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IN THE SUPREME COURT OF FLORIDA

DARRICK L. MCFADDEN, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-93

DISCRETIONARY REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and Facts for this appeal, with the following additions/corrections:

The prosecutor in the instant case was having difficulties proving his case against a co-defendant. R.11-14. The prosecutor then sent a letter to Defendant, who was already convicted and in prison, pursuant to section 921.186. R.14. The prosecutor later visited Defendant along with an investigator. R.14. The prosecutor essentially offered that if Defendant was interested in providing substantial assistance and testifying against co-defendant McSwain, the State would "make a motion to the Court under the statute and recommend that the Defendant's sentence be either suspended or reduced." R.14. The State "repeated to him over and over that the State would not make a recommendation, nor would we promise him that any amount of reduction or suspension would occur, that this was something totally up to the judge." R.14-15. The prosecutor made clear that it would be in the judge's discretion, and the State would not agree to any specific amount of years or suspension. R.15.

At the hearing for reduction of sentence held pursuant to 921.186, the prosecutor noted that the State had done exactly as it promised. R.15. The prosecutor had promised he would accurately account the facts and Defendant's substantial

assistance, "and then leave it in the Court's discretion." R.15.

Although the judge had expressed some concern about the substantial assistance statute opening up a floodgate of inmate requests to assist the State, the judge did not disregard the statute. R.35. Said the court, "It's still there naturally, that's true because the statutes in the past. I cannot replace the legislature's thoughts with mine." R.35.

The defense pointed out that the legislature wanted to give state prosecutors the same power as federal prosecutors by being able to close cases through substantial assistance. R.36. This case did not involve a minimum mandatory. R.38.

The judge noted that some of the questions it was asking were simply "to determine if I were to grant the motion, what I should do with the motion. And that is why I asked the questions... It really had nothing to do with the meaning of the statute." R.40. The judge noted that the maximum sentence Defendant could have originally received was life. R.50.

The judge denied the motion to reduce the sentence. He stated, "After reviewing the testimony, the Statute itself, the court finds it has no alternative than to deny the motion. The philosophy is good, sir and everything else if I could substantiate--I did take some of that into consideration at the time I [originally] sentenced you." R.50-51.

SUMMARY OF THE ARGUMENT

This Court should adopt the rationale of the First District in Cooper v. State, 106 So. 3d 32 (Fla. 1st DCA 2013), holding that "orders denying motions filed pursuant to section 921.186, Florida Statutes, are not appealable." That court hinted that certiorari might apply in some cases, but not there: "Because the trial court ruled on the merits of the motion we decline to treat the appeal as a petition for writ of certiorari." Id.

The Second District, on the other hand, held that a district court has jurisdiction to review the denial of a motion to reduce a defendant's sentence for providing substantial assistance, where the defendant alleges the trial court misapplied statute 921.186, authorizing reduction or suspension. McFadden v. State, 130 So. 3d 697 (Fla. 2d DCA 2013). The Second District certified conflict with Cooper.

The Second District opinion suggests that there must be an avenue of review, at least to ensure that the correct laws were applied. Even if the Court agrees with that position, this Court should still reject the Second District's "limited direct appeal" solution. As suggested by the First District in Cooper, the better approach would be for the district courts to entertain common law certiorari to address these types of limited issues in extraordinary cases.

ARGUMENT

ISSUE

WHETHER THE DISTRICT COURTS HAVE JURISDICTION TO REVIEW A CIRCUIT COURT'S DENIAL OF A MOTION TO REDUCE SENTENCE ARISING FROM A SUBSTANTIAL ASSISTANCE HEARING UNDER SECTION 921.186? (Restated)

Section 921.186, Fla. Stat, allows the State to file a motion to reduce sentence based on substantial assistance:

> Notwithstanding any other law, the state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of violating any felony offense and who provides substantial assistance in the identification, arrest, or conviction of any of that person's accomplices, accessories, coconspirators, or principals or of any other person engaged in criminal activity that would constitute a felony. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion **may** reduce or suspend the sentence if the judge finds that the defendant rendered such substantial assistance.

Petitioner challenges the First District's opinion in Cooper, holding that a 921.186 hearing is not appealable. Petitioner also suggests that the Second District's opinion in McFadden did not go far enough, as it held the court only has jurisdiction if the defendant alleges the trial court misapplied the law. Petitioner suggests that a district court has "full jurisdictional authority" to review 921.186 hearings, which

apparently means an unprecedented de novo review of the hearing.

