IN THE SUPREME COURT OF THE STATE OF FLORIDA

GILBERT DUDLEY, III,

Petitioner,

v.

Case No. SC11-2292
5th DCA No. 5D10-2863

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The only facts relevant to this Court in determining whether to accept jurisdiction are those contained within the opinion of the district court.

The Fifth District Court of Appeal's (Fifth District Court) opinion in Dudley v. State, 64 So. 3d 736 (Fla. 5th DCA 2011), stated:

> The State charged Dudley with two counts of sexual battery on a mentally defective person. In count I, the State alleged that on or about March 21, 2008, the Defendant penetrated or had union with the victim's vagina or anus. In count II, the State alleged that in 2007 the Defendant penetrated or had union with the victim's vagina or mouth. Both counts alleged that the victim was mentally defective, and that Dudley had reason to believe or had actual knowledge that the victim was mentally defective. See § 794.011(4)(e), Fla. Stat. (2007).
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> After the jury returned guilty verdicts on both counts, the trial court set aside the verdicts and dismissed the charges, finding that the State's evidence at trial was insufficient to support a jury finding that the victim was a "mentally defective" person as defined in section 794.011(4)(e), Florida Statutes. That statute defines "mentally defective" to mean "a mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of his or her conduct." § 794.011(1)(b), Fla. Stat. (2007).

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First, the State presented testimony from the victim. It is clear from this testimony that the victim, who was twenty-one years old at the time of trial, has a mental and developmental age far below her physical age, and that her ability to appraise the nature of many things is severely limited. For example, the victim repeatedly referred to Dudley's sexual organ as his “popsicle,” and testified to the times when Dudley put his “popsicle” inside her. She explained that she did not want to do this but that “he told me if I don't do it, he was gonna punch me.” When asked why she did not immediately tell her mother about the incidents, she said that Dudley promised to take her to the park if she did not tell her mother. The victim's word choices and phraseology throughout the testimony reflect the mental ability of a young child.

Second, the victim's special education teacher, Ms. Hook, had worked with the victim for four or five years and also served as the victim's Special Olympics coach. Ms. Hook testified that the victim was in a class for the mentally disabled who have IQs lower than seventy. Ms. Hook testified that her students, including the victim, need constant supervision as they are not capable of self-direction, and have significant cognitive limitations. Ms. Hook recounted specific instances of the victim's limitations. For example, the victim does not understand the concept of differing valuations of money or the relative value of things. Ms. Hook explained that if the victim had a $5 bill, the victim could not understand why she could not use the bill to purchase a $13 CD. Similarly, Ms. Hook testified that the victim does not understand abstract concepts such as “in a little while” or “usual.” She further testified that the victim could not rationally process and express her emotions,

but would simply cry or stomp her feet if she did not like something.

Third, the victim's mother testified that her daughter has mild cerebral palsy, has been diagnosed with bi-polar disorder and was simply “not like everyone else.” She explained that if the victim were ill, she would not know to take medication even if a doctor had provided her with it; that she cannot cook because she could burn the house down; that if she observed someone ill and incapacitated, she would not know to call “911” or otherwise seek help, but would probably just watch the person lie there. The mother further described her daughter's mind as “very childlike,” explaining that she does not know how to count money; does not understand the basics of personal hygiene; is afraid of the dark; and, cannot be left alone for any extended period of time because of her need for constant monitoring. She explained that the victim will never be able to drive due to her limited mental capacity, must generally be separated from other children due to the concern that they would pick on her or persuade her to do inappropriate things, and that she cannot take a bus by herself. According to her mother, the victim is able to do laundry for the family, but only after much assistance, and is able to keep her room clean but needs prompting. The victim likes to watch Disney videos; and, she likes to shop and dance. The victim's room is decorated in a Tinkerbell theme. The victim has never had a paying job.

The mother put the victim on birth control in the form of Depo–Provera shots. The mother began taking the victim to get these shots after an incident with an emotionally handicapped young man which caused the mother to worry about her daughter being taken advantage of and getting pregnant. The victim has been

committed to a mental institution four times.

Finally, the State presented the testimony of Dr. Malcolm J. Graham, III, a psychologist who does evaluations for a number of different governmental agencies and who has been qualified as an expert witness in court many times. He testified at length as to the victim's mental limitations; opined that the victim is mentally retarded, in the moderate range; reported that the victim scored sixty-one on her verbal IQ scale, fifty on her performance IQ, and fifty-one on her full scale, putting her at less than one percentile. In other words, at least ninety-nine percent of the people who take the test scored at a higher intelligence level than the victim. Dr. Graham testified that the victim could not remember for five minutes even one of four words that he asked her to remember during a conversation; that she cannot name one single current event happening anywhere in the world; and, that she cannot perform even the simplest arithmetic calculations, such as 3 + 1. He opined that the victim will always need to be in a highly structured environment where she will be cared for, as she will never be able to function independently. Significantly, Dr. Graham testified that in his professional opinion the victim suffers from a mental defect that renders her "permanently incapable of appraising the nature of her conduct" in the context of engaging in sexual intercourse—the very definition of "mentally defective" contained in the statute pursuant to which the State prosecuted Dudley.

