IN THE SUPREME COURT OF FLORIDA

FRANK MONTE,	)	
	)	
Petitioner/Appellant,	)	
	)	
v.	)	Case No.SC11-259
	)	4th DCA CASE NOS. 4D08-1461
	)	4D08-1437
STATE OF FLORIDA,	)	
	)	
Respondent/Appellee.	)	

PETITIONER'S BRIEF ON DISCRETIONARY JURISDICTION

CAREY HAUGHWOUT
Public Defender

ELLEN GRIFFIN
Assistant Public Defender
Fifteenth Judicial Circuit of Florida
Florida Bar No. 511889
Attorney for Frank Monte

421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600; (561) 624-6560
appeals@pd15.state.fl.us

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PRELIMINARY STATEMENT

Petitioner, Frank Monte, 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 the Appellant in the Fourth District Court of Appeal and the State was Appellee. The Decision of the District Court is reported as ***Monte v. State***, 36 Fla. L. Weekly D82 (Fla. 4th DCA January 5, 2011) and is attached as Appendix A.

STATEMENT OF THE CASE AND THE FACTS

Petitioner was charged with aggravated stalking and violation of a protective injunction. The court appointed three experts to determine Petitioner's competency to proceed to trial. Over defense counsel's objection and without a hearing, the trial court determined that Petitioner was competent to proceed to trial.

After conducting a hearing pursuant to ***Faretta v. California***, 422 U.S. 806 (1975), the trial court granted Petitioner's request to proceed *pro se*. The Public Defender was appointed to act as stand-by counsel.

Petitioner was convicted as charged and sentenced to five years in prison on count one and a consecutive 365 days in the county jail on count two.

On appeal, Petitioner argued that the trial court erred in failing to conduct a competency hearing prior to trial and that this error required reversal for a new trial. The Fourth District

agreed that the court erred in failing to conduct the required competency hearing before trial. However, instead of ordering a new trial outright, relying on ***Mason v. State***, 489 So.2d 734, 737 (Fla.1986), the Fourth District reversed and remanded for a retroactive determination of competency:

> We, therefore, reverse and remand for the trial court to conduct a nunc pro tunc competency hearing if the experts who evaluated Monte and their reports are available. If not available-or if Monte's competency to stand trial cannot be retroactively determined-the trial court shall afford Monte a new trial.

(Appendix A, page 6). The District Court held that this Court's opinions in ***Tennis v. State***, 997 So.2d 375 (Fla.2008) and ***Tingle v. State*, 536 So.2d 202, 204 (Fla.1988)** allowed for retroactive determinations of competency. In doing so, it acknowledged that the First District Court had questioned the continuing viability of ***Mason*** in light of ***Tennis***:

> We are aware that the First District Court of Appeal has questioned whether the Florida Supreme Court has subsequently overruled its ***Mason*** holding that "no per se rule exists in Florida forbidding a nunc pro tunc competency determination regardless of the circumstances." *See* ***Rogers v. State***, 16 So.3d 928, 931 n. 5 (Fla. 1st DCA 2009). The First District based its doubt on a comment made by Justice Pariente in a footnote to her concurring opinion in ***Tennis v. State***, 997 So.2d 375 (Fla.2008). Justice Pariente noted that the competency hearing held in that particular case after the guilt phase of the trial was not relevant in establishing if the defendant had been competent to stand trial "because a determination of competency cannot be retroactive." ***Id***. at 381 n. 7 (Pariente, J., concurring) (*citing* ***Tingle v. State***, 536 So.2d 202, 204 (Fla.1988)). We believe, however, that in citing to ***Tingle***, Justice Pariente was only referring to the general rule as applied to the facts in ***Tennis***. *See* ***Tingle***, 536 So.2d at 204 ("[A] hearing to determine whether a defendant was competent at

> the time he was tried generally cannot be held retroactively.") (emphasis added). The use of the word "generally" by the supreme court in ***Tingle*** implies that there are exceptions. Thus, ***Tingle***, if anything, affirmed the existence of the exception the Florida Supreme Court had previously explained in ***Mason***.

(Appendix A, page 7, fn.5).