The State submits that this Court should adopt the rationale of the First District in Cooper v. State, 106 So. 3d 32 (Fla. 1st DCA 2013), wherein it was held that "orders denying motions filed pursuant to section 921.186, Florida Statutes, are not appealable." The court hinted that certiorari could apply in some cases, but did not in that case. "Because the trial court ruled on the merits of the motion we decline to treat the appeal as a petition for writ of certiorari." Id.

The Second District, on the other hand, in reviewing this case held that a district court has jurisdiction to review the denial of the State's motion to reduce a defendant's sentence for providing substantial assistance, where Defendant alleged the trial court misapplied statute 921.186 authorizing reduction or suspension. McFadden v. State, 130 So. 3d 697 (Fla. 2d DCA 2013. The Second District certified conflict with Cooper. Id.

The Second District opinion suggests that there must be some avenue of review to ensure that the correct legal process was followed, and the correct law applied. Thus, the opinion appears to have created a new basis of direct appeal: the Second District has permitted a limited appeal of issues similar to those normally alleged in petitions for certiorari, such as a departure from the essential requirements of law. The Second District did not say what standard of review they would use on

such direct review, but it would seem to be de novo legal review, as they were limiting the review to the correct application of the law.

The Second District also did not explain why it did not evaluate certiorari as an option, and instead simply cited U.S. v. Manella, 86 F.3d 201, 203 (11th Cir. 1996) in support of its jurisdiction for appeal. However, Manella is a federal case which itself did not consider common law certiorari. It is not even clear if certiorari was a viable option for the Manella court, or if that writ is even still utilized in federal courts (as it is in Florida,) or if it has been subsumed by statute. See, e.g., 18 U.S.C. § 3742(a)(1). Further, the Manella court relied on federal statute § 3742(a)(1), allowing for appellate review of a sentence "imposed in violation of law." The Florida jurisdictional rules do not appear to have that exact provision, so the opinion should not be read to automatically provide the same authority to Florida courts. See, e.g., Fla. R. App. P. 9.140.

In Florida, Rule of Appellate Procedure 9.030(b)(2) explicitly notes that "Certiorari Jurisdiction" may be used by the district courts. This appears to be a perpetuation of the common law writ of certiorari. See, e.g., Bared & Co., Inc. v. McGuire, 670 So. 2d 153 (Fla. 4th DCA 1996)(discussing certiorari jurisdiction and rules allowing for appellate and

certiorari jurisdiction). See also Fla. Const. Art. 5, § 4(b)(3) ("A district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction.").

Thus, even if this court agrees with the Second District's need for review, this court should still reject their "limited direct appeal" solution. The Second District did not cite any rule of appellate procedure in support of such jurisdiction. As suggested by the First District in Cooper, the better approach is for the district courts to simply employ common law certiorari as necessary to address these types of rare, limited issues in extraordinary cases.

Certiorari:

Common law certiorari is the best approach for the instant situation. To obtain a writ of certiorari, a petitioner must show there has been "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal." Lacaretta Restaurant v. Zepeda, 115 So. 3d 1091 (Fla. 1st DCA 2013) citing Reeves v. Fleetwood Homes of Fla., Inc., 889 So. 2d 812, 822 (Fla. 2004). The latter requirements constitute irreparable harm, and irreparable harm is a condition precedent to invoking certiorari jurisdiction. Id. citing Spry v. Prof'l Employer Plans, 985 So. 2d 1187 (Fla.

1st DCA 2008).

"Departure from the essential requirements of law" is defined the same way across all uses of certiorari review: "a violation of a clearly established principle of law resulting in a miscarriage of justice." Lacaretta, supra, (citing Padovano, Florida Appellate Practice § 18.10, at 367 (2010 ed.) and Combs v. State, 436 So. 2d 93, 96 (Fla. 1983)). As this Court has observed,

> The required "departure from the essential requirements of law" means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.

Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 527 (Fla. 1995) (quoting Jones v. State, 477 So. 2d 566, 569 (Fla. 1985)). It is not enough that the district court disagrees with the circuit court's interpretation of the law, but there must be an application of either incorrect law or a miscarriage of justice. See Ivey v. Allstate Ins. Co., 774 So. 2d 679 (Fla. 2000).

Here, the Second District held that it had limited jurisdiction to review an order denying a motion filed pursuant to section 921.186, where Defendant had alleged that the trial court "misapplied the statute." This condition appears to be

similar to certiorari's requirement of a "departure from the essential requirements of law." But without the exacting requirements for certiorari, such as a miscarriage of justice, the McFadden rule may operate more loosely in a direct appeal context. This court should reject this new basis of appeal.

