Electronically Filed 11/04/2013 04:36:31 PM ET

RECEIVED, 11/4/2013 16:38:40, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

**CASE NO.: SC12-2365**

BERNARD DOUGHERTY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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# PETITIONER'S REPLY BRIEF ON THE MERITS

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# TABLE OF AUTHORITIES

## Cases



## Rules

## REPLY

***There is Conflict Jurisdiction.*** The State contends that there is no express and direct conflict in this case. Rsp. Br. at 6. Citing to the Fourth District's decision in *Jones v. State*, 38 Fla. L. Weekly D1349 (Fla. 4th DCA June 19, 2013),[1] the State contends that the appellate court explained that "*Macaluso* simply recognizes that Rule 3.212 'does not sanction stipulation to the ultimate issue of competency.'" *Id.*[2] Mr. Dougherty does not disagree. The problem here is that after stipulating to the expert reports, the trial court deemed Mr. Dougherty competent without any further inquiry. The State's own recitation of the facts makes the point:

> At the [competency] hearing, defense counsel indicated that they had received the reports from the doctors and that the defense would stipulate to the findings, i.e., present no witnesses, evidence, or argument disputing the doctors' conclusions that Dougherty was malingering. The State did not dissent. ***The trial court the [sic] said 'very good,' (i.e., the defendant is competent) and put the case on the docket sounding.***

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[1] Mr. Dougherty cited to *Jones* at page 11 of his initial brief in setting forth the basis of this Court's conflict jurisdiction.

[2] Later in its brief, the State urges this Court, should it grant jurisdiction, to find that *Macaluso* "to be an overly broad statement of the law as it requires testimony to be presented, when the findings are undisputed. . . ." Rsp. Br. at 12. *Macaluso* does not require testimony, nor has Mr. Dougherty advanced that proposition.

Rsp. Br. at 10 (emphasis added). The lower court's acceptance of this procedure forms the basis of the conflict here. Ini. Br. at 8-13 (establishing the trial court's duty in making a competency determination under FLA. R. CRIM. P. 3.210).

The State shrugs off the trial court's clear departure from the requirements of FLA. R. CRIM. P. 3.210 claiming that "[w]hile the trial court could have been more loquacious and explicitly found Dougherty competent based on the reports stipulated to by defense counsel, no magic words were required." Rsp. Br. at 10. That, however, is the entire point of this proceeding. While Mr. Dougherty agrees that no "magic words" are required, the record must still establish that the trial court discharged its duty to independently determine Mr. Dougherty's competence. The State's claim that the trial court could have articulated its reasoning better is nothing more than a concession. How could the trial court say anything when it simply accepted the parties' stipulation?

Mr. Dougherty's position that the trial court failed to make an independent competency determination is likewise supported by the State's citation to *Jones*. There, the Fourth District noted that "pursuant to the parties' request, the court accepted the reports in lieu of expert testimony. ***After considering the evidence,*** the court declared Jones competent to proceed." *Jones*, 38 Fla. L. Weekly D1349 at *1 (emphasis added). There is no evidence that the trial court here undertook any independent consideration of the evidence following the parties' stipulation.

As the State makes clear in its own brief, when confronted with the stipulation, the trial court merely remarked, "very good." Rsp. Br. at 10.

The State further notes that *Macaluso* relied on the decision in *Sampson v. State,* 853 So. 2d 1116 (Fla. 4th DCA 2003) where "the trial court did not hold *any* degree of [competency hearing]." *Id.* at 6 (emphasis in original). In contrast, the State urges, that Mr. Dougherty here "stipulated to the written reports at a properly scheduled competency hearing . . . ." *Id.* (quoting *Dougherty v. State*, 96 So. 3d 984, 985 (Fla. 5th DCA 2012)). This distinction does not help the State's argument. Although the hearing may have been set to determine Mr. Dougherty's competence, the trial court did not discharge its duty to determine competency. It accepted the parties' stipulation, without more, and set the case for a docket sounding. *Id*. at 10.

Accordingly, the decision below is in express and direct conflict with the Fourth District Court of Appeal's decision in *Macaluso v. State,* 12 So. 3d 914 (Fla. 4th DCA 2009). As Mr. Dougherty established in his initial brief, there is also express and direct conflict with this Court's decision in *Brown v. State,* 245 So. 2d 68 (Fla. 1971), *Fowler v. State*, 255 So. 2d 513 (Fla. 1971), and *McCray v. State,* 71 So. 3d 848 (Fla. 2011). All three decisions – which the State does not address in any detail in its own brief – established that the trial court has a duty to

make an independent competency determination even where, as here, the parties stipulate to the body of evidence to be considered by the court. Ini. Br. at 9-11.

***The State Misapprehends Mr. Dougherty's Argument.*** The State offers a laundry-list of cases which it claims stand for the proposition that "the parties can stipulate to a competency determination solely based on the reports filed by the experts." Rsp. Br. at 7-8. But that is not Mr. Dougherty's complaint. In his initial brief, Mr. Dougherty acknowledges that the parties can stipulate to the body of evidence to be used by the trial court to determine competency. Ini. Br. at 11. But that is only the first step in the process. The trial court must then make an independent competency determination. That did not happen here. The record is clear that the trial court found Mr. Dougherty competent based on the stipulation of the parties that he was competent. Rsp. Br. at 10. As Mr. Dougherty established in his initial brief, the law does not allow the trial court to abdicate its principal role in determining competency by simply ratifying a stipulation made by the parties.[3]

[3] The State devotes some energy to rebutting Mr. Dougherty's claim that the lower court's decision lacked "textual support." Rsp. Br. at 10-12. The State seems to think that Mr. Dougherty is referring to the medical reports presented to the trial court. Not so. In his initial brief, Mr. Dougherty established that the appellate court's ruling lacked textual support in the sense that there was no rule, statute, or decision that released the trial judge from making an independent competency determination. Ini. Br. at 13-15.

## CONCLUSION

Based on the foregoing points and authorities, Mr. Dougherty asks this Court to reverse his convictions and remand with instructions that the trial court conduct a competency determination.

Dated: November 4, 2013

Respectfully submitted:

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## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was sent by via e-mail this 4th day of November 2013 to the party listed below.

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirements contained in FLA. R. APP. P. 9.210(a)(2).

s/ Carlos F. Gonzalez
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