It was undisputed that Dudley was fully aware of the victim's mental condition. After becoming romantically involved with the victim's mother, Dudley moved in with the family and had become "like a father figure" to the victim. At some point, Dudley

> lost his job, and then became the primary caregiver for the victim when her mother was at work. It was Dudley who had taken the victim to her appointment with Dr. Graham for a disability benefits evaluation; and, it was Dudley who initially gave Dr. Graham a full background and factual explanation of the victim's mental limitations, before Dr. Graham began his own testing and evaluation. Dudley also admitted to his two sexual encounters with the victim, although he testified that the victim "came on to" him both times. He also testified that he believes the victim can work and do some things for herself, and that he believes the victim to be more intelligent than most others recognize.
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> It is unclear what procedural mechanism the trial judge was following when he *sua sponte* announced that he was setting aside the verdicts and dismissing the charges in this case. Dudley had never moved to dismiss the charges; the judge had denied Dudley's motions for judgment of acquittal at trial; and, there were no post-trial motions pending. Dudley was simply awaiting sentencing.

Dudley, 64 So. 3d at 747,748-749 (Footnote omitted). The Fifth District Court receded from Terragrossa and certified conflict with Mathis. Id. at 752.

Petitioner belatedly filed notice to invoke the discretionary jurisdiction of this Court. The State's brief on jurisdiction follows.

SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction in the instant case. While the Fifth District Court of Appeal conditionally certified conflict with Mathis v. State, 682 So. 2d 175 (Fla. 1st DCA 1996), there is no express and direct conflict with this case on the face of the decision under review.

ARGUMENT

THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION.

Petitioner seeks discretionary review with this Honorable Court under Article V, Section 3(b)(3) of the Florida Constitution. See also Fla. R. App. P. 9.030(a)(2)(A)(iv). Article V, Section 3(b)(3) provides that the Florida Supreme Court may review a district court of appeal decision only if it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." In Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986), this Court explained:

> Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

Reaves, 485 So. 2d at 830, n.3. Additionally, this Court has held that inherent or so-called "implied" conflict may not serve as a basis for this Court's jurisdiction. DHRS v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986). Respondent contends no such conflict exists between the cited authority and the instant opinion.

In Dudley v. State, 64 So. 3d 746 (Florida 5th DCA 2011), the Fifth District Court concluded that:

The parties cite to five relevant appellate decisions dealing with the sufficiency of the evidence to support a jury finding that a sexual battery victim was "mentally defective" at the time of the crime. Dudley argues for affirmance of the trial court's dismissal order citing Mathis v. State, 682 So. 2d 175 (Fla. 1st DCA 1996) and State v. Torresgrossa, 776 So. 2d 1009 (Fla. 5th DCA 2001). The State argues for reversal and reinstatement of the verdicts, citing Hudson v. State, 939 So. 2d 146 (Fla. 4th DCA 2006), Schimele v. State, 784 So. 2d 591 (Fla. 4th DCA 2001) and Bowman v. State, 760 So. 2d 1053 (Fla. 4th DCA 2000). In our view, the facts from Hudson, Schimele and Bowman more closely match the facts in this case, and **both Mathis and Torresgrossa are distinguishable**.

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By contrast, in Mathis the First District reversed a conviction based upon the appellate panel's conclusion that the evidence was legally insufficient to permit a jury to find that the victim in that case was "mentally defective" on the date of the alleged sexual battery. Mathis is distinguishable for two reasons. First, the testimony in Mathis established the victim to be "right at the upper end of" the "trainable mentally handicapped range," and the mental capacity evidence regarding the victim was based upon observations made and testing done "fifteen months before the date of the alleged sexual battery." Mathis, 682 So.2d at 180. Because the evidence in Mathis suggested that the mental capacity of the victim would improve with time, the panel was properly concerned about the lack of evidence addressing the mental capacity of the victim as of the date of the charged crime. There is no similar concern in our case, because the witnesses testified regarding the victim's mental condition at

> the time of the crimes. Additionally, the victim's mental condition here is permanent.
>
> Second, the Mathis panel expressed special concern regarding the fact that no expert opined that the victim suffered from "'a mental disease or defect which render[ed] [her] temporarily or permanently incapable of appraising the nature of ... her conduct.'" Id. (quoting § 794.011(1)(b), Fla. Stat. (1993)). In our case, Dr. Graham gave that opinion.
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> *******
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> Although **both Mathis and Torresgrossa are factually distinguishable**, we find the analysis in Mathis troubling in that it suggests an unreasonably narrow reading of the term "mentally deficient." In short, Mathis equates "mental deficiency" with "legal insanity," and further suggests that anyone with a sufficient mental capacity to competently testify in court cannot be found "mentally deficient."

Id. at 750-752 (Emphasis added). In closing, the Fifth District Court stated that, "to the extent that Mathis can be read as equating 'mental deficiency' with competence to testify, or to mean a total or complete lack of mental capacity or understanding, we disagree and conflict with Mathis." Id.

However, as the Fifth District Court pointed out, the instant case and Mathis are factually distinguishable primarily because, in the instant case, the State presented critical expert testimony which was found lacking in Mathis, i.e., that "the victim suffered from 'a mental disease or defect which render[ed] [her] temporarily or permanently incapable of

appraising the nature of ... her conduct.'" Id. at 751. As the instant case and Mathis are factually distinguishable on the face of the opinions, the Fifth District Court's opinion in Dudley does not expressly and directly conflict with Mathis. Jurisdiction should be denied.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Honorable Court decline to accept jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Respondent has been delivered via U.S. Mail to: Clyde M. Taylor, III, counsel for Petitioner, at Taylor & Taylor, P.A., 125-B King Street, St. Augustine, Florida 32084, this 6th day of January, 2012.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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