The court should use the same rule that applies to 3.800(c):

Rule 3.800(c), like section 921.186, also allows for a motion to reduce or modify a sentence. The rule states:

> (c) Reduction and Modification. A court **may** reduce or modify ... a legal sentence imposed by it, sua sponte, or upon motion filed, within 60 days after the imposition, or within 60 days after receipt by the court of a mandate ... If no order is entered on the motion within 90 days ... the motion shall be deemed denied. This subdivision shall not be applicable to those cases in which the death sentence is imposed or those cases in which the trial judge has imposed the minimum mandatory sentence or has no sentencing discretion.

Certiorari is the only procedure by which to challenge the denial of a rule 3.800(c) motion, which is generally not appealable. "It is well established that an order denying a motion to reduce sentence under rule 3.800(c) is not appealable." Spaulding v. State, 93 So. 3d 473 (Fla. 2d DCA 2012) (cit. omitted). In Schlabach v. State, 37 So. 3d 230 (Fla. 2010), this Court approved of the Second District's opinion in Childers, which stated: "A rule 3.800(c) motion is directed to a circuit court's *absolute* discretion, and the ruling cannot be

appealed." Id. at 239-40 (citing Childers v. State, 972 So. 2d 307 (Fla. 2d DCA 2008) (emph. added)).

"The appellate courts, however, have recognized that some trial court errors that occur when considering rule 3.800(c) motions may be reviewed by petition for writ of common law certiorari." Spaulding, at 475, (citing Kwapil v. State, 44 So. 3d 229 (Fla. 2d DCA 2010); Moya v. State, 668 So. 2d 279 (Fla. 2d DCA 1996)). In part because a ruling on a 3.800(c) motion is discretionary, certiorari is used sparingly to correct only a very narrow range of mistakes. Spaulding, supra. Specifically:

> Most decisions granting certiorari relief from such orders have done so because the trial court erroneously concluded that it lacked jurisdiction to consider the motion. See, e.g., Lancaster v. State, 821 So. 2d 416 (Fla. 2d DCA 2002). On at least one occasion, this court has granted relief because the trial court expressly ruled that it did not have authority to modify a condition of probation in such a proceeding. See Wesner v. State, 843 So.2d 1039 (Fla. 2d DCA 2003). We have once granted certiorari relief on the State's concession because the defendant's motion was denied when he failed to attend a hearing that was not properly noticed. See Alexander v. State, 816 So. 2d 778 (Fla. 2d DCA 2002). The First District has granted relief on the State's concession when the trial court erroneously treated the motion as if it were filed pursuant to rule 3.800(a). See Thomas v. State, 751 So.2d 764 (Fla. 1st DCA 2000). In that situation, the trial court simply applied the wrong law.

Spaulding v. State, 93 So. 3d 473 (Fla. 2d DCA 2012). "The errors that have been corrected so far in these certiorari

proceedings have been errors in jurisdiction, clear violations of due process, and applications of what is obviously the wrong law." Id. at 475. The court emphasized that "this court will typically limit certiorari review of orders denying relief under rule 3.800(c) to errors involving jurisdiction, violations of due process, patent applications of the wrong law, and other clear deprivations of constitutionally guaranteed rights." Id.

The absolute discretion discussed above under rule 3.800(c) is like the discretion created by section 921.186. This court should find that rule 921.186 is likewise not appealable--except by certiorari, and in only the same types of extraordinary situations above, which justify the writ for a 3.800(c) denial.

The appeal was properly denied, even if treated as a petition for certiorari:

Even if Defendant's appeal were treated as a petition for certiorari, the record does not demonstrate a departure from the essential requirements of law nor a miscarriage of justice. The trial court took testimony and ultimately decided not to grant a reduction. It expressed concern over the fact that Defendant waited until after his sentence to provide substantial assistance, R.44, as well as concern over whether additional facts might come to light to affect the co-defendant's sentence. Further, the court noted there is no statute of limitations that might prevent seeking relief in the future. R.46.

The prosecutor noted many times that he was leaving the issue in the judge's discretion. Although the judge had expressed some concern about the substantial assistance statute opening up a floodgate of inmate requests to assist the State, the judge did not disregard the law. R.35. The judge stated, "It's still there naturally [the concern], that's true because the statutes in the past. *I cannot replace the legislature's thoughts with mine*." R.35. The defense pointed out that the legislature wanted to give State prosecutors the same power as federal prosecutors to use substantial assistance. R.36.

