

Case No. SC12-542

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By _____

IN THE
FLORIDA SUPREME COURT

ERIC D. SOUTHERS,
Appellant-Petitioner,

vs.

STATE OF FLORIDA,
Appellee-Respondent.

APPELLANT'S BRIEF ON JURISDICTION

On Review from the First District
Court of Appeal, Case No. 1D11-6267

ERIC D. SOUTHERS
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Fed. Reg. No. 28872-018
Federal Correctional Institution
1900 Simler Avenue
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Statement of the Case and the Facts

This is a Review from the First District Court of Appeal's Affirmation of Appellant's ("Southers") Appeal from the Fourth Judicial Circuit Court's summary denial of Souther's Motion for Post-Conviction relief filed under Rule 3.850 of the Florida Rules of Criminal Procedure.

On November 3, 2011, Southers filed his Rule 3.850 Motion [R.1]^{1/}, asserting, 1) he is actually innocent of the criminal offense, 2) newly discovered evidence deems Fla. Stat. §893.13 unconstitutional, and 3) the court was deprived of jurisdiction to enter judgment. [R.7]

On November 7, 2011, the Circuit Court denied relief stating the issue had "been addressed adversely to the defendant in the Florida District Court of Appeal." [R.16]

Southers timely and properly filed his Appeal into the First District Court of Appeal in January 2012, Affirming the Circuit Court's Order denying relief, relying on the holding in Flagg v. State, 74 So. 3d 138 (Fla 1st DCA 2011). See, Appendix.

Southers timely filed his Notice to Invoke Discretionary Jurisdiction on March 12, 2012, and the instant Brief on Jurisdiction within 10 days. ^{2/}

1/ "R" denotes Record on Appeal, followed by the page number.

2/ Given the benefit of the Florida "Mailbox rule" as to filing dates. Haag v. State, 591 So. 2d 614 (Fla 1992)

Summary of Argument

Southers seeks Review of the Appellate Court's Opinion declaring Florida Statute §893.13 valid based upon legal principle which is contrary to the opinion of the Florida Supreme Court.

The Judgment in this criminal case must be Vacated where it was entered in violation of the United States Constitution.

Southers' statute of conviction, §893.13, has been held facially violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and accordingly, any prosecution brought pursuant to that statute is subject to dismissal.

The ruling in Shelton v. Sec'y Dept. of Corr., 802 F. Supp. 2d 1289 (M.D. Fla. 2011), holding that §893.13 is unconstitutional by operation of the Fourteenth Amendment, is binding upon Florida Circuit and District Courts, where the Florida Supreme Court has recognized that State Courts are bound by Federal Court determinations of Federal law questions.

This Court has the power to hear this case because the lower court has declared valid a state statute, its reasoning is based upon legal principle which is contrary to the opinion of the Florida Supreme Court, and in conflict with a case now pending in this Court on the same question of law.

Failure to consider Souters' claims will result in a fundamental miscarriage of justice.

Souters requests this Honorable Court to Review this

case, Reverse the lower tribunal's decision, holding that they should have reached the opposite result, and Vacate Southers' conviction in case no 05-CF-404.

Argument

According to the Florida Constitution, the Florida Supreme Court has the jurisdiction to hear cases dealing with decisions of District Courts of Appeal that expressly declare valid a State Statute and rely on decisions in direct conflict with other District Courts or the Supreme Court.

1. The First District Court of Appeal declared Fla. Stat. §893.13 valid, denying Southers' relief in case no 1D11-6267 providing this Court discretionary jurisdiction to Review this Case.
2. In Florida, direct review of a criminal case includes seeking discretionary review by the Florida Supreme Court if that Court has jurisdiction to entertain such review. Mullins v. State, 974 So. 2d 1135, 1136-38 (Fla. 3rd DCA 2008). The Florida Supreme Court does not have jurisdiction to review a per curiam affirmance without opinion, Grate v. State, 750 So 2d 625, 626 (Fla 1999), or a per curiam affirmance with citations to cases not pending review by the Florida Supreme Court. Persaud v. State, 838 So. 2d 529, 531-33 (Fla 2003). The Florida Supreme Court does have jurisdiction if the citations include a case pending review by the Court. Mullins, 974 So. 2d at 1135.

