IN THE SUPREME COURT OF FLORIDA

BERNARD DOUGHERTY

Petitioner,

v.

Case No: SC -
L.T. NO: 5D10-2755

STATE OF FLORIDA

Respondent. /

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal
Fifth District, State of Florida

Bernard Dougherty ##D19763
Apalachee Correctional Institution
52 West Unit Dr.
Sneads, FL 32460

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules of Court

Fla. R. Crim. P. 3.800(a) & 3.212(c)(7)

Fla. R. App. P. 9.030(a)(2)(A)(iv)

Fla. R. App. P. 9.210

Florida Statutes

Florida Statutes § 893.13

Constitution

Florida Constitution, Article V, § 3(b)(3) (1980)

United States Constitution, Amendment Fourteen

STATEMENT OF THE CASE AND FACTS

Petitioner was charged via felony information in case no: 05-2000-CF-032977 (Eighteenth Judicial Circuit, Brevard County, Florida) with (1) resisting an officer with violence; (2) acquiring a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge; and (3) criminal use of personal identification information. Petitioner exercised jury trial, which at the conclusion the criminal use of personal identification information charge was *nolle prossed.* Petitioner was convicted of the remaining two charges and sentenced on both counts as a habitual felony offender.

On August 10, 2002, the trial court found petitioner incompetent to proceed and committed him to the Department of Children and Families. Some months

later, the DCF determined that petitioner no longer met the criteria for involuntary commitment. He was discharged from DCF and returned to the county jail.

The trial court set a competency hearing for February 27, 2003, but rather than review the issue, the parties set the case for docket sounding on April 23, 2003. In the interim, before an evidentiary competency evaluation was held at "the next docket sounding," defense counsel again questioned petitioner's competency and moved the trial court for new mental health examinations. In response to the defense motion, the trial court appointed three experts to examine petitioner and re-scheduled a competency hearing for September 10, 2003, because petitioner's competency was again in question notwithstanding the separate issue of petitioner's release from DCF involuntary commitment and "restoration" of competency from said commitment. At the September 10th hearing the following competency review occurred:

COURT: This is the matter of the State of Florida versus Bernard Dougherty. Who's got that case?

STATE: Judge, Ms. Cobrand and I. It should not be that complicated.

DEFENSE: We did get the evaluation back from three doctors, so *we will stipulate he is competent to proceed.*

COURT: Very good. We'll put it on just the regular docket sounding then.

(*See* Opinion of the Court, *Dougherty v. State,* Appendix A).

The State then proceeded to prosecute petitioner without any further mention and/or determination of petitioner's alleged restored competency. Petitioner was ultimately adjudicated guilty for the charged offenses and sentenced as a habitual felony offender to a collective twenty-year term in the Florida Department of Corrections.

In 2009, Petitioner challenged the legality of his habitual offender sentences and, after appellate review of the Motion to Correct Illegal Sentence, Florida Rule of Criminal Procedure 3.800(a) from the trial court's denial, the Fifth District affirmed in part, reversed in part, and remanded for resentencing, holding that "[t]he trial court erred in sentencing Dougherty as a habitual offender" on the adjudicated felony count of acquiring a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge because the offense although not codified in Florida Statutes § 893.13, "it clearly relates to possession of a controlled substance and is included within section 893.13" Florida Statutes. *Dougherty v. State*, 33 So. 3d 732 (Fla. 5th DCA 2010).

Petitioner was resentenced by the trial court judge in 2011 and contemporaneously at the resentencing hearing defense counsel objected to and preserved for appellate review the issue that petitioner's competency was never lawfully restored in 2003 from expert determination of incompetence and the court's order to involuntary commit petitioner.

On direct review, the Fifth District affirmed based on its conclusion that "[a]ppellant was adjudicated competent by oral pronouncement of the trial court based on the stipulation of defense counsel." *Dougherty v. State*, 37 Fla. L. Weekly D1913 (April 10, 2012). However, the appellate court remanded for entry of a *nunc pro tunc* written order declaring petitioner competent as of September 10, 2003. Petitioner timely filed a motion for rehearing / rehearing *en banc*. Said motion was denied on September 28, 2012. On October 26, 2012, Petitioner filed a timely notice to invoke the discretionary jurisdiction of this court. The instant jurisdictional brief follows.

SUMMARY OF THE ARGUMENT

Petitioner argues that the court's decision (*Dougherty v.* State, 37 Fla. L. Weekly D1913) is in express and direct conflict with the decision of the Fourth District Court of Appeal in *Macaluso v. State*, 12 So. 3d 914 (Fla. 4th DCA 2009), because the *Macaluso* Court decided that under no circumstance may defense counsel "stipulate" to the competency of a criminal defendant. In contrast, the Fifth District in the instant case at bar decided that petitioner was adjudicated competent by oral pronouncement of the trial court *based on the stipulation of defense counsel.*

The Fourth and Fifth District Courts of Appeal are in express and direct conflict regarding the issue of a defense counsel's authority to stipulate to a criminal defendant's competency.

Resolution from this court is necessary.

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 the supreme court of another district court of appeal on the same point of law. Art. V, § 3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN *Macaluso v. State*, 12 So. 3d 914 (Fla. 4th DCA 2009).

It is clear from the record that petitioner was determined incompetent to stand trial on August 21, 2002, and was involuntarily committed to the Department of Children and Families (DCF). After a period of time in DCF care, medical staff found that he no longer met the criteria for involuntary commitment. Petitioner was then transferred back to the county jail and the trial court ordered mental health examinations from three qualified physicians. No record of the psychiatric exam

findings and conclusions were introduced to the trial court. Defense counsel merely stated to the court:

> **DEFENSE:** We did get the evaluation back from three doctors, so *we will stipulate he is competent to proceed.* (Appendix B)(emphasis added).

