IN THE SUPREME COURT OF FLORIDA

ROGER D. CHURCHILL JR.
Petitioner

v.

Case # ________________
Ref.# #5D14-1081

STATE OF FLORIDA
Respondent

_____________________________/

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PETITIONER'S JURISDICTIONAL BRIEF

On review from the District Court of Appeal, Fifth District, State of Florida.

PROVIDED TO AVON PARK CORRECTIONAL INSTITUTION ON 9/2/15 FOR MAILING
cmk
RDC.

Roger D. Churchill Jr. #168634
Avon Park Correctional Institution
8100 Hwy 64 East
Avon Park, Florida 33825

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STATEMENT OF THE CASE AND FACTS

Petitioner, Roger D. Churchill Jr. was arrested and charged with multiple drug offenses. He attempted to have evidence suppressed through *a Motion in Limine* which resulted in a hearing. The Circuit Court subsequently denied the motion, which led Mr.Churchill to take an *OPEN PLEA* of no contest while reserving his rights to appeal the circuit court's ruling.

An agreement of dispositiveness was reached between the defendant, the state and the trial Judge and was accepted by all parties as to exactly what dispositive meant in this case. After sentencing an appeal was then filed with the Fifth District Court of Appeals to review the trial court's order denying Petitioner's Suppression Motion.

On July 24, 2015, the District Court of Appeals dismissed the appeal. (Appx "A"). The Fifth District Court of Appeal refused to review the claims on the merit because the circuit court's "order was not dispositive." The District Court further indicated that although the State had stipulated to the dispositiveness of the appeal, the (District Court) was not bound to accept that stipulation.

A timely Notice to Invoke the Jurisdiction of this court was filed. This present brief is being submitted within 20 days of that Notice as is required by rule.

SUMMARY OF THE ARGUMENT

In this case, the Fifth District Court of Appeal held that it does not have to accept a clear stipulation of dispositiveness on an appeal from a *nolo contendere* plea. The District Court's actions in disregarding the stipulation and its subsequent action in dismissing Petitioner's appeal are in direct conflict with the Third District of Appeal. *In Finney v. State*, 420 So.2d 639 (Fla. 3rd DCA 1982), the court held that a clear stipulation as to dispositiveness is binding, as it is in effect an agreement that the District Court's action will be binding and end the litigation.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of another District Courts of Appeal on the same point of law. see Article V §3 (b) (3) (Fla. Const. 1980) Fla. R. App. P. 9.030 (a) (2) ( ) (iv).

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEALS IN THIS CASE DIRECTLY CONFLICTS WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN *FINNEY V. STATE*, 420 So.2d 639 (Fla. 3rd Dist. 1982)

The Fifth District Court of Appeal in Petitioner's case has determined that it has discretion to disregard a clear stipulation as to dispositiveness of an issue on an appeal from a *no contest* plea. As explained below, the decision of the Fifth District Court conflicts with a decision of the Third District Court which provides that a clear stipulation on dispositiveness made by the parties and Circuit Court is then binding on the District Court. The Petitioner respectfully submits that this court should grant discretionary review and resolve this conflict by *quashing* the decision of the Fifth District Court of Appeal in Petitioner's case.

CIRCUIT COURT STIPULATION

The stipulation and agreement between the State and Petitioner accepted by the Circuit Court was that the issue-denial of *motion in limine* (suppression) was dispositive. This was not simply an agreement that the issue was appealable, but rather an agreement that the District Court's ruling and resolution of the issue on appeal would end litigation as it was dispositive, Nor was this an implied[1]

[1] *Leisure v. State*, 429 S.2d 434 (Fla. 1st DCA 1983)

acceptance by the Circuit Court but rather instead a clear acceptance of the dispositiveness.

FIFTH DISTRICT COURT ACTION

The Fifth District Court of Appeals evaluated the issue, decided it was not dispositive and on that basis determined that it was not bound to accept the lower court's dispositive ruling and agreement; further because of this it could not be addressed on appeal and therefore was subject to dismissal.

In support of its decision, the District Court in a footnote cited to *Ashley v. State,* 611 So.2d 617, 618 (Fla. 2d DCA 1993) for the proposition that where the attorney and trial court erred in their assumption as to the dispositiveness of the ruling on a *motion in limine* ,then it was not bound to accept that stipulation.

CONFLICT BOTH EXPRESS AND DIRECT

The Third District Court in *Finney v. State*, 420 So.2d 639 (Fla. 3rd DCA 1982) held to the exact opposite. The Third District in a *Rehearing En Banc* held that when there is a clear stipulation as to dispositiveness between the State, defense and Court, then it is binding on the District Court in a subsequent appeal from a *nolo contendere* plea. There is no reasonable basis to reconcile these diametrically opposed reasoned decisions.