Petitioner filed a Timely Notice of Discretionary Review on February 2, 2011.

SUMMARY OF THE ARGUMENT

The Fourth District's opinion below, directly and expressly conflicts with this Court's opinions in ***Tennis v. State***, 997 So.2d 375 (Fla. 2008) and ***Tingle v. State***, 536 So.2d 202, 204 (Fla.1988), and with opinions of the First, Second and Fifth District Courts of Appeal.

On numerous occasions, this Court and the Districts Courts held that determinations of competency cannot be made retroactively. Here, the Fourth District held that retroactive determinations of competency are not prohibited and remanded the case for the trial court to conduct a retroactive competency hearing.

This Court should also exercise its discretionary jurisdiction because the issue presented in this case has a continuing statewide significance and is appropriate for resolution by this Court in fulfilling its constitutional responsibility to ensure consistent application of the law throughout the state by resolving inter-district conflicts. *See* ***Florida Star v. B.J. F.***, 530 So. 2d 286,

288 (Fla. 1988); ***PNR, Inc. v. Beacon Prop. Mgmt., Inc***., 842 So. 2d 773, 777 (Fla. 2003).

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW

This Court has authority pursuant to Article V, Section 3(b)(3) of the *Florida Constitution* (1980) to review a decision of a district court of appeal that expressly and directly conflicts with a decision of this Court or another district court of appeal on the same question of law

In the case below, based on ***Mason v. State, 489 So.2d 734*** (Fla. 1986) and its own interpretation of ***Tingle***, the Fourth District Court reversed and remanded Petitioner's case for a retroactive determination of competency. The Fourth District's application and reliance on ***Mason*** and ***Tingle*** are in direct conflict with more recent opinions of this Court and decisions of other District Courts.

In an opinion joined by three other members of this Court, Justice Pariente wrote in ***Tennis v. State***, 997 So.2d 375 (Fla. 2008):

> In this case, a post-guilt phase competency hearing was held, at which Tennis was found to be competent. However, this hearing is not relevant to the present issue because a **determination of competency cannot be retroactive**. *See* ***Tingle v. State***, 536 So.2d 202, 204 (Fla.1988); ***Hill v. State***, 473 So.2d 1253, 1259 (Fla.1985).

Id. at 381, fn 7. (*Emphasis added*). Despite this clear and unequivocal statement, the Fourth District held that this Court's opinion in ***Tingle*** allowed a retroactive determination of competency, and therefore, so to must ***Tennis***.

In ***Tingle***, this Court held "[A]s we have previously noted in ***Scott*** and ***Hill***, a hearing to determine whether a defendant was competent at the time he was tried generally cannot be held retroactively." ***Tingle***, 536 So. 2d at 204. In ***Hill v. State***, 473 So.2d 1253, 1259 (Fla. 1985) and ***Scott v. State***, 420 So. 2d 595 (Fla. 1982), this Court reversed and remanded for new trials after finding that retroactive determinations of competency would be improper. Neither case mentioned the possibility of a retroactive competency determination or employed the word 'generally'.

The Second and Fifth Districts have also interpreted ***Tingle*** as prohibiting retroactive determinations of competency. In ***Brockman v. State***, 852 So. 2d 330 (Fla. 2nd DCA 2003), the Second District relied on ***Tingle*** to reverse and remand for a new trial after a finding of competency, and stated that "competence may not be determined retroactively." ***Id.***

The Fifth District Court has consistently relied on ***Tingle*** to disapprove of retroactive competency hearings. In ***Mairena v. State***, 6 So.3d 80 (Fla. 5th DCA 2009), the court reversed for a new trial after a competency hearing "[b]ecause a hearing to determine

whether a criminal defendant was competent to proceed at the time of trial cannot be held retroactively. . . .” ***Id***. at 86. *See also* ***Maxwell v. State***, 974 So.2d 505, 511 (Fla. 5th DCA 2008)(“Because a hearing to determine whether a criminal defendant was competent at the time of trial cannot be held retroactively. . . .”); ***Harris v. State***, 864 So.2d 1252, 1255-1256 (Fla. 5th DCA 2004)(Recognizing the competency cannot be determined retroactively).

