IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC11-259

FRANK MONTE,

Petitioner,

- versus -

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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Preliminary Statement

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was Appellant and Respondent was Appellee in the District Court of Appeal of Florida, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

Statement Of The Case And Facts
(limited to the issue of jurisdiction)

Noting that in determining jurisdiction, this Court is limited to the facts apparent on the face of the opinion, Hardee v. State, 534 So. 2d 706, 708 n.1 (Fla. 1988), Respondent will present the facts as they appear in the opinion below:

The state charged Petitioner with two counts of aggravated stalking and one count of violation of a protective injunction. Monte v. State, 36 Fla. L. Weekly D82 (Fla. 4th DCA Jan. 5, 2011).

Approximately two months prior to trial, an expert was appointed by the trial court, at defense counsel's request, to address Petitioner's competency to stand trial. Id. The expert found Petitioner competent to proceed. Id.

During a subsequent hearing, the trial court considered Petitioner's

competency to proceed based on the written evaluation prepared by the appointed expert. Id. The trial court stopped short of making a ruling after defense counsel objected, arguing that the trial court was required to appoint at least two experts to assist with the determination of competency. Id.

The next day, the trial court, on its own motion, appointed two more experts to examine Petitioner. Id. One of the experts found Petitioner not competent to proceed, while the other found him competent to proceed. Id. The record does not show that any additional competency hearing was ever held.

After a jury trial, Petitioner was convicted of one count of aggravated stalking and one count of violating a protective injunction. Id.

Petitioner filed a direct appeal of his conviction and sentence. On appeal, Petitioner claimed, inter alia, that the trial court erred in failing to conduct a competency hearing both before trial and sua sponte during trial, when, Petitioner claimed, it should have become apparent to the trial court that such a hearing was necessary. Id. The Fourth District found the trial court erred in not conducting a competency hearing because "sufficient grounds existed to question Monte's competency to stand trial . . . However . . . the mandatory subsequent competency hearing never occurred." Id. Relying on this Curt's opinion in Mason v. State, 489 So. 2d 734, 737 (Fla. 1986), the Fourth District remanded for a retroactive

competency hearing: ". . . a retroactive determination of competency may be possible and legally permissible because three pre-trial psychological examinations have in fact already been performed and the records associated with those evaluations may remain available for review and consideration." Id.

Petitioner now seeks review of the decision of the Fourth District Court of Appeal based on conflict jurisdiction.

Summary Of The Argument

This Court does not have jurisdiction to review the instant case. The decision of the Fourth District Court of Appeal in the instant case does not expressly and directly conflict with decisions of this Court or any other District Courts of Appeal on the same question of law. Therefore, this Court should not review the case at bar and should dismiss the Petitioner's case.

Argument

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR ANY OTHER DISTRICT COURT OF APPEAL.

Petitioner alleges that the decision of the Fourth District Court of Appeal in Monte v. State, 36 Fla. L. Weekly D82 (Fla. 4th DCA Jan. 5, 2011), expressly and directly conflicts with a footnote found in a concurring opinion in this Court's opinion in Tennis v. State, 997 So. 2d 375 (Fla. 2008), and also with a variety of opinions out of the various District Courts of Appeals which, he claims, stand for the proposition that a hearing to determine whether a criminal defendant was competent at the time of trial cannot be held retroactively. See Rogers v. State, 16 So. 3d 928 (Fla. 1st DCA 2009); Mairana v. State, 6 So. 3d 80 (Fla. 5th DCA 2009); Maxwell v. State, 974 So. 2d 505, 511 (Fla. 5th DCA 2008); Cochrane v. State, 925 So. 2d 370, 372 (Fla. 5th DCA 2006); Harris v. State, 864 So. 2d 1252, 1255-56 (Fla. 5th DCA 2004); Brockman v. State, 852 So. 2d 330 (Fla. 2d DCA 2003).

Article V, § 3(b)(3) of the Florida Constitution restricts this Court's review of a district court of appeal's decision only if it expressly conflicts with a decision of this Court or of another district court of appeal. It is not enough to show that the district court's decision is effectively in conflict with other appellate decisions.

This Court's jurisdiction to review the Fourth District's decision in this case may only be invoked by either the announcement of a rule of law which conflicts with a law previously announced by this Court or another district court of appeal or by the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975).

The term "expressly" requires some written representation or expression of the legal grounds supporting the decision under review. See Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). A decision of a district court of appeal is no longer reviewable on the ground that an examination of the record would show that it is in conflict with another appellate decision; it is reviewable if the conflict can be demonstrated from the district court of appeal's opinion itself. The district court of appeal must at least address the legal principles which were applied as a basis for the decision. See Ford Motor Co. v. Kakis, 401 So. 2d 1341, 1342 (Fla. 1981).