The *Finney* Court reasoned that there was no conflict with the Supreme Court's decision in *Brown v. State*, 376 So.2d 382 (Fla. 1979) which requires that

only dispositive issues can be appealed. The Court's reasoning is that with everyone in agreement then no further judicial labor would be expended regardless of which way the appellate court ruled because that in itself made the issue dispositive. See also *Griffith v. State*, 832 So.2d 801 (Fla. 3rd DCA 1988) (Dispositiveness by agreement-State bound to same position on appeal); *Mylock v. State*, 750 So.2d 144 (Fla. 1st DCA 2000) (Dispositive because of agreement) and *Jackson v. State*, 382 So.2d 749 (Fla. 1st DCA 1980) (Dispositive because of agreement).

REVIEW SHOULD BE GRANTED

Review should be granted to resolve the clear conflict on such a very basic matter. Review should also be granted because the facts present would allow the court to address the underlying problem exposed[2] --that a device (stipulation as to dispositiveness) which was designed to resolve and simplify no contest pleas in the Circuit Court and the subsequent appeals in the District Courts has instead evolved into a judicial labor enhancer. It often results in the court later disregarding the plea agreement and in most cases it is the cause of additional litigation in both the Circuit and District Court.

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[2] Once the court accepts Jurisdiction, it can address additional or other issues related to it.

INADEQUATE STIPULATION OR INADEQUATE RECORD

Even if this court agrees that a stipulation as to dispositiveness is binding on the District Court, the question often arises as it did here as to what exactly was stipulated where there were multiple challenges presented in support of suppression. The Fifth District Court found that the stipulation in Petitioner's case was an agreement on multiple bases, not just the one raised on appeal.

Petitioner disagrees with the District Court's assessment of the extent of the stipulation. This uncertainty is present because the record can be interpreted in more than one way on this critical issue.

The Second District Court of Appeals in *England v. State*, 46 So.3d 127 (Fla. 2nd DCA 2010) gave the defendant the benefit of any doubt caused by ambiguity[3] of this sort. ***Clear rules should be in place to prevent this all too common ambiguity such as mandatory written agreements spelling out exact the bases for suppression and if it is agreed that the issues singly or only jointly are dispositive.***

When an agreement is accepted as dispositive only if all bases are resolved favorably on appeal (as inaccurately interpreted by the District Court here) then the whole purpose of the dispositive agreement is lost. The Appellate Court must delve into each issue and only if all are resolved favorably can it then grant relief;

[3] See *Alexander v. State*, 399 So.2d 1110 (Fla. 1st DCA 1981) (two separate issues-one dispositive-one not)

otherwise all the Judicial Labor is wasted as the court must dismiss for lack of jurisdiction.

Here, for example, where appellate counsel chose to argue only what he considered the strongest basis, the court felt it was required to dismiss the appeal but not until wasting its time. The only way to avoid these complicated situations is to limit stipulation as to dispositiveness without basing suppression on multiple issues. For instance in *Armas v. State,* 947 So.2d 675 (Fla. 2nd DCA 2007) ,the court treated the issues as dispositive even though arguably not, and even though the State could bring Armas to trial on multiple cases because of the dispositiveness agreement.

The approach taken by the Fifth District Court here almost guarantees extended litigation and a large expenditure of judicial resources in both the District and Circuit Courts.

For instance,the question of whether Petitioner's appellate counsel should have raised other basis for suppression will have to be presented later to the District Court under a *Petition for Writ of Habeas Corpus* alleging Ineffective Assistance of Appellate Counsel under Fla. R. App. P. 9.141.

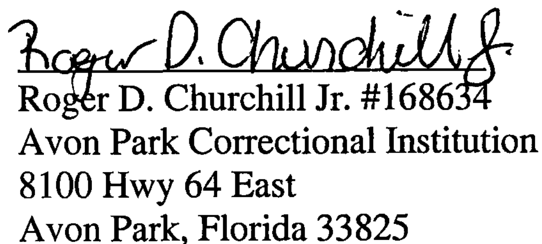
Likewise, trial counsel's action in entering into such an agreement will also later lead to a challenge to his effectiveness under Fla. R. Crim. P. 3.850. Again as a result, a motion to withdraw from the plea under rule 3.850 will be filed as the

main consideration of the plea-Appellate Court's consideration of the suppression issue was not provided.

