**IN THE SUPREME COURT OF FLORIDA**

**STATE OF FLORIDA,**

**Petitioner,**

**v.**

**VERSON EDWARD DORTCH,**

**Respondent.**

**Case No. SC18-681**
**4th DCA Case Nos. 4D16-2815, 4D16-2816**

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# PETITIONER'S BRIEF ON JURISDICTION

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## PRELIMINARY STATEMENT

Respondent was the defendant/Appellant and Petitioner was the prosecution/Appellee in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Okeechobee County, Florida and the Fourth District Court of Appeal.

## JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review any decision of a district court of appeal that is certified to be in direct conflict with a decision of another district court of appeal. Art. V, § 3, Fla. Const.

## STATEMENT OF THE CASE AND FACTS

> The State charged the defendant with possession of a firearm by a felon, dealing in stolen property, and giving false information to a pawnbroker. His attorney filed a written motion for a competency examination, pursuant to Florida Rule of Criminal Procedure 3.210(b). The motion indicated there were "reasonable grounds to believe" the defendant was incompetent, but did not articulate specific facts concerning the defendant's mental state. The motion indicated the defendant waived the required twenty-day hearing.
>
> The trial court granted the motion and appointed an expert. The order included language reiterating the defendant's waiver of the hearing. It does not appear that an examination or a hearing on competency ever took place.
>
> While incarcerated, the defendant was later charged with

> a new crime of aggravated assault by a detainee with a deadly weapon and introducing contraband into a county detention facility. His attorney did not move for a competency evaluation in the new case.
>
> The defendant entered an open plea to both cases nearly a year after his initial arrest. The trial court accepted the plea and sentenced the defendant to ten years in prison. The defendant did not move to withdraw his plea. He now appeals the judgment and sentence in both cases

*Dortch v. State*, No. 4D16-2815, slip op. at 1 (Fla. 4th DCA Apr. 4, 2018).

On appeal, Respondent argued that the trial court erred in failing to conduct a competency hearing, relying on *Samson v. State*, 853 So. 2d 1116 (Fla. 4th DCA 2003). *Id.*, slip op. at 1. After reviewing the pertinent law, the Fourth District analyzed the issue as follows:

> One thing is certain: competency requires strict adherence to the Florida Rules of Criminal Procedure 3.210–212. *Dougherty v. State*, 149 So.3d 672, 677–78 (Fla. 2014); *Deferrell v. State*, 199 So.3d 1056, 1060–61 (Fla. 4th DCA 2016). Once a trial court has reasonable grounds to believe the defendant is incompetent and orders an examination, it must hold a hearing, and it must enter a written order on the issue. *See* Fla. R. Crim. P. 3.210(b), 3.212(b). Failure to do so is fundamental error and requires reversal.
>
> This means that to raise the issue of a failure to comply with Florida Rules of Criminal Procedure 3.210–212 on direct appeal, it is not necessary that a defendant first file a motion to withdraw plea under Florida Rule of Appellate Procedure 9.140(2)(A) in cases where the trial court has reasonable grounds to believe the defendant is

> incompetent and has ordered an examination. Indeed, the rules mandate a hearing and an order under such circumstances. This is true regardless of whether the defendant has previously been declared incompetent. This mandate does not apply however if the trial court had no reasonable grounds to believe the defendant is incompetent.
>
> To require a criminal defendant, who may be incompetent, to file a motion to withdraw a plea before raising the issue on appeal is unwarranted. If a defendant is incompetent, confining him to post-conviction relief, without the assistance of counsel, is not a remedy designed to do justice.
>
> We therefore recede from our prior decisions in *Burns*, *Williams*, and *R.C.* to the extent they conflict with our holding. We certify conflict with the First, Third, and Fifth District Courts of Appeal in *Pressley v. State*, 227 So.3d 573 (Fla. 1st DCA 2017), *Garcia–Manriquez*, and *Hicks*.
>
> Reversed and remanded for further proceedings consistent with this opinion. The trial court may determine the defendant's competence nunc pro tunc if possible. *Hawks v. State*, 226 So.3d 892, 894–95 (Fla. 4th DCA 2017). If the trial court cannot do so, the judgment and sentence should be vacated and the case set for trial.

