fact dispositive. *Sommers v. State*, 404 So. 2d 366 (Fla. 2d DCA 1981) (referencing *Brown*). Certain legal issues are presumptively dispositive. *See*, *e.g.*, *Tiller v. State,* 330 So.2d 792 (Fla. 1st DCA 1976). Alternatively, in some cases, the legal issue is presumptively not dispositive, *Brown*, 376 So. 2d at 385 (confession are not dispositive), unless there is a stipulation that the issue is dispositive. *Wilson v. State*, 885 So.2d 959, 959–60 (Fla. 5th DCA 2004) ("An order denying a motion to suppress a confession is not dispositive for purposes of this rule unless the parties so stipulate."). In most other circumstances, a detailed factual review of the case is required to determine whether the legal issue is dispositive. *Churchill* (considering a *Daubert* motion). By authorizing a stipulation, this allows for greater judicial efficiency and reduction in judicial labor.

The ability of an appellate court to do the analysis required when evaluating the factual basis related to a legally dispositive issue is exceptionally limited as compared to the trial court, and likely places the appellate court beyond its intended role. Some judges believe this type of inquiry is not the province of the appellate court, and beyond the scope or focus of the appellate judiciary to all together. *See Zeigler*, 471 So. 2d at 177 (Zehmer, J., concurrence) ("The rule preventing us from engaging in selective disapproval of stipulations made by the state and the accused is necessary to assure that appellate courts are not thrust into the position of reviewing acts of the parties or their attorneys instead of judicial acts of the court below."). Requiring this mini-trial is not in accord with the policy of expediting litigation as outlined in *Brown*.

Here, unlike the appellate courts, trial courts are in a superior vantage point when determining what weight should be provided to certain facts offered or proffered by the respective parties when evaluating whether the legal issue is indeed dispositive. Clearly, some issues are presumptively dispositive; however, the vast majority are not. When the parties enter into a stipulation that the legal issues are dispositive, it affords the State, the defendant, and the trial judge certainty in the scope of the issues being litigated, as well as certainty when a defendant enters his plea. Not allowing stipulations places the appellate court in a position where it is reweighing the testimony and evidence, rather than deciding

the legal decisions of the trial court. This is counter to the State of Florida's jurisprudence and the role of the appellate judiciary. As such, this Court should quash the Fifth District' decision in *Churchill*.

C. A plea bargain is a contract, and a plea bargain may be set aside for a mutual mistake of a material fact; as such, this Court should reverse the Fifth District decision in *Churchill* because Petitioner entered a plea bargain reserving his right to appeal a dispositive motion believing he was entitled to have these issues heard by the appellate court which did not occur.

In a criminal case, a plea bargain is essentially a contract. *Batista v. State*, 951 So. 2d 1008 (Fla. 4th DCA 2007), *rev. denied*, 966 So. 2d 965 (Fla. 2007). The rules of contract law apply, thus there must be mutual assent between the parties when entering into a plea agreement. *Obara v. State*, 958 So. 2d 1019 (Fla. 5th DCA 2007). In coming to this agreement, there must be a mutual understanding and an agreement regarding the actions and obligations of each party must be defined. *Clark v. State*, 651 So. 2d 1309 (Fla. 3d DCA 1995). However, where there is a mutual mistake of material fact, a plea bargain may be set aside. *Handley v. State*, 890 So. 2d 529 (Fla. 2d DCA 2005); *see also Jackson v. State*, 801 So. 2d 1024, 1026 (Fla. 5th DCA 2001) (holding that where "sentence promised by the court could not be imposed due to the mutual mistake concerning the guidelines, defendant should have been allowed an opportunity to withdraw his plea"). A judge's decision to participate in the plea bargaining process is left to the broad

discretion of the trial judge; however, once involved, he or she becomes a participant in the agreement. *See State v. Warner*, 762 So. 2d 507, 514-15 (Fla. 2000).

Even with a well-defined understanding of what dispositive means, the parties, trial court, and appellate courts have differed in understanding the definition of this word and its practical implications. *Finney*, 420 So.2d at 643–44 (Pearson, J., specially concurring) (footnotes omitted). At the trial court level, the State and defendant may stipulate to an understanding that, regardless of whether the case may still be prosecuted based on facts outside the legal issue being decided by the trial judge, the parties have presented the evidence they intend to present and do not intend to offer any additional evidence and agree to be bound by the appellate court's decision. *Id.* However, at the appellate court level, the State (now represented by the Office of the Florida Attorney General) may find that the same or additional facts ruled on by the trial judge, regardless of the legal issue the appellate court is reviewing, still support a good faith argument that a trial may still occur regardless of the appellate court's decision. *Id.* The different understanding of the term "dispositive" means that the State (at both the trial court and the appellate court level), the defendant and the trial court have a different understanding of the meaning of dispositive, thereby resulting in a mutual mistake

of a material bargain. As such, the bargain should be set aside, and the defendant should be authorized to withdraw his or her plea.