CONCLUSION

Review should be granted to resolve the direct conflict present and to re-evaluate stipulations on dispositiveness as they are not working as they were intended to. This Court is asked to consider this brief liberally as it was prepared without access to the record. Petitioner's Appellate counsel did not have an opportunity to present this issue as he became seriously ill during the direct appeal and was unable to continue in his representation of the Petitioner. If there is any question over whether jurisdiction should be exercised, Petitioner respectfully requests that counsel be appointed to fully and properly present this issue.

Respectfully Submitted,



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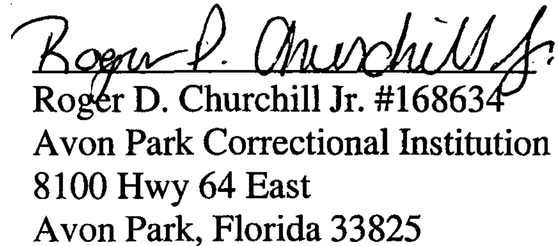
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief and appendix has been furnished via prepaid first class mail to: The Office of the Attorney General, 444 Seabreeze Blvd, Daytona Beach, Florida 32118 by entrusting it to prison Officials for mailing on this 1st day of September 2015.

Roger D. Churchill Jr. #168634

CERTIFICATE OF FONT COMPLAINCE

I HEREBY CERTIFY that the foregoing brief is in compliance with the font requirements of the Florida Rules of Appellate procedure.



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Case # ________________
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STATE OF FLORIDA
Respondent

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APPENDIX TO JURISDICTIONAL BRIEF

Appx "A" ------ Opinion in *Roger Churchill v. State* case # 5D14-1081 (Fla. 5th DCA July 24, 2015).

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APPENDIX

141081

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ROGER DENNIS CHURCHILL, JR.,

Appellant,

v. Case No. 5D14-1081

STATE OF FLORIDA,

Appellee.

_______________________________/

Opinion filed July 24, 2015

Appeal from the Circuit Court for Citrus County,
Richard A. Howard, Judge.

James S. Purdy, Public Defender, and Christopher S. Quarles, Assistant Public Defender, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Douglas T. Squire, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

Roger Dennis Churchill, Jr. appeals his judgment and sentence for one count of manufacture of methamphetamine, one count of conspiracy to manufacture methamphetamine, and one count of possession of a listed chemical, entered after he pled no contest to the charges while reserving his right to appeal the trial court's ruling

on his pre-trial motion in limine.[1] We decline to address the issue. Because the trial court's order was not dispositive,[2] it cannot be challenged on direct appeal. See Fla. R. App. P. 9.140(b)(2)(A)(i); Garcia-Roque v. State, 120 So. 3d 618 (Fla. 5th DCA 2013) (affirming defendant's convictions and sentences without addressing lower court's ruling on the motion in limine because such ruling was not dispositive). "An issue is legally 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." 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). Accordingly, we dismiss the appeal. See Garcia-Roque, 120 So. 2d at 619.

DISMISSED.

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[1] The specific issue presented on appeal is whether the presumptive field test conducted by law enforcement met the standard set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). See § 90.702, Fla. Stat. (2014); Perez v. Bell South Telecomm., Inc., 138 So. 3d 492, 497-98 (Fla. 3d DCA 2014). Churchill argues it did not. He does not contest the trial court's ruling concerning the identification of the methamphetamine based on the law enforcement officer's training and experience.

[2] Even though the State stipulated below that the trial court's ruling was dispositive, this Court is not bound to accept the State's stipulation. See Ashley v. State, 611 So. 2d 617, 618 (Fla. 2d DCA 1993) (finding that the attorneys and the trial court erred in their assumptions that the ruling on the motion in limine was dispositive, because the defendant could be brought to trial regardless of whether the appellate court affirmed or reversed the trial court's ruling). Here, the stipulation was based on the exclusion of all of the deputy's testimony, including his identification of the methamphetamine based on his training and experience. Churchill waived any argument as to this additional testimony by not raising it in his initial brief. See, e.g., Hoskins v. State, 75 So. 3d 250, 257 (Fla. 2011) (citing Hall v. State, 823 So. 2d 757, 763 (Fla. 2002)) (stating argument not raised in initial brief barred); J.A.B. Enters. v. Gibbons, 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992) ("[A]n issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief.") (citing Snyder v. Volkswagen of Am., Inc., 574 So. 2d 1161 (Fla. 4th DCA 1991)).

EVANDER, BERGER and WALLIS, JJ., concur.