

IN THE SUPREME COURT OF FLORIDA

ANTHONY SHEPPARD, :
 :
 Petitioner, :
 :
 vs. : Case No. SC08-1452
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 :
 _____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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PRELIMINARY STATEMENT

In this brief on jurisdiction, Petitioner, ANTHONY SHEPPARD, Defendant in circuit court and Appellant in district court of appeal, shall be referred to as Petitioner or by name. Respondent, State of Florida, represented by State Attorney for Thirteenth Judicial Circuit in circuit court and by the Office of the Attorney General in district court of appeal, shall be referred to as Respondent or the State. Petitioner's appeal, 2D06-4557, comprised two volumes: (V1, R01-129; SV1, R130-157).

STATEMENT OF THE CASE AND FACTS

The Second District Court of Appeal decision, Sheppard v. State, No. 2D06-4557 (Fla. 2d DCA Feb. 27, 2008), reh'g granted in part, (Fla. 2d DCA July 16, 2008), set out these facts:

On August 9, 2005, Mr. Sheppard pleaded guilty to violating his community control previously imposed for convictions of two counts of uttering a forged instrument-a third-degree felony. § 831.02, Fla. Stat. (2001). An Assistant Public Defender (the APD) represented Mr. Sheppard at the community control revocation hearing. The APD told the trial court that the State had offered "a year and a day followed by four years of sex offender probation."^{FN1}The APD candidly advised the trial court that he and Mr. Sheppard agreed that Mr. Sheppard was unlikely to successfully complete the probationary portion of such a split sentence.^{FN2}The APD also informed the trial court that Mr. Sheppard's scoresheet under the Criminal Punishment Code reflected a minimum sentence of a nonstate prison sanction, and he asked the trial court for a "straight time" sentence of eighteen to twenty-four months' imprisonment with no probation to follow. After a lengthy discussion of Mr. Sheppard's admitted inability to comply with the reporting and housing requirements of community control, the trial court sentenced him to two consecutive five-year prison

terms-ten years total-the maximum for the two third-degree felonies of uttering a forged instrument. § 775.082(3)(d), Fla. Stat. (2001).

....
After sentencing, Mr. Sheppard timely filed a pro se motion to withdraw his guilty plea under Florida Rule of Criminal Procedure 3.170(1) based on the alleged misadvice of counsel. He asserted that his plea was involuntarily made because the APD improperly refused to allow him to accept the State's plea offer and misled him about the sentence that he would receive.

On May 9, 2006, the trial court held an evidentiary hearing on the motion. The State called the APD as its only witness. The APD identified himself as an employee of the public defender's office assigned to the sexual offender division. Midway through the APD's testimony, the trial court interrupted the proceedings to ask, "Who represents Mr. Sheppard?" The APD replied, "This is a pro se motion." Unaccountably, the trial court then resumed the hearing. Mr. Sheppard did not take advantage of the opportunity to cross-examine "his lawyer." The unsworn statement that Mr. Sheppard offered in support of his motion is only three lines long in the transcript of the proceedings. Mr. Sheppard did not call any witnesses at the hearing.

Sheppard, No. 2D06-4557 at slip op. 2-3, (footnotes omitted); see Appendix-A, decision in Sheppard v. State, No. 2D06-4557 (Fla. 2d DCA Feb. 27 2008), reh'g granted in part, (Fla. 2d DCA July 16, 2006). After the Second District Court of Appeal denied Mr. Sheppard's appeal on Feb. 27, 2008, concluding the trial court should not have considered the merits of the pro se motion to withdraw plea but, instead, should have stricken it as a nullity, a motion for rehearing, clarification, and/or certification was filed on March 12, 2008, based on direct conflict with the Fourth District Court of Appeal decisions, in Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004) and Bermudez v. State, 901 So. 2d 981, 984-85 (Fla. 4th DCA 2005). On July 16, 2008, the Second

District Court of Appeal granted rehearing in part, affirming its earlier decision reversing the trial court's order denying Mr. Sheppard's pro se motion to withdraw plea and remanding with directions that the trial court strike the motion as a nullity, while certifying direct conflict with the Fourth District Court of Appeal decisions in Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004) and Bermudez v. State, 901 So. 2d 981, 984-85 (Fla. 4th DCA 2005), on the prohibition against "hybrid representation" called the "nullity rule" and pro se motions to withdraw plea filed, pursuant to Fla. R. Crim. P. 3.170(1), being treated as a nullity unless the pro se motion contains an unequivocal request to discharge counsel and whether an exception exists to treating such pro se motion without an unequivocal request to discharge counsel as a nullity when such pro se motion contains allegations of counsel's misadvice or coercion sufficient to reflect an "adversarial relationship" between pro se defendant and his court-appointed counsel that negates the prohibition against "hybrid representation" and precludes striking the pro se motion to withdraw plea as a nullity. See Sheppard, No. 2D06-4557 at slip op. 3-10. On July 28, 2008, notice to invoke discretionary jurisdiction, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(vi), was filed in Second District Court of Appeal along with a motion to stay mandate not yet disposed of as of the date of service of this brief on jurisdiction. See Fla. R. App. P. 9.120(b) & (d).

