IN THE SUPREME COURT
STATE OF FLORIDA

FILED
THOMAS D. HALL
2013 JUL 23 PM 2:32
CLERK, SUPREME COURT
BY _____

Case No.: _____
DCA No.: 4D13-1309
L.T. No.: 04-9086CF10A

PETER CUNNINGHAM,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

JURISDICTIONAL BRIEF

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA, APPEALING THE DENIAL OF PETITIONER'S WRIT OF HABEAS CORPUS, CASE NUMBER 4D13-1309 FILED UNDER THE MAILBOX RULE; THOMPSON V. STATE, 761 So.2D 324 (Fla.2000)

Peter Cunningham, *pro se*

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SUMMARY OF ARGUMENT

Petitioner filed his second writ of habeas corpus alleging ineffective assistance of appellate counsel for failing to raise a fundamental error of erroneous jury instruction under Montgomery, Haygood and Williams, supra.

The 4th DCA dismissed the petition as successive and untimely without ruling on the merits and in reliance of Francois v. Wainwright, 470 So.2d 685-686 (Fla.1985). The 4th District's ruling directly and expressly conflicts with other district courts and the Supreme Court on the same question of law, under Article V, Section (3)(b)(3) of the Florida Constitution and Fla.R.App.P., Rule 9.030(A)(2)(A) IV.

STATEMENT OF FACTS

On or about January 11, 2008, in the Circuit Court of the 17th Judicial Circuit, Petitioner was found guilty of Second Degree Murder in Count One and Attempted Second Degree Manslaughter in Counts Two and Three. He was sentenced to life in prison in Count One. On Counts Two and Three he was sentenced to twenty years each to run concurrent. Petitioner appealed his conviction to the 4th DCA, where his appeal was per curium affirmed. See Cunningham v. State, 22 So.3d 127 (Fla. 4DCA 2009) mandate issued January 8, 2010.

In the case at bar, Petitioner filed his first writ of habeas corpus (Sept. 12, 2011) alleging ineffective assistance of appellate counsel under Fla.R.App.P., Rule 9.141. The 4th DCA per curium affirmed without an opinion. Denied June 11, 2012.

Petitioner later filed his second writ of habeas corpus alleging the same argument as in Haygood v. State, 38 Fla. L. Weekly S 93 Fla.2013); and Williams v. State, 38 Fla. L. Weekly S 97 (Fla.2013). The 4th DCA issued an opinion on May 7, 2013 stating the petition is dismissed as successive and untimely under Rule 9.141(d)(5) under the holding of Francois v. Wainwright, 470 So.2d 685-686 (Fla.1985). Rehearing and Rehearing En Banc denied on June 24, 2013.

JURISDICTIONAL STATEMENT

This Honorable Court has jurisdiction to Invoke Discretionary Review of the Fourth District Court of Appeal's opinion, where Petitioner's Fourteenth Amendment of the United States Constitution and Article V; Section (3)(B)(3)(6) of the Fla. Const. 1980 has been violated pursuant to Fla.R.App.P., Rule 9.120(d) and 9.030(A)(2)(A)(iv).

Under the holding of Strazzulla v. Hendricks, 177 So.2d 1,4 (Fla.1965) under the law of the case doctrine, an appellate court should consider a point of law previously decided in a former appeal only in unusual circumstances and only when a

manifest injustice will result from a strict and rigid adherence to the rule.

Petitioner was misadvised by appellate counsel that his erroneous jury instructions under Montgomery v. State, 39 So.3d 252 (Fla.2010); Haygood v. State, 38 Fla. L. Weekly S 93 (Fla.2013) and Williams v. State, 38 Fla. L. Weekly S 87 (Fla.2013) had no merit and therefore he did not raise the issue in his first habeas corpus. Petitioner then filed his second writ of habeas corpus, where he argued that appellate counsel was ineffective for failing to raise a fundamental error where the jury instruction read manslaughter by act with intent to kill and culpable negligence.

The Fourth District denied his claim on a procedural ground that his second petition was successive and untimely.