Southers' percuriam Affirmation cites Flagg v. State, supra,

which "recognize[d] that the Second District recently certified the constitutional issue raised in this case to the Florida Supreme Court for immediate resolution pursuant to Fla. Rule App. Proc. Rule 9.125. See, State v. Adkins, 2011 WL 4467637 (Fla 2d DCA Sept. 28, 2011)," holding Shelton v. Sec'y Dept. Corr., 802 F. Supp. 2d 1289 (M.D. Fla 2011) is binding upon Florida Courts, and §893.13 is facially violative of the Fourteenth Amendment's Due Process Clause and any prosecution brought pursuant to that statute is subject to dismissal.

This Court then has Discretionary Jurisdiction to Review the District Court of Appeal's decision where the Affirmance is based upon a citation that includes a case pending Review by this Court. Mullins, supra.

3. The District Court in Flagg held that Shelton, supra, is not binding on the Court, or any other state court, relying on State v. Dwyer, 332 So. 2d 333, 335 (Fla 1976) ("Even though lower federal court rulings may be in some instances persuasive, such rulings are not binding on State courts").

This legal principal as a basis for its decision to deny relief is contrary to the opinion of the Florida Supreme Court in Mobil Oil Corp v. Shevin, 354 So 2d 372, 375 n.9 (Fla 1978), which expressly has recognized that State Courts are bound by Federal Court determinations of federal law questions.

By law, the ruling in Shelton clearly applies to Florida Circuit and District Courts because the Florida Supreme Court has

them to be bound by United States Court determinations of federal law questions; Shelton held that §893.13 violated the Fourteenth Amendment of the United States Constitution - a determination of federal law question involving Florida criminal Statute.

Thus, this Court has jurisdiction to Review this case.

4. The Flagg decision directly conflicts with the Adkins decision now pending before the Florida Supreme Court on the same question of law, giving this Court jurisdiction to resolve the conflict.

Conclusion

This Honorable Court should exersize its discretionary jurisdiction and Review this case where the District Court declared a Florida Statute valid; its affirmance is based upon a case pending review by this Court; the legal principle used as a basis for its decision is contrary to the opinion of this Court, and; the opinion conflicts with a decision now pending before this Court on the same question of law.

The judgment in this criminal case must be Vacated where it was entered in violation of the United States Constitution.

Respectfully submitted,

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1900 Simler Avenue
Big Spring, TX 79720

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Appellant's Brief on Jurisdiction has been served upon the Attorney for Appellee, State Attorney General Pamela Jo Bondi, at The State Capitol, PL 01, Tallahassee, FL, 32399-1050, by United States Postal Service, First Class postage pre-paid, on this 12 day of March, 2012.

Eric D. Southers

Eric D. Southers
Appellant Pro se

Certificate of Font Compliance

I certify that the lettering in this Pro se brief is "Presentor 10" and complies with the font requirements of Florida Rule of Appellate Procedure, Rule 9.210(a)(2).

Eric D. Southers

Eric D. Southers
Appellant Pro se

APPENDIX

ERIC DOMINIQUE
SOUTHERS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D11-6267

Opinion filed February 16, 2012.

An appeal from the Circuit Court for Nassau County.
Robert M. Foster, Judge.

Eric Dominique Southers, pro se, Appellant.

Pamela Jo Bondi, Attorney General, and Dixie Daimwood, Assistant Attorney
General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED. See Flagg v. State, 74 So. 3d 138 (Fla. 1st DCA 2011).

DAVIS, THOMAS, and RAY, JJ., CONCUR.