In *Macaluso v. State*, 12 So. 3d 914 (Fla. 4th DCA 2009), the court reviewed an indistinguishable issue:

> Defendant was found incompetent to stand trial and sent to a facility. The court held a hearing five months later. His attorney advised the court that he had since been found competent based on "evaluations that were obtained by the Public Defender's Office." Without further hearing or evidence, the court spontaneously declared defendant competent to begin trial and the case proceeded to trial. *Id.*, at 915 (Appendix C).

The Fourth District relied on its prior holding in *Sampson v. State*, 853 So.2d 1116 (Fla. 4th DCA 2003), where the court faced a nearly identical circumstance, and previously held:

> [T]he trial judge did not take the testimony of any of the examining physicians and did not enter a written order stating that Samson was restored to competence. Therefore, he remained incompetent to proceed and could not enter valid pleas. 853 So.2d at 1117.

Macaluso, 12 So. 3d 915 (Appendix C).

Here, petitioner was also determined incompetent and involuntarily committed by the trial court. At the September 23, 2003, competency review, the trial court "did not take the testimony of any of the examining physicians and did

not enter a written order stating that [petitioner] was restored to competence." *Macaluso* at 915 (quoting *Sampson v. State*, 853 So.2d. 1116)(internal quotations omitted). Instead, at the September 23rd hearing, the trial court allowed defense counsel to stipulate to petitioner's restored competence.

Macaluso directly confronted the issue of a criminal defendant's attorney stipulating to his client's restored competence. The Fourth District held: "If the Rule wanted lawyers to be able to stipulate to restored competency without an evidentiary hearing, it would have so stated in explicit terms." *Macaluso* at 915.

It is true that the court held *a* hearing in the case at bar, but petitioner argues that because the court did not accept for review any of the conclusions and findings of the three psychiatric physicians, "did not take the testimony of any of the examining physicians and did not enter a written order stating that [petitioner] was restored to competence," then it cannot be rightfully said that the trial court held an *evidentiary* hearing to determine petitioner's competency after a period of incompetence. *Cf. Macaluso* at 915 ("If Rule wanted lawyers to be able to stipulate to restored competency without an ***evidentiary hearing***, it would have so stated in explicit terms.").

No *evidentiary* hearing was held in the case at bar to determine petitioner's competency. The September 23rd hearing where defense counsel stipulated to petitioner's restored competence cannot be treated as competent substantial

evidence of restored competence because if this Court wanted attorney's to stipulate to restored competency, this Court would amend Florida Rule of Criminal Procedure 3.212(c)(7)[1] to include a lawyer's stipulation as *evidence of restored competence.*

The Fifth District's August 10, 2012, holding that:

> It is apparent from the record that the trial court found Appellant competent to proceed *based on the representation* ***and stipulation of defense counsel.*** The lack of written order may be cured without the need for a new trial . . . .Because Appellant stipulated to the written reports at a properly scheduled competency hearing, the trial court was authorized to base its competency finding on the written reports. *Dougherty v. State*, 37 Fla. L. Weekly D1913 (Appendix A)(emphasis added).

The trial court, however, ***never saw or reviewed the written findings.*** Rather, the trial court based its determination of petitioner's restored competence solely on defense counsel's *stipulation* that the reports concluded restoration.

For these reasons, petitioner argues that this Court's authority to invoke discretionary jurisdiction in order to resolve conflict between the district courts of appeal is necessary here. The Fifth District's holding in *Dougherty v. State* is in express and direct conflict with the Fourth District's holding in *Macaluso v. State.*

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[1] "If, at any time after such commitment, the court decides, after hearing, that the defendant is competent to proceed, it shall enter its order so finding and shall proceed."

Resolution is necessary so that a criminal defendant's right not to face prosecution by the government in a state of incompetence or incapacity, guaranteed under the Fourteenth Amendment of the United States Constitution, *see Drope v. Missouri*, 420 U.S. 162, 171 (1975)("[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."), is effectively ensured by the trial courts of Florida [2] and not disparately applied.

CONCLUSION

This court has discretionary jurisdiction to review the decision below, and the court should exercise that jurisdiction to consider the merits of the petitioner's argument. Petitioner moves the Court to accept jurisdiction and resolve the conflict presented here.

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[2] Example: The First Judicial Circuit in and for Escambia County vacated a defendant's judgment of conviction and sentence on a collateral Rule 3.850 challenge, based on the holding in *Macaluso* that a defense attorney can never stipulate to restored competency after a period of involuntary commitment in the DCF. *See*, Order Granting Defendant's Motion for Postconviction Relief in case: *State of Florida v. Rhoderick Lewis,* no: 2008-CF-2242; and 2008-CF-2243 (First Judicial Circuit, Escambia County).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing appellant's motion for rehearing, certification, and rehearing *en banc* has been placed in the hands of institutional staff at Apalachee Correctional Institution for mailing via pre-paid postage U.S. Mail to: (1) Office of the Attorney General, Criminal Appeals Division, 444 Seabreeze Blvd., Ste. 500 Daytona Beach, Florida 32118, on this 2 day of **NOVEMBER 2012**.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief is in compliance with Florida Rule of Appellate Procedure 9.210 and generated using Times New Roman 14-point font.

Bernard Dougherty #D19763