Here, the Petitioner entered into a plea agreement with the understanding he had stipulated to a dispositive issue that he could seek review of on appeal when entering his plea. The State made this agreement binding itself by stipulating that if the appellate court ruled favorably for the Petitioner, it would not proceed to continue prosecuting the Petitioner. The trial judge expressly entered into this plea agreement when it acknowledged the issues preserved were dispositive and accepted Petitioner's *nolo contendere* plea. Pet.'s App. III. When the Petitioner's case was rejected by the Fifth District without the court specifically addressing the legal issues in question, there was mutual mistake of a material fact regarding the dispositive nature of the legal issue in question. As such, reversal of this case is warranted.

D. This Court should quash the Fifth District's decision in *Churchill*, because *Ashby*, its progeny, and all five district courts of appeal authorize the use of a stipulation for purposes of determining whether an issue is legally dispositive of a case.

When this Court first considered authorizing defendants to enter a *nolo contendere* plea, the Court compared the act to entering a stipulation. *Ashby*, 245 So. 2d at 228 ("[t]he practice is conceptually similar to that of stipulation of facts or law, not uncommon in civil and criminal trials."). Since *Ashby*, this Court

affirmed the First District's decision authorizing the use of stipulations between the parties. *Jackson,* 382 So.2d at 750, *aff'd,* 392 So.2d at 1324. Since the time this Court affirmed *Jackson,* each of the five district courts of appeal, at one time or another, have authorized or noted that the parties may enter into a stipulation when determining whether an issue is legally dispositive. *See, e.g., Beermunder*, 41 Fla. L. Weekly D1191 (Makar, J. concurrence) (outlining the First District's most recent jurisprudence on the issue); *Ruilova,* 125 So.3d at 996 (Second District holding, "In this case it is clear that the trial court determined in good faith that the issue was dispositive, and the parties likewise entered into a good faith stipulation to that effect. Thus, we can fully review this issue."); *Finney,* 420 So.2d at 643 (Third District holding, "[b]ecause this case falls squarely in line with *Jackson* ... we must conclude that by virtue of the stipulation, the present motion to suppress is dispositive of the issue on appeal."); *Weber v. State,* 492 So. 2d 1166, 1167 (Fla. 4th DCA 1986) (Fourth District noting, if "there is record evidence of a stipulation between the parties that the issue was dispositive, then we can reach the merits.:); *Freeman v. State*, 450 So. 2d 301, 303 (Fla. 5th DCA 1984) (Fifth District reviewed the merits of the appeal after finding that "Although the trial court made no finding that the suppression of the confession was dispositive, we conclude that the statements made by the prosecutor amounted to a stipulation that the confession was dispositive.").

Here, this Court is confronted with a question of whether to authorize parties to enter into stipulations for purposes of determining a dispositive issue, at the risk that the issue is itself not dispositive. However, for nearly forty years the trial courts have allowed this to occur, and the appellate courts have considered the merits of these cases. Allowing stipulations regarding dispositive issues supports public policy concerns and is jurisprudentially in line with *Ashby*, its progeny, and all the appellate courts in Florida.

E. This Court should quash the Fifth District decision in *Churchill* and remand to the trial court because Petitioner's appellate counsel filed his initial brief without arguing each of the stipulated dispositive issues, thereby expressly waiving all but one, likely resulting in an ineffective assistance of counsel claim, and a claim for ineffective assistance of trial counsel for advising Petitioner to enter this stipulated agreement.

Regardless of whether this Court requires subsequent courts to accept a stipulation between the parties, to avoid further litigation for a claim of ineffective assistance of counsel, this Court should reverse the decision in *Churchill*, and order the district court to remand to the trial court authorizing Petitioner to file a motion to withdraw his plea, or in the alternative, directing the Fifth District to grant leave to file a new initial brief on the merits. *See Morgan*.

The trial counsel advised Petitioner to enter the stipulated agreement to appeal the dispositive issue of the filed motions. On appeal, the Petitioner's

appellate counsel did not argue all of the stipulated to legally dispositive issues. In its decision, the Fifth District declined to address the merits of Petitioner's brief finding it did not have jurisdiction because the issue on appeal was not dispositive. *Churchill*, 169 So. 3d at 1261 (citations omitted).

