

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

NICOLAS DOMINIQUE,

Respondent.

Case No. SC15-1613

ON DISCRETIONARY REVIEW FROM THE  
THE DISTRICT COURT OF APPEAL,  
FOURTH DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER

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### **PRELIMINARY STATEMENT**

Petitioner, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Dominique, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Respondent or by proper name.

### **STATEMENT OF THE CASE AND FACTS**

The pertinent history and facts are set out in the decision of the lower tribunal which is a decision after remand from this Court. See Dominique v. State, \_\_\_ So. 3d \_\_\_, 40 Fla. L. Weekly D1828, 2015 WL 4634528 (Fla. 4<sup>th</sup> DCA 2015). In that case, the Court of Appeal, Fourth District, certified conflict with the Third District's decision in Dawkins v. State, --- So.3d ----, 2015 WL 3759556, 40 Fla. L. Weekly D1426 (Fla. 3d DCA June 17, 2015), rev. pending, SC15-1322 (Fla. September 2, 2015), on the issue of whether Montgomery<sup>1</sup> error in the manslaughter by act instruction is always fundamental error, even in a case where there is evidence supporting manslaughter by culpable negligence and the manslaughter by culpable negligence instruction was

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<sup>1</sup> State v. Montgomery, 39 So. 3d 252, 259 (Fla. 2010).

given. Based on that certified conflict, the State now seeks the discretionary review of this Court.

#### **SUMMARY OF ARGUMENT**

As certified by the Fourth District, there is a direct conflict between a decision of the Third District and a decision of the Fourth District. Therefore, there is jurisdiction, and this Court should accept this case to review this important issue.

#### **ARGUMENT**

**AS THE FOURTH DISTRICT CERTIFIED, THE OPINION IN THE INSTANT CASE IS IN DIRECT CONFLICT WITH THE THIRD DISTRICT'S DECISION IN DAWKINS.**

Petitioner contends that this Court has jurisdiction pursuant to Article V, §3(b)(4), of the Florida Constitution, which is paralleled by Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi). This section of the Constitution provides: "The supreme court ... [m]ay review any decision of a district court of appeal ... that is certified by it to be in direct conflict with a decision of another district court of appeal." Here, the Court of Appeal, Fourth District (hereinafter the Fourth District), has certified conflict with a decision of the Third District, Dawkins v. State, --- So.3d ----, 2015 WL 3759556, 40 Fla. L. Weekly D1426 (Fla. 3d DCA June 17, 2015),

rev. pending, SC15-1322 (Fla. September 2, 2015), on the issue of whether Montgomery<sup>2</sup> error in the manslaughter by act instruction is always fundamental error, even in a case where there is evidence supporting manslaughter by culpable negligence and the manslaughter by culpable negligence instruction was given.

Notably, the very same issue is actually already before this Court in Dawkins v. State, SC15-1322, in the very same case as to which the Fourth District has certified conflict. In fact, Dawkins has been stayed pending the outcome of the instant case. This Court has also just heard oral argument, on September 3, 2015, in cases with similar issues: Daugherty v. State, SC14-860, and McCloud v. State, SC14-1150. The State argued in those cases that the Montgomery error in the manslaughter by act instruction was not fundamental error based on the facts of the case which supported a finding of manslaughter by culpable negligence and an instruction on same was given. Clearly, this is an important and recurring legal issue and this Court should accept jurisdiction to resolve this important and recurring legal issue in this case as well.

In this case, Respondent appealed from a conviction for second degree murder. He raised a claim of error in the

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<sup>2</sup> State v. Montgomery, 39 So. 3d 252, 259 (Fla. 2010).

manslaughter by act instruction pursuant to this Court's decision in State v. Montgomery, 39 So. 3d 252, 259 (Fla. 2010). The Court of Appeal, Fourth District (hereinafter the Fourth District), initially found that, although the instruction was error pursuant to Montgomery, it was not fundamental error because the trial court also gave a manslaughter by culpable negligence instruction. Dominique v. State, 40 So. 3d 33 (Fla. 4<sup>th</sup> DCA 2010). The appellate court affirmed Respondent's conviction and sentence.

Respondent petitioned for review by this Court and, while the petition was pending, this Court issued Haygood v. State, 109 So. 3d 735 (Fla. 2013). This Court found fundamental error had occurred under the facts of that case because the manslaughter by act instruction was erroneous and because there was no evidence to support the alternative manslaughter by culpable negligence instruction. As this Court pointed out in Haygood:

**Significantly, there was no evidence to support a finding that Tuckey's death resulted from culpable negligence.** Haygood's unambiguous admission that he intended to strike, headbutt, choke, and trip Tuckey essentially eliminated the alternate means of committing manslaughter - manslaughter by culpable negligence - as a viable lesser offense. **Thus, second degree murder was the only offense realistically available to the jury under the evidence presented in this case and the instructions given** - instructions that required the jury to find intent to kill in order to convict Haygood for manslaughter by act.