The Fifth District again held that a retroactive determination of competency was not permissible in ***Cochrane v. State***, 925 So. 2d 370, 372 (Fla. 5th DCA 2006). In reversing for a new trial, the Fifth District wrote

> In ***Tingle v. State***, 536 So.2d 202 (Fla.1988), the supreme court held that a trial court erred in denying a motion to determine competency where there were reasonable grounds to believe that the defendant may have been incompetent. Finding that there can be no retroactive determination that a defendant was competent at the time he was tried, the supreme court vacated Tingle's conviction and sentence and remanded for a competency determination and retrial if Tingle were to be found competent. *See also* ***Scott v. State***, 420 So.2d 595 (Fla.1982).

Id. at 372.

This Court should accept jurisdiction because the decision of the Fourth District below directly and expressly conflicts with the decision of this Court and with the decisions of the Second and Fifth Districts in its interpretation and application of ***Tennis*** and ***Tingle***.

In its decision below, the Fourth District acknowledged the

First District's holding in ***Rogers v. State***, 16 So.3d 928 (Fla. 1st DCA 2009. In ***Rogers***, the First District recognized that this Court had, on rare occasions and only "explicitly" and using "unmistakable language" remanded cases for retroactive determinations of competency. ***Id***. at 931-932. The First District questioned whether retroactive determinations of competency would be possible under any circumstances in light of ***Tennis***. ***Id***. at 931, fn. 5. After distinguishing ***Mason*** and similar cases on the grounds that they dealt with retroactive determinations of competency in a post conviction context, the First District also explained that ***Mason*** predated ***Tennis*** and indicated that ***Mason*** may no longer be good law***. Id***.

This Court should also exercise its jurisdiction because the decision below misinterprets this Court's decisions in ***Tennis*** and ***Tingle*** and misapplied the law to the facts in this case. "For a District Court of Appeal to accept a decision of this court as controlling precedent, and then to attribute to that decision a patently erroneous and unfounded principal of law, is to create a 'real and embarrassing conflict of opinion and authority'" ***Pinkerton-Hays Lumber Co. v. Pope***, 127 So. 2d 441, 443 (Fla. 1961), *quoting* ***Ansin v. Thurston***, 101 So.2d 808, 811. (Fla. 1958). Correcting such a misapplication and resolving such conflicts is an appropriate exercise of this Court's jurisdiction. ***Id***.

Correcting erroneous and unfounded interpretations of this

Court's decisions which could lead to conflicts of opinion is an appropriate exercise of the Court's jurisdiction. ***Pinkerton-Hays Lumber Co. v. Pope***, 127 So.2d 441, 443 (Fla. 1961). Additionally, the exercise of this Court's jurisdiction will ensure consistent application of the law and avoid inter-district conflicts. *See* ***Florida Star v. B.J. F.***, 530 So. 2d 286, 288 (Fla. 1988); ***PNR, Inc. v. Beacon Prop. Mgmt., Inc.***, 842 So. 2d 773, 777 (Fla. 2003). The decision of the Fourth District is an incorrect interpretation of this Court's decisions in ***Tennis*** and ***Tingle***, and if allowed to stand it could result in furtherance of an incorrect principle of law.

CONCLUSION

Based on the foregoing argument and authorities, Petitioner respectfully requests this Honorable Court to exercise its discretionary review under Article V, Section 3(b)(3), Florida Constitution over the instant cause and review it on the merits.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 3rd Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

_____
ELLEN GRIFFIN
Assistant Public Defender
Florida Bar No. 511889

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Brief On Discretionary Jurisdiction has been furnished to: Heidi Bettendorf, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this 9th day of February, 2011.

_____
Counsel for Frank Monte

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY has been prepared with 12 point Courier New type, in compliance with a *Fla. R. App. P*. 9.210(a)(2) this 9th day of February, 2011.

_____
ELLEN GRIFFIN
Assistant Public Defender

APPENDIX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Appendix to Petitioner's Brief on Discretionary Jurisdiction has been furnished to: Heidi Bettendorf, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401, by courier this 9th day of February, 2011.

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Counsel for Frank Monte