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal decision in Sheppard v. State, No. 2D06-4557 (Fla. 2d DCA Feb. 27, 2008), reh'g granted in part, (Fla. 2d DCA July 16, 2008), certified direct conflict with the Fourth District Court of Appeal decisions in Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004) and Bermudez v. State, 901 So. 2d 981 (Fla. 4th DCA 2005), on the prohibition against "hybrid representation" and pro se motions to withdraw plea filed, pursuant to Fla. R. Crim. P. 3.170(1), while represented by counsel, being treated as a nullity unless the pro se motion contains unequivocal request to discharge counsel and whether an exception exists to treating such as a nullity when the pro se motion contains allegations of counsel's misadvice or coercion sufficient to reflect an "adversarial relationship" between pro se defendant and his court-appointed counsel that negates the prohibition against "hybrid representation" and precludes striking the pro se motion to withdraw plea as a nullity. Accordingly, the Florida Supreme Court should exercise its discretionary jurisdiction and review the Second District Court of Appeal decision in Sheppard that certified direction conflict with the Fourth District Court of Appeal's decisions in Peterson and Bermudez. See Art. V, § 3(b)(4), Fla. Const.; see also Fla. R. App. P. 9.030(a)(2)(A)(vi).

ARGUMENT

WHETHER THIS COURT SHOULD EXERCISE DISCRETIONARY JURISDICTION TO REVIEW SECOND DISTRICT COURT OF APPEAL DECISION IN SHEPPARD V. STATE, NO. 2D06-4557 (FLA. 2D DCA FEB. 27, 2008), REH'G GRANTED IN PART, (FLA. 2D DCA JULY 16, 2008), THAT CERTIFIED DIRECT CONFLICT WITH FOURTH DISTRICT COURT OF APPEAL DECISIONS IN PETERSON V. STATE, 881 SO. 2D 1129 (FLA. 4TH DCA 2004) AND BERMUDEZ V. STATE, 901 SO. 2D 981 (FLA. 4TH DCA 2005)?

Yes. The Second District Court of Appeal, in Sheppard v. State, No. 2D06-4557 (Fla. 2d DCA Feb. 27, 2008), reh'g granted in part, (Fla. 2d DCA July 16, 2008), certified direct conflict with the Fourth District Court of Appeal's decisions in Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004) and Bermudez v. State, 901 So. 2d 981 (Fla. 4th DCA 2005), on the prohibition against "hybrid representation" and a pro se motion to withdraw plea filed, pursuant to Fla. R. Crim. P. 3.170(1), being treated as a nullity unless such motion contains an unequivocal request to discharge counsel and whether an exception exists to treating such as a nullity when the pro se motion contains allegations of counsel's misadvice or coercion sufficient to reflect an "adversarial relationship" between the pro se defendant and his court-appointed counsel that negates the prohibition against "hybrid representation" and precludes striking the pro se motion to withdraw plea as a nullity. Accordingly, the Florida Supreme Court should exercise its discretionary jurisdiction and review this certified direct conflict. See Art. V, § 3(b)(4), Fla. Const.; see also Fla. R. App. P. 9.030(a)(2)(A)(vi).

The Second District Court of Appeal decision in Sheppard v.

State, No. 2D06-4557 (Fla. 2d DCA Feb. 27, 2008), reh'g granted, in part, (Fla. 2d DCA July 16, 2008), held that a pro se motion to withdraw plea, filed pursuant to Fla. R. Crim. P. 3.170(1), while represented, should be stricken as a nullity unless it contains an unequivocal request to discharge counsel while certifying direct conflict with Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004) and Bermudez v. State, 901 So. 2d 981 (Fla. 4th DCA 2005). Sheppard v. State, No. 2D06-4557 at slip op. 3-10. In particular, the Second District Court held:

[W]e think that the exception to the rule prohibiting hybrid representation for motions under rule 3.170(1) should be limited - as we held in Mourra - to cases where the defendant makes an unequivocal request to discharge counsel. Thus we decline to adopt the more expansive exceptions to the rule prohibiting hybrid representation that the Fourth District has recognized in Peterson and Bermudez. We certify that our decision on this point is in direct conflict with these cases. We reverse the trial court's denial of Mr. Sheppard's pro se motion to withdraw plea, and we remand with directions for the trial court to strike the motion as a nullity.