Here, the Fourth District Court of Appeal's ruling expressly and directly conflicts with the decision of Stephens v. State, 974 So.2d 455 (Fla. 2DCA 2008); Williams v. State, 947 So.2s 694 (Fla. 4DCA 2007); and Haager v. State, 36 So.3d 883 (Fla. 2DCA 2010). As in these cases, to prevent a manifest injustice, Petitioner must receive the same relief and be given an opportunity to be heard and to resolve the conflict of being successive and untimely. Lago v. State, 975 So.2d 613 (Fla. 3DCA 2008).

Unlike Slappy v. State, 584 So.2d 1108 (Fla. 1DCA 1991) Petitioner filed his motion in accordance with Fla.R.App.P., Rule 9.141(d)(5) by filing his second petition before the expiration of the four-year time limitation.

Petitioner's second habeas corpus was denied upon the court's belief that it was untimely and successive. However, Petitioner disagrees with the court's ruling as the second habeas corpus was filed pursuant to section (d)(5) which states:

> "A petition alleging ineffective assistance of appellate counsel on direct review shall not be filed more than 2 years after the judgment and sentence become final on direct review unless it alleges under oath with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel. In no case shall a petition alleging ineffective assistance of appellate counsel on direct review be filed more than 4 years after the judgment and sentence become final on direct review."

Petitioner's judgment and sentence became final on his direct review on November 9, 2009. See: Cunningham v. State, 22 So.3d 127 (Fla. 4DCA 2009); Mandate issued Jan. 8, 2010. Petitioner's second habeas corpus was filed in the 4th DCA on April 3, 2013, approximately three years and three months after his direct review became final. Petitioner's second habeas corpus, under oath, alleged and included a copy of a response letter from direct review counsel, Tatjana Ostapoff, advising Petitioner that he was not entitled to relief because, even though his manslaughter instructions included intent to kill, it also included culpable negligence.

Petitioner now states that he was misled about the results of his appeal by counsel, and refers to Haygood v. State, 38 Fla. L. Weekly S 93 (Fla.2013), where this Court held it to be fundamental error, where the jury instruction of manslaughter includes intent to kill *and* culpable negligence.

Because the Petitioner's direct review was pending during Montgomery, he requested counsel to brief the issue of fundamental error on review, which was negated by counsel, in which she relied upon cases such as Nieves v. State, 22 So.3d 691 (Fla. 2DCA 2009) which, Petitioner notes that in Nieves, briefing the issue at hand ultimately certified conflict with Montgomery, supra and Zeigler v. State, 18 So.3d 1239 (Fla. 2DCA 2009). The decision rendered in Nieves directly undermines the decision direct-review counsel made by choosing to forego briefing the issue as requested by Petitioner on direct review.

At the very least, as shown by all cases relied upon by direct-review counsel in response letter, Petitioner would have no doubt, been afforded the opportunity of a written opinion, permitting Petitioner certiorari review by the Supreme Court on this issue. And, had direct-review counsel done so, Petitioner would have ultimately been afforded relied such as in Haygood v. State, 38 Fla. L. Weekly S 93 Fla.2013); and Williams v. State, 38 Fla. L. Weekly S 97 (Fla.2013).

ARGUMENT

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

In the instant case, Petitioner filed his second petition for writ of habeas corpus alleging ineffective assistance of appellate counsel.

The 4th DCA dismissed Petitioner's habeas corpus under Fla.R.App.P., Rule 9.141(d)(5) stating that the petition was successive and untimely citing Francois v. Wainwright, 470 So.2d 685, 686 (Fla.1985).

Petitioner's first habeas corpus was per curium affirmed. In Bard v. Wilson, 687 So.2d 254 (Fla. 1DCA 1996), the court held: "Mere denial of the petitioner's petition is not on the merits." Also see: Hamilton v. State, 979 So.2d 420, 422-23 (Fla. 2DCA 2008) the court held: "Unless a direct appeal is affirmed with a written opinion that expressly addresses the issue it is not a denial on the merits.

Here, not only did the 4th DCA cause a conflict, but it also created a manifest injustice and violated Petitioner's right to due process under the U.S. Const., where the issue raised in Petitioner's second habeas corpus are the same points of law as in Haygood v. State, 38 Fla. L. Weekly S 93 Fla.2013) and Williams v. State, 38 Fla. L. Weekly S 97 (Fla.2013), each of which were considered a fundamental error.