*Id.*, slip op. at 1-2.

## SUMMARY OF THE ARGUMENT

The Fourth District Court certified conflict with the First, Fifth, and Third District Courts of Appeal. This Court should accept review of the case because the decision of the Fourth District Court of Appeal contradicts the explicit language of Florida Rules Appellate Procedure 9.140(b)(2)(A). Also, the decision is faulty because the decision contradicts this Court's definition of fundamental error.

## ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL CERTIFIED CONFLICT WITH THE FIRST, THIRD, AND FIFTH DISTRICT COURTS OF APPEAL IN *PRESSLEY V. SATE*, 227 SO. 3D 573 (FLA. 1ST DCA 2017); *GARCIA-MANRIQUEZ V. STATE*, 146 SO. 3D 134 (FLA. 3D DCA 2014); AND *HICKS V. STATE*, 915 SO. 2D 740, 741 (FLA. 5TH DCA 2005).

### 1. The decision conflicts with decisions of three other district courts of appeal.

The decision of the Fourth District Court of Appeal conflicts with decisions from the First, Third, and Fifth District Courts of Appeal holding that a defendant must file a motion to withdraw his plea to properly preserve a challenge to the voluntary and intelligent nature of the plea.

In *Hicks v. State*, 915 So. 2d 740, 741 (Fla. 5th DCA 2005), the defendant raised a claim on direct appeal that the trial court failed to hold a competency hearing prior to accepting his plea. The Fifth District Court of Appeal stated that:

> Following a guilty or no contest plea, a defendant may appeal only the trial court's lack of subject matter jurisdiction; a violation of a plea agreement, if preserved by a motion to withdraw the plea; an involuntary plea, if preserved by a motion to withdraw the plea; and a sentencing error, if preserved.

*Hicks v. State*, 915 So. 2d 740, 741 (Fla. 5th DCA 2005). The Fifth District Court continued that "[a]n issue relating to the voluntary and intelligent nature of the plea falls within the limited class of issues which a defendant may raise on appeal from a guilty or no contest plea without having specifically reserved the right to do so." *Id*. The Fifth District Court dismissed the appeal without prejudice for lack of jurisdiction but reserved "Hicks's right to seek appropriate and timely postconviction relief in the trial court." *Id*.

The same limitation upon jurisdiction of appellate courts was recognized by the Third District Court of Appeal in *Garcia-Manriquez v. State*, 146 So. 3d 134 (Fla. 3d DCA 2014). In *Garcia-Manriquez*, the defendant claimed on direct appeal that the trial court erred in accepting a plea with which he did not entirely agree. *Id*. The Third District Court of Appeal stated: "Because Garcia–Manriquez failed to file a motion to withdraw his plea, we dismiss this appeal without prejudice to Garcia–Manriquez' right to seek appropriate and timely post-conviction relief below." *Id.* Specifically, the Third District held "Because the issue was not presented to the trial court in a timely motion to withdraw his plea, we are without

jurisdiction to consider this claim." *Id.*

More recently, the First District Court of Appeal recognized the same limitation on appellate courts in *Pressley v. Sate*, 227 So. 3d 573 (Fla. 1st DCA 2017). The First District Court of Appeal held that

> [A]ppellant's competency due to intellectual disability was at issue during the entire proceedings—a matter unpreserved by counsel as dispositive prior to entry of the plea—we affirm the judgment and sentence but without prejudice to the appellant's opportunity to file a rule 3.850 motion to challenge his plea as involuntary.

*Id.*

Contrary to these decisions, the Fourth District Court of Appeal held:

> [T]o raise the issue of a failure to comply with Florida Rules of Criminal Procedure 3.210-212 on direct appeal, it is not necessary that a defendant first file a motion to withdraw plea under Florida Rule of Appellate Procedure 9.140(2)(A) in cases where the trial court has reasonable grounds to believe the defendant is incompetent and has ordered an examination.