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The jury's verdict of second-degree murder is proof that it necessarily found Haygood lacked intent to

kill. But, because of the faulty instruction on manslaughter, the jury was deprived of the ability to decide whether Haygood's lack of intent to kill, when considered with all the other evidence, fit within the elements of the offense of manslaughter. Based on the evidence presented, **the only non-intentional homicide offense remaining for the jury's consideration in this case was second-degree murder.**

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We hold that giving the manslaughter by culpable negligence instruction does not cure the fundamental error in giving the erroneous manslaughter by act instruction where the defendant is convicted of an offense not more than one step removed from manslaughter and the evidence supports a finding of manslaughter by act, **but does not reasonably support a finding that the death occurred due to the culpable negligence of the defendant.**

Haygood, 109 So. 3d at 742-43 (emphasis added). Also see Daniels v. State, 121 So. 3d 409, 419 (Fla. 2013) ("In reaching the verdict that it did - second-degree murder - the jury necessarily concluded that Daniels had no intent to kill. Because of the continuing requirement in part of the 2008 instruction that the jury find intent to kill in order to convict for manslaughter by act, the jury was left with second-degree murder as the only other non-intentional alternative.").

Subsequently, this Court remanded the instant case to the Fourth District for reconsideration in light of Haygood. Dominique v. State, No. SC10-1746, 2014 WL 7463710 (Fla. Dec. 30, 2014). On remand below, the State asserted that the instant case was factually distinct from Haygood. That is, in Haygood, this Court expressly found that the erroneous manslaughter by

act instruction was fundamental error where the evidence did not support the accompanying manslaughter by culpable negligence instruction. But, in the instant case, the erroneous manslaughter by act instruction was not fundamental error where the evidence in the instant case did indeed support the manslaughter by culpable negligence instruction that was also given.

As the Fourth District explained:

At the trial, the state presented evidence that the defendant was outside of his former girlfriend's house when her new boyfriend arrived by car. When the new boyfriend exited his car, the defendant chased the new boyfriend down the street while firing a gun, shooting the new boyfriend in the leg which caused him to fall, and then shooting the new boyfriend in the back of the head, killing him.

The state argued that the defendant's actions constituted first-degree murder. The defendant argued that his actions in chasing the new boyfriend down the street while firing his gun was, at worst, manslaughter by culpable negligence.

Dominique, 2015 WL 4634528 at \*1.

Unfortunately, the Fourth District disregarded the factual distinction made by the State as irrelevant, saying:

However, that factual distinction was not central to the Supreme Court's reasoning in Haygood. Instead, as cited above, central to the Supreme Court's reasoning in Haygood was that the erroneous manslaughter by act instruction pertained to a disputed element of the offense (the defendant's state of mind) and the error was pertinent or material to what the jury had to consider to convict the defendant in that case. Similarly here, the erroneous manslaughter by act

instruction pertained to a disputed element of the offense (the defendant's state of mind) and the error was pertinent or material to what the jury had to consider to convict the defendant in this case. Thus, fundamental error occurred.

Dominique, 2015 WL 4634528 at \*2.

By doing so, the appellate court essentially eliminated any situation in which the giving of the manslaughter by act instruction would not be fundamental error, thus treating it as per se reversible error. The court said, "under our reading of the evolving precedent from Montgomery to Haygood to Griffin, giving the manslaughter by culpable negligence instruction cannot under any circumstance cure the fundamental error caused by giving the erroneous manslaughter by act instruction, even where the evidence reasonably could support a finding of manslaughter by culpable negligence." Id. at \*4.

Yet, although the Fourth District saw fit to disregard part of this Court's opinion in Haygood, the Fourth District certified conflict with an opinion from the Third District, Dawkins, in which the Third District gave full effect to this language from Haygood. In the Dawkins opinion, the Third District court reasoned, based on Haygood, that, because there existed evidence from which the Dawkins jury reasonably could have found the appellant guilty of manslaughter by culpable negligence, and because a manslaughter by culpable negligence instruction was given, the error in giving the manslaughter by

act instruction was not fundamental error. Clearly, the Dawkins opinion conflicts with the Dominique opinion on the issue of whether a Montgomery error is always per se fundamental error. And, as previously mentioned, Dawkins is already pending review in this Court.

In sum, there is a direct conflict between the Fourth District's decision in this case, and the Third District's decision in Dawkins. This Court should exercise its jurisdiction and accept this case in order to resolve the certified conflict and decide this important and recurring issue.

**CONCLUSION**

Based on the foregoing reason, the State respectfully requests this Honorable Court accept jurisdiction.

**CERTIFICATE OF SERVICE**

I certify that a copy of the instant initial brief on jurisdiction as well as the accompanying appendix containing a copy of the appellate court's opinion have been furnished to the following by E-MAIL via the Florida Courts Portal on September 10, 2015: Patrick Burke, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 Third Street, West Palm Beach, FL 33401 at pburke@pd15.state.fl.us, jharring@pd15.state.fl.us, and appeals@pd15.state.fl.us.

**CERTIFICATE OF COMPLIANCE**

I certify that this brief was computer generated using  
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Respectfully submitted and certified,  
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