Sheppard, No. 2D06-4557 at slip op. 10. Relying on Logan v. State, 846 So. 2d 472, 474-75 (Fla. 2003), for the "nullity rule" regarding a criminal defendant not having a constitutional right to "hybrid representation" by both counsel and himself such that pleadings filed by a criminal defendant who is represented by counsel are generally treated as a nullity unless they include an unequivocal request to discharge counsel, the Second District Court of Appeal, in Mourra v. State, 884 So. 2d 316, 321 (Fla. 2d DCA 2004), extended the "nullity rule" to pro se motions to

withdraw plea, filed pursuant to Fla. R. Crim. P. 3.170(1), holding that same rule should generally apply to a pro se motion to withdraw plea pursuant to rule 3.170(1) unless the motion contains an unequivocal request to discharge counsel. Sheppard, No. 2D06-4557 at slip op. 3-10, citing Logan and Mourra. In Sheppard, the Second District Court certified direct conflict with the Fourth District Court of Appeal's decisions in Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004) and Bermudez v. State, 901 So. 2d 981 (Fla. 4th DCA 2005), after explaining why the court, in applying the "nullity rule" and its prohibition against hybrid representation to pro se motions to withdraw plea, filed pursuant to Fla. R. Crim. P. 3.170(1), that did not contain an unequivocal request to discharge counsel, was unwilling to recognize an exception when the pro se motion contained allegations of counsel's misadvice or coercion sufficient to reflect an "adversarial relationship" between a pro se defendant and his court-appointed counsel that negated any prohibition against hybrid representation and precluded striking the pro se motion to withdraw plea as a nullity as the Fourth District Court of Appeal held in Peterson, 881 So. 2d at 1129-30, and Bermudez, 901 So. 2d at 984-85. Sheppard, No. 2D06-4557 at slip op. 3-10.

Jurisdiction for discretionary review by the Florida Supreme Court, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(vi), exists to review the Second District Court of Appeal decision, in Sheppard v. State, No. 2D06-4557 (Fla. 2d DCA Feb. 27, 2008), reh'g granted

in part, (Fla. 2d DCA July 16, 2008), certified to be in direct conflict with the Fourth District Court of Appeal's decisions in Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004) and Bermudez v. State, 901 So. 2d 981 (Fla. 4th DCA 2005), on whether an exception exists to treating a pro se motion to withdraw plea filed, pursuant to Fla. R. Crim. P. 3.170(1), while represented by counsel, as a nullity unless the pro se motion contains unequivocal request to discharge counsel when such pro se motion contains allegations of counsel's misadvice or coercion sufficient to reflect an "adversarial relationship" between the pro se defendant and his court-appointed counsel that negates prohibition against "hybrid representation" and precludes striking the pro se motion to withdraw plea as a nullity. The Florida Supreme Court should exercise discretionary jurisdiction and review the Second District Court decision in Sheppard that certified direct conflict with the Fourth District Court of Appeal's decisions in Peterson and Bermudez on this issue so that the direct conflict certified can be resolved with harmony restored in the Florida district courts of appeal, accordingly. See Art. V, § 3(b)(4), Fla. Const.; see also Fla. R. App. P. 9.030(a)(2)(A)(vi).

CONCLUSION

Petitioner, ANTHONY SHEPPARD, respectfully, requests that this Court exercise discretionary jurisdiction, pursuant to Art. V, § 3(b)(4), Fla. Const., to review the Second District Court of Appeal's decision in Sheppard v. State, No. 2D06-4557 (Fla. 2d DCA Feb. 27, 2007), reh'g granted in part, (Fla. 2d DCA July 16, 2008) that certified direct conflict with the Fourth District Court of Appeal's decisions in Peterson v. State, 881 So. 2d 1129 (Fla. 4th DCA 2004) and Bermudez v. State, 901 So. 2d 981 (Fla. 4th DCA 2005).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to John M. Klawikofsky, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of August, 2008.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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APPENDIX

ITEM

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- A. Conformed copy of Second District Court of Appeal decision, Sheppard v. State, No. 2D06-4557 (Fla. 2d DCA Feb. 27, 2008), reh'g granted in part, (Fla. 2d DCA July 16, 2008) 1-9