Here, the Fourth District Court of Appeal's ruling expressly and directly conflicts with the decisions of Slappy v. State, 584 So.2d 1108 (Fla. 1DCA 1991); Stephens v. State, 974 So.2d 455 (Fla. 2DCA 2008); Lago v. State, 975 So.2d 613 (Fla. 3DCA 2008) and therefore, Petitioner should have been afforded the same opportunity as them. See: Haager v. State, 36 So.3d 883 (Fla. 2DCA 2010); Williams v. State, 947 So.2d 694 (Fla. 4DCA 2007); Johnson v. State, 9 So.3d 640 (Fla. 4DCA 2009); Adams v. State, 957 So.2d 1183, 1186 (Fla. 3DCA 2006).

In Anglin v. Mayo, 88 So.2d 918 (Fla.1956) the court held: "If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the Court to brush aside formal technicalities and issue such appropriate orders as will do justice."

Here, justice would have been served had the 4th DCA set aside formal technicalities and issued a ruling in favor of the Petitioner as did in the recent cases by this court in Montgomery, Haygood and Williams. Instead, the 4th DCA has now caused a conflict in rule 9.141(d)(5), Francois v. Wainwright, supra, and created a manifest injustice, violating Petitioner's right to due process. Conflict must be resolved and this cause remanded back to the 4th DCA for further proceedings or as deemed necessary.

RELIEF SOUGHT

WHEREFORE, Petitioner prays this Court would resolve said conflict and remand this cause to the 4th DCA for further proceedings.

Peter Cunningham, *pro se*

OATH

I declare under the penalties of perjury that I have read and understand the foregoing document and statements in it are true.

July 18, 2013
Date

Peter Cunningham, *pro se*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been placed in the hands of prison officials for mailing to the Attorney General's Office at 1515 N. Flagler Drive, Ste. 900, West Palm Beach, Fl 33401 on this 18th day of July 2013.

Peter Cunningham, *pro se*
DC# L73833
Blackwater River C.F.
5914 Jeff Ates Road
Milton, Florida 32583

Legal Mail P.J.C.
Provided to
Blackwater River Correctional Facility
on 7/18/13 for mailing. Initial

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PETER CUNNINGHAM,
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STATE OF FLORIDA,
Respondent.

APPENDIX

APPENDIX A: Opinion denying petition; Filed May 7, 2013

APPENDIX B: Order denying Rehearing/Rehearing En Banc

_____
Peter Cunningham, *pro se*

APPENDIX A

EX. A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

May 07, 2013

CASE NO.: 4D13-1309
L.T. No.: 04-9086 CF10A

PETER CUNNINGHAM v. STATE OF FLORIDA

Appellant / Petitioner(s) Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that this petition alleging ineffective assistance of appellate counsel is dismissed as untimely. Fla. R. App. P. 9.141(d)(5). Petitioner previously filed a petition claiming ineffective assistance of appellate counsel and that petition was denied in 4D11-3442. This petition is successive and subject to summary denial on that basis as well. *Francois v. Wainwright*, 470 So. 2d 685, 686 (Fla. 1985).

WARNER, GROSS and TAYLOR, JJ., Concur.

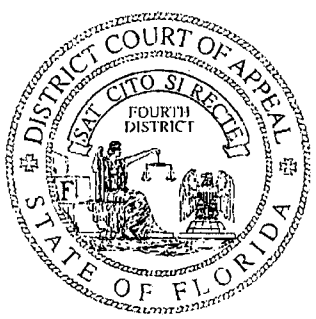
I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

cc: Attorney General-W.P.B. Peter Cunningham

dl

Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal



APPENDIX B

EX B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

June 24, 2013

CASE NO.: 4D13-1309
L.T. No.: 04-9086 CF10A

PETER CUNNINGHAM v. STATE OF FLORIDA

Appellant / Petitioner(s) Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that petitioner's motion filed May 24, 2013, for rehearing and rehearing en banc is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

cc: Attorney General-W.P.B. Peter Cunningham

kb

Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

DISTRICT COURT OF APPEAL
SAT CITO SI RECTE
FOURTH DISTRICT
STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendix has been placed in the hands of prison officials for mailing to the Attorney General's Office at 1515 N. Flagler Drive, Ste. 900, West Palm Beach, Fl 33401 on this 18th day of July 2013.

Peter Cunningham, *pro se*
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