*Dortch*, slip op. at 3. The Fourth District's decision implicitly conflicts with the other district courts,

> Once a trial court has reasonable grounds to believe the defendant is incompetent and orders an examination, it must hold a hearing, and it must enter a written order on the issue. See Fla. R. Crim. P. 3.210(b), 3.212(b).1 Failure to do so is fundamental error and requires reversal.

*Dortch*, slip op. at 2. Ultimately, the Fourth District Court:

> Reversed and remanded for further proceedings consistent with this opinion. The trial court may determine the defendant's competence nunc pro tunc if possible. *Hawks v. State*, 226 So. 3d 892, 894-95 (Fla. 4th DCA 2017). If the trial court cannot do so, the judgment and sentence should be vacated and the case set for trial.

*Dortch*, slip op. at 3.

**2. This Court should exercise its discretion to hear this case.**

This Court should exercise its discretion to hear this case for several reasons. *See* Harry Lee Anstead, Gerald Kogan, Thomas D. Hall, & Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 485 (2005) ("jurisdictional briefs in discretionary cases should always demonstrate that the case is significant enough to be heard").

The decision of the Fourth District Court of Appeal contradicts the explicit language of Florida Rule of Appellate Procedure 9.140(b)(2)(A). The rule provides that, following a guilty or no contest plea, a defendant may appeal only the trial court's lack of subject matter jurisdiction; a violation of a plea agreement, if preserved by a motion to withdraw the plea; an involuntary plea, if preserved by a motion to withdraw the plea; and a sentencing error, if preserved. Fla. R. App. P. 9.140(b)(2)(A). In adopting the amendments to the Rules of Appellate Procedure,

this Court concluded that *Robinson v. State*, 373 So. 2d 898 (Fla. 1979) foreclosed appeals from matters which transpired prior to the plea but did not prevent a defendant from raising four distinct matters: (1) subject matter jurisdiction, (2) illegality of the sentence, (3) failure of the government to abide by a plea agreement, and (4) the voluntary intelligent character of the plea. *See Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103, 1105 (Fla. 1996) (citing *Robinson*, 373 So. 2d at 902). Thus, this Court's reasoning makes simple common sense. As this Court stated "[i]f the record raises issues concerning the voluntary or intelligent character of the plea, that issue should first be presented to the trial court in accordance with the law and standards pertaining to a motion to withdraw a plea." *State v. T. G.*, 800 So. 2d 204, 206 (Fla. 2001) (quoting *Robinson*, 373 So. 2d at 902). In a situation of an obvious error like the present case, the trial court is in the best position to quickly and efficiently provide the proper relief to a defendant.

Moreover, the Fourth District Court of Appeal incorrectly determined that the error in this case amounted to fundamental error. The Fourth District Court of Appeal found that "[f]ailure to [order an examination and hold a hearing] is fundamental error and requires reversal." *Dortch*, slip op. at 2. Given the ability of the trial court to determine Respondent's competency nunc pro tunc, the failure to

hold a hearing cannot be fundamental. In other words, until the nunc pro tunc hearing is held, the fundamental nature of the error is unknown. The Fourth District Court's analysis conflicts this Court's description of fundamental error as error that "goes to the foundation of the case" and "error that is not subject to harmless error review." *See Daniels v. State*, 121 So. 3d409, 417-18 (Fla. 2013). Since the alleged error might not require reversal, the purported error in this case cannot be characterized as fundamental.

## CONCLUSION

Based on the foregoing argument, Petitioner requests that this Honorable Court accept jurisdiction in this case.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was served by email on Benjamin Eisenberg, Esq., Assistant Public Defender, Counsel for Respondent, at 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 at beisenberg@pd15.state.fl.us, gztaylor@pd15.state.fl.us, and appeals@pd15.org on May 14, 2018.

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/s/ JOSEPH D. CORONATO, JR.
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## CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Times New Roman font, 14 point, and double spaced.

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/s/ JOSEPH D. CORONATO, JR.
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