The judge also noted that some of the questions he was asking were simply "to determine *if I were to grant the motion*, what I should do with the motion. And that is why I asked the questions ... It really had nothing to do with the meaning of the statute." R.40. The judge noted that the maximum sentence Defendant could have originally received was life. R.50.

The judge denied the motion to reduce the sentence, stating, "*After reviewing the testimony*, the Statute itself, the court finds it has no alternative than to deny the motion. The philosophy is good, sir and everything else if I could substantiate--*I did take some of that into consideration at the time I [originally] sentenced you*." R.50-51.

Accordingly, the trial court's statements taken as a whole demonstrate that it did not depart from the essential

requirements of law, and did not abuse its power in denying Appellant's motion. The trial court's Order denying the reduction should be upheld. Further, Defendant cannot show a miscarriage of justice where his arguments were heard and considered by the judge, and the State made no promises except to request the hearing. Further, Defendant did not even have to testify against the co-defendant, but merely gave a simple deposition in prison after which the co-defendant later pled. The judge indicated that he still considered the original sentence to be appropriate, regardless of such later assistance. It was not a miscarriage for the judge to decide to make him serve the full sentence. Defendant was serving a legal sentence for which he was convicted and guilty, for a crime for which he was morally responsible.

Respondent also notes that section 893.135(4) contains a nearly identically worded statute for a reduction of sentence for drug case defendants who perform substantial assistance. That section has been upheld, although under different constitutional attacks. See State v. Werner, 402 So. 2d 386 (Fla. 1981); State v. Johnson, 480 So. 2d 660 (Fla. 2d DCA 1985); Stone v. State, 402 So. 2d 1330 (Fla. 1st DCA 1981).

Responses to miscellaneous arguments made by Petitioner:

In his Brief, Petitioner claims that section 921.186 "confers substantive and procedural rights and obligations that

distinguish it from a motion to mitigate filed by a defendant under 3.800(c)." (Pet. Brief p. 13). The State submits otherwise. The statute itself authorizes the State alone to file the motion, and gives the judge total discretion to grant or deny the reduction. Further, the statute gives the arresting agency an opportunity to be heard "in aggravation or mitigation," showing that any requested reduction is in no way guaranteed. As such, the statute only gives the State a right to request a hearing, but gives Defendant no rights at all, except perhaps the procedural right to a basic hearing once requested.

Indeed, the State would argue that 921.186 gives a Defendant even *less* due process rights than a 3.800(c) motion. Rule 3.800(c) gives a defendant a personal right to file a motion for reconsideration, within 60 days of his sentence, while the proceeding is still fresh. Rule 3.800(c) is related to the original sentencing because it is a vehicle by which to reconsider the propriety *of the original sentence*. On the other hand, section 921.186 may be invoked only by the State, and potentially years after the conviction is final.

Thus, 921.186 has nothing to do with the propriety of the original sentence, nor is it a part of the original conviction process. Rather, it allows the State to seek a *possible* reduction purely as a reward for new assistance. See, e.g., U.S. v. McGee, 508 F.3d 442 (C.A.7 Wis. 2007). ("defendants [moving

for reduction of sentence based on assistance] are not afforded the same protections in the context of Rule 35(b) as they are at their initial sentencing."); U.S. v. Shelby, 584 F.3d 743, 745 (C.A.7, Ill. 2009) ("Rule 35(b) likewise *confers an entitlement on the government* rather than on the defendant... it contains no suggestion that the filing of the motion allows the defendant to argue for resentencing on the basis of something other than the assistance he gave the government... To suppose that the happenstance of the government's wanting to reward the defendant modestly for some post-sentencing cooperation reopens the entire sentencing process, ... would create a triple anomaly.").

The prosecutor here correctly noted at the hearing that section 921.186 gives the State no control over any reduction in sentence, and only the power to request a hearing. Unlike in a plea agreement, the prosecutor cannot promise anything to Defendant (other than that he will file such motion) because Defendant is already convicted and serving a sentence. Further, the assistance here was initiated completely after, and separate from, Defendant's original plea or conviction proceedings. As such, only the barest due process rights attach. A prosecutor holds up his end of the bargain by requesting the hearing and presenting the facts. The judge then has complete discretion to grant or deny the motion. At that point, the 921.186 hearing is at least as discretionary as a 3.800(c) reconsideration hearing.