Although it did not specifically reach the merits, the Fifth District found the Petitioner did not contest the trial court's ruling regarding the identification of the methamphetamine based on the law enforcement officers training and experience. *Churchill*, 169 So. 3d at 1261 n. 1. The Fifth District noted that by limiting the argument to this basis, and not including the other arguments in the initial brief, the Fifth District stated Petitioner waived any argument regarding the additional testimony since he did not raise these issues in his initial brief. *Id. Churchill*, 169 So. 3d at 1261 n. 2 (citations omitted). In Petitioner's Pro Se Jurisdictional Brief, he has stated his intention to file a motion pursuant to Florida Rule of Criminal Procedure 3.850 against his trial and appellate counsel respectively. (J.B. 7-8). Because of the merit arguments listed above, and the Petitioner's stated intention to seek relief pursuant to Florida Rule of Criminal Procedure 3.850, this Court should quash the Fifth District's decision in *Churchill*, and remand this case to the trial court to allow the Petitioner an opportunity to withdraw his plea, or in the alternative, leave to file a new initial brief.

II. If this Court holds that an appellate court is not bound to accept an express stipulation regarding the dispositveness of a legal issue, then when an appellate court finds it does not have jurisdiction because the preserved issue is not dispositive, the appellate court should remand the case to the trial court with instructions the defendant has leave to file a motion to withdraw his plea.

A defendant's due process right to receive effective representation and enter a plea knowingly and intelligently requires a defendant to have an opportunity to withdraw his plea if an appellate court deems the issue is not dispositive. *Morgan*, 486 So. 2d at 1359. In *Morgan*, following a finding the stipulated dispositive legal issue was not actually dispositive, the court remanded to the trial court with direction that "If the defendant so moves, the trial court shall vacate and set aside the judgment and sentence and shall allow the defendant to withdraw his plea of *nolo contendere* and reinstate his not guilty plea." *Morgan*, 486 So. 2d at 1359. The court explained that, "Fairness dictates that the defendant should be given the opportunity to withdraw his plea of *nolo contendere*." *Morgan*, 486 So. 2d at 1359 n. 3. If this court deems that stipulations should not control, then this Court should adopt the holding in *Morgan*.

As noted previously, in deciding *Churchill*, the Fifth District relied on *Ashley*, 611 So. 2d at 618 and *Garcia-Roque*, 120 So. 3d at 619 for its authority to dismiss Petitioner's appeal. *Churchill.* When the precedent for both of these cases is analyzed, it is clear the dismissal of a nondispositive issue without allowing a

defendant leave to withdraw a plea is internally inconsistent because *Ashley* was decided based on *Morgan*, and *Garcia-Roque* relied on cases which similarly required leave of the defendant to withdraw his or her plea. *See Levine*, 788 So. 2d at 380 (citing *Zambuto*, 731 So. 2d at 46). Here, where there is a stipulated agreement that the issue is dispositive, and the appellate court deems it is not dispositive, then out of an abundance of fairness (and to limit additional collateral appeals) a defendant should be provided an opportunity to withdraw his plea.[4]

Conclusion

Petitioner requests this Court quash the decision of the Fifth District Court of Appeal in *Churchill* and direct the Fifth District to remand to the trial court with direction to authorize Petitioner to file a motion to withdraw his plea, or the alternative, direct the Fifth District to grant Petitioner leave to file a new direct appeal on the merits.

[4] Petitioner was not afforded an opportunity to have the merits of his brief considered or ruled on by the Fifth District. As such, this initial brief does not consider these arguments, but rather focuses on the express and direct conflict between *Finney* and *Churchill* and whether the Fifth District erred by not accepting the stipulation of dispositiveness, or in the alternative, reversing and providing Petitioner leave to withdraw his plea. *See Caso v. State*, 524 So. 2d 422, 424 (Fla. 1988) (holding it is the lower court's decision, not its reasoning, that is reviewed).

Respectfully submitted,

s/ Rocco J. Carbone, III
Rocco J. Carbone, III
EAKIN & SNEED
599 Atlantic Boulevard, Suite 6
Atlantic Beach, Florida 32233
Telephone: 904 247 6565
Email: rocco.carbone@comcast.net
Florida Bar No. 0095544
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail on this 3rd day of August 2016.

PAMELA JO BONDI
ATTORNEY GENERAL
Tallahassee, Florida

PAMELA JO BONDI ATTORNEY GENERAL
WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 773026
444 Seabreeze Boulevard Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997 (FAX)
CrimmAppWPB@MFloridaLegal.com
Counsel for Respondent

CERTIFICATE OF COMPLIANCE

I HEREBYCERTIFY that this brief has been prepared with Times New Roman 14 point type and complies with the font requirements of Rule 9.210.

Respectfully submitted,

s/ Rocco J. Carbone, III
Rocco J. Carbone, III
EAKIN & SNEED
599 Atlantic Boulevard, Suite 6
Atlantic Beach, Florida 32233
Telephone: 904 247 6565
Email: rocco.carbone@comcast.net
Florida Bar No. 0095544
Attorney for Petitioner

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