When determining whether conflict jurisdiction exists, this Court is limited to the facts which appear on the face of the opinion. Hardee v. State, 534 So. 2d at 708, n.1; White Constr. Co. v. DuPont, 455 So. 2d 1026 (Fla. 1984). In the past, this Court has held that it would not exercise its discretion where the opinion below established no point of law contrary to the decision of this Court or of

another district court of appeal. The Florida Star v. B.J.F., 530 So. 2d 286, 289 (Fla. 1988). "'Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.' In other words, inherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction." State, Department of Health v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986) (quoting Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986)). See also School Board of Pinellas County v. District Court of Appeal, 467 So. 2d 985, 986 (Fla. 1985).

In the case at bar, Petitioner's claim of jurisdictional conflict with opinions from this Court rests on a footnote in a concurring opinion authored by Justice Pariente. See Tennis v. State, 997 So. 2d at 382. This language in Tennis is obiter dicta and not the holding in the case. Thus, there can be no express and direct conflict. See Ciongole v. State, 337 So. 2d 780 (Fla. 1976) (declining to exercise conflict jurisdiction because conflicting language was obiter dicta). Furthermore, the language in the Tennis footnote is located in a concurring opinion, not in the majority opinion of this Court. See, e.g., Kennedy v. Kennedy, 641 So. 2d 408 (Fla. 1994) (discretionary jurisdiction cannot be based on a plurality opinion). Finally, the footnote conforms to the classic definition of obiter dicta: a purely gratuitous observation made in pronouncing an opinion and which concerns some

rule, principle or application of law not necessarily involved in the case or essential to its determination. See Bunn v. Bunn, 311 So. 2d 387, 389 (Fla. 4th DCA 1975). In Tennis, this Court was called on to determine whether the trial court erred when it failed to conduct a Faretta inquiry despite Tennis' unequivocal request to represent himself. The issue of whether a competency hearing was held was not relevant to this Court's ultimate determination on that issue. Thus, Justice Pariente's footnote was not essential to this Court's determination of the Faretta issue.

Next, Petitioner's claim that the Fourth District's opinion conflicts with various opinions of the First, Second and Fifth District Courts is unavailing. As discussed previously, to show conflict, the Fourth District must have applied a rule of law to produce a different result in a case which involves **substantially the same facts as a prior case**. Mancini v. State, 312 So. 2d at 733. The cases cited by petitioner are not in the same procedural posture as Petitioner's case. For example, in some cases cited by Petitioner, the case came to the District Court in a different procedural posture than the case at bar. In Rogers v. State, 16 So. 3d 928 (Fla. 1st DCA 2009), the issue was whether the trial court exceeded its authority when it conducted a competency determination on remand when the First District had **reversed** the murder conviction. The case at bar involves a direct appeal of a

conviction, not the disposition of a case on remand. In Cochrane v. State, 925 So. 2d 370, 372 (Fla. 5th DCA 2006), the issue presented was whether appellate counsel was ineffective for failing to argue on appeal that the trial court erred in failing to conduct a competency hearing. Again, in the case at bar, the issue was before the Fourth District in a direct appeal of a criminal conviction.

In Mairana v. State, 6 So. 3d 80 (Fla. 5th DCA 2009), the question of Mairena's competency arose seven months after a single competency evaluation was conducted finding him competent. In Maxwell v. State, 974 So. 2d 505 (Fla. 5th DCA 2008), the competency determination finding Maxwell incompetent was made after Maxwell entered his plea. In Harris v. State, 864 So. 2d 1252, 1255-56 (Fla. 5th DCA 2004), two of the three evaluations were over six months old and one was a month old. Additionally, the trial court failed to either consider or read any of the three competency reports. In Brockman v. State, 852 So. 2d 330 (Fla. 2d DCA 2003), the reports were four and eleven months old. The Second District determined these reports were too remote in time to provide an accurate assessment of Brockman's competency to proceed to trial. In the case at bar, the three competency evaluations were all performed with two months of the trial. Converse to Petitioner's argument in support of conflict jurisdiction, the facts of these cases cited by Petitioner support the State's position that there is no conflict.

The Fourth District, consistent with this Court's holding in Mason v. State, 489 So. 2d 734, 737 (Fla. 1986), found that there was a sufficient number of expert and lay witnesses who could provide pertinent evidence as to petitioner's competency at the time of and during trial. In the cases cited by Petitioner, it is clear that the information relied upon (or ignored) by the trial court was too stale to make an accurate competency determination had one been properly held at the time of trial, and much less so if a competency determination had been ordered on remand. Thus, the facts of Petitioner's show that the Second and Fifth Districts properly determined that **under the facts of those cases**, no retroactive competency determination could properly be made.

Accordingly, this Court should decline to review the decision of the Fourth District in this case.

Conclusion

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully submits that this Court should decline to grant review in the above-styled cause.

Respectfully submitted,

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Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Ellen Griffin, Esquire, Assistant Public Defender, Criminal Justice Building, Sixth Floor, 421 Third Street, West Palm Beach, Florida, 33401, this ____ day of February, 2011.

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HEIDI L. BETTENDORF
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Certificate Of Type Size And Style

In accordance with Fla. R. App. P. 9.210(a)(2), Respondent hereby certifies that the instant brief has been prepared with Times New Roman 14 point font.

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