Petitioner next claims that section 921.186 is novel and is unlike rule 3.800(c) because it trumps all other statutes and "changes the legal limits," by removing all applicable minimum mandatories and sentencing floors. The State first responds that even if true, this would not create a material distinction from 3.800(c), because it would not change the fact that the judge's decision whether to reduce is still absolutely discretionary.

However, it is actually unclear what effect section 921.186 has on applicable minimum-mandatories, because that issue has not arisen in case law. Petitioner simply assumes that the judge in a 921.186 reduction hearing can completely disregard all minimum-mandatory or PRR designations, for example. However, section 921.186 clearly states, "*Notwithstanding any other law*, the state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of violating any felony offense and who provides substantial assistance."

Thus, although the issue is not ripe for resolution in this case, it is entirely reasonable that a hearing judge would read section 921.186 in harmony with other enhancement statutes and find that certain minimum-mandatories still apply, and act as a floor limiting how much it can reduce the sentence. Also, in those cases the prosecutor would likely choose to explicitly waive the floor (an act many statutes allow for), or not, on a case-by-case basis, resolving any issue in advance. Further, it

is worth noting that the comparable federal statute contains the following provision: "When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute." Fed. R. Crim. Proc. 35(b)(4). The State statute contains no such explicit authorization.

Petitioner also claims that the Second District employed the incorrect standard of review in McFadden, and claims the issues must be reviewed de novo. Yet petitioner does not specify what incorrect standard they believe the Second District was using. If petitioner is actually suggesting that the trial court's discretionary decision of whether or not to grant a reduction must be appealable, and the entire hearing reviewed de novo, this is inconsistent with the plain language of section 921.186: "the judge... *may* reduce or suspend the sentence." Such position is also inconsistent with the established standards of review for 3.800(c) hearings, which are not de novo and give the judge complete discretion to choose the sentence.

The State also submits that there may be ambiguity in the use of the word "discretion." The word "discretion" in a 3.800(c) context is not the same type of discretion employed in all "abuse of discretion" cases. There are some areas in which a trial judge has "discretion," but the decision can be unreasonable and is reviewable under the abuse of discretion standard (e.g., admission of evidence). On the other hand, there

are some areas which are "purely discretionary."

In a purely discretionary issue, the decision is not appealable because, in essence, there is no way that the judge can abuse his discretion, so long as he follows the law and makes *any* decision within those legal confines. See, e.g., Childers v. State, 972 So. 2d 307 (Fla. 2d DCA 2008) ("A rule 3.800(c) motion is directed to a circuit court's *absolute* discretion, and the ruling cannot be appealed"); Spaulding v. State, 93 So. 3d 473 (Fla. 2d DCA 2012) (limiting certiorari review of orders denying 3.800(c) relief to errors involving jurisdiction, violations of due process, patent applications of wrong law, and clear deprivations of constitutional rights.).

In light of all the above, this Court should adopt the holding of the First District in Cooper and reject the holding of the Second District in McFadden. The Second District should have dismissed the appeal or treated it as a petition for certiorari, if the brief sufficiently suggested a departure from the essential requirements of law and a miscarriage of justice.

This Court should remand and instruct the Second District to dismiss the appeal pursuant to Cooper, as it was without jurisdiction under the rules of procedure. The court can also note that even if the appeal had been treated as a petition for certiorari under 9.030(b)(2), relief was not warranted because Defendant cannot establish a departure from the essential

requirements of law nor a miscarriage of justice on this record.

It should be observed that the Second District in fact affirmed the denial of the motion to reduce the sentence, even after considering the issue under the direct appeal standard, which would appear to be even less stringent than a certiorari standard. The Second District was still able to reject Petitioner's "misapplication of law" claim on the merits. As such, the trial judge's denial of the motion to reduce sentence also would have been affirmed under treatment of the appeal as a petition for certiorari.

CONCLUSION

This Court should adopt the holding of the First District in Cooper and quash the holding of the Second District in McFadden. The Second District should have dismissed the appeal, or treated it as a petition for certiorari and denied it.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically via the Florida Courts eFiling Portal to Karen Kinney, Assistant Public Defender, kkinney@pd10.state.fl.us, mjudino@pd10.state.fl.us, appealfilings@pd10.state.fl.us, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, on this 23rd day of July, 2014.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and font used in this brief is 12 point Courier New, complying with Fla. R. App. P. 9.210(a)(2).

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