

IN THE SUPREME COURT OF FLORIDA

ARNOLD JEROME KNIGHT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC18-309

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

JURISDICTIONAL BRIEF OF RESPONDENT

PAMELA JO BONDI  
ATTORNEY GENERAL

TRISHA M. PATE  
ASSISTANT ATTORNEY GENERAL  
Florida Bar No. 0045489

KAITLIN R. WEISS  
ASSISTANT ATTORNEY GENERAL  
Florida Bar No. 106130

Office of the Attorney General  
PL-01, The Capitol  
Tallahassee, FL 32399-1050  
crimapptlh@myfloridalegal.com  
Kaitlin.Weiss@myfloridalegal.com  
(850) 414-3300  
(850) 922-6674 (FAX)  
COUNSEL FOR RESPONDENT

RECEIVED, 04/25/2018 09:28:29 AM, Clerk, Supreme Court

**TABLE OF CONTENTS**

	<b>PAGE#</b>
TABLE OF CONTENTS.....	ii
TABLE OF CITATIONS.....	iii
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE AND FACTS.....	2
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	3-8
WHETHER THE FIRST DISTRICT'S OPINION IN <i>KNIGHT V. STATE</i> IS IN EXPRESS AND DIRECT CONFLICT WITH THE FOURTH DISTRICT'S DECISION IN <i>CARUTHERS V. STATE</i> , OR THIS COURT'S DECISION IN <i>DEAN V. STATE</i> ; OR IF THE QUESTION CERTIFIED BY THE FIRST DISTRICT IS ONE OF GREAT PUBLIC IMPORTANCE?.....	3-8
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	10
CERTIFICATE OF COMPLIANCE.....	10

**TABLE OF CITATIONS**

<b>CASES</b>	<b>PAGE#</b>
<i>Ansin v. Thurston</i> , 101 So. 2d 808 (Fla. 1958).....	4
<i>Caruthers v. State</i> , 232 So. 3d 441 (Fla. 4th DCA 2017).2, 5, 7, 8	
<i>Dean v. State</i> , 230 So. 3d 420 (Fla. 2017).....	2, 5, 6, 7, 8
<i>Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc.</i> , 498 So.2d 888 (Fla. 1986) .....	3
<i>Jenkins v. State</i> , 385 So.2d 1356 (Fla. 1980).....	4
<i>Knight v. State</i> , 2018 WL 944663 (Fla. 1st DCA Feb. 19, 2018) .....	2, 4, 6, 7, 8
<i>Moore v. State</i> , 181 So. 3d 1186 (Fla. 2016).....	8
<i>Reaves v. State</i> , 485 So.2d 829 (Fla. 1986) .....	3
<i>Roberts v. State</i> , 2018 WL 1100825 (Fla. Mar. 1, 2018).....	7
<i>State v. Montgomery</i> , 39 So. 3d 60 (Fla. 2016).....	4, 5
<i>Walton v. State</i> , 208 So. 3d 60 (Fla. 2016).....	7
<i>Williams v. State</i> , 123 So. 3d 23 (Fla. 2013).....	7
 <b>OTHER AUTHORITIES</b>	
Article V, § 3(b)(3), Fla. Const.....	3
Article V, §3(b)(4), Fla. Const.....	3, 8
Fla. R. App. P. 9.030(a)(2)(A)(iv).....	3
Fla. R. App. P. 9.030(a)(2)(A)(v).....	3

**PRELIMINARY STATEMENT**

Respondent, 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 Respondent, the prosecution, or the State. Petitioner, Knight, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number. A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

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

The pertinent history and facts are set out in the decision of the lower tribunal, attached hereto. They can also be found at *Knight v. State*, 2018 WL 944663 (Fla. 1st DCA Feb. 19, 2018); *Caruthers v. State*, 232 So. 3d 441 (Fla. 4th DCA 2017); and *Dean v. State*, 230 So. 3d 420 (Fla. 2017).

## **SUMMARY OF ARGUMENT**

The operative facts, as contained within the "four corners" of the First DCA's decision reveals no express or direct conflict with the Fourth District's opinion in *Caruthers*, or this Court's opinion in *Dean*. Further, the court should decline jurisdiction as to the certified question, because the ruling is explicitly noted by the First DCA as being fact specific. The fact-specific nature of the ruling makes this case an improper vehicle for the consideration of the issue of waiver.

## ARGUMENT

**WHETHER THE FIRST DISTRICT'S OPINION IN *KNIGHT V. STATE* IS IN EXPRESS AND DIRECT CONFLICT WITH THE FOURTH DISTRICT'S DECISION IN *CARUTHERS V. STATE*, OR THIS COURT'S DECISION IN *DEAN V. STATE*; OR IF THE QUESTION CERTIFIED BY THE FIRST DISTRICT IS ONE OF GREAT PUBLIC IMPORTANCE?**

### A. Standard of Review.

The applicable standard of review for claims of direct and express conflict is de novo subject to the following criteria.

### B. Jurisdictional Criteria.

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), and Fla. R. App. P. 9.030(a)(2)(A)(v) which parallels Article V, §3(b)(3) and Article V, §3(b)(4). Fla. Const. Section (3) provides that: "The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. Const. Section (4) states that: "The supreme court... [m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance..."

When assessing jurisdiction based on Article V, §3(b)(3), conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986). *Accord Dept. of Health*

*and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc.*, 498 So.2d 888, 889 (Fla. 1986) (rejected "inherent" or "implied" conflict; dismissed petition). In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). In *Ansin v. Thurston*, 101 So.2d 808 (Fla. 1958), this Court explained:

It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

*Ansin* at 810.

#### C. The First DCA's Decision in *Knight*

In *Knight v. State*, 2018 WL 944663 (Fla. 1st DCA Feb. 19, 2018) Appellant was charged with attempted first-degree murder with a weapon, and convicted of attempted second-degree murder with a weapon. The jury instruction given for the lesser offense of attempted voluntary manslaughter with a weapon was erroneous. This Court previously held in *Montgomery* that, pursuant to the jury pardon doctrine, an erroneous manslaughter jury instruction is fundamental error. *State v. Montgomery*, 39 So. 3d 60 (Fla. 2016).

The First DCA held that this Court has receded from the jury pardon doctrine in *Dean*, eliminating the need for a fundamental error analysis under *Montgomery*.

The First DCA alternatively held that the error in jury instructions can be waived. The First DCA stated that based on the specific facts of this case, the error in the manslaughter instruction was waived by defense counsel.

D. The Fourth Circuit's Decision in *Caruthers*

In *Caruthers v. State*, 232 So. 3d 441 (Fla. 4th DCA 2017) the Fourth DCA noted that they chose not to apply the holding in *Dean* to *Caruthers* because the case was not decided by a majority of this Court, and so is not binding.

E. This Court's Decision in *Dean*

In *Dean*, the defendant was convicted of second-degree felony murder and the jury was not instructed on manslaughter as a lesser included offense, despite the defendant's request that it be included as a lesser. *Dean v. State*, 230 So. 3d 420 (Fla. 2017). The Fourth District affirmed the conviction, and the Florida Supreme Court affirmed the ruling by the Fourth District. The majority agreed that "manslaughter is a necessarily lesser included offense of second-degree felony murder." *Id.* at 424. The majority stated that: "for the reasons expressed in Justice Polston's concurring opinion and Justice Quince's concurring in

result only opinion, we approve the result of the Fourth District's decision to affirm Dean's convictions." *Id.*

F. Why *Knight* is not in express and direct conflict with the decision in *Caruthers* or *Dean*

*Knight* is not in express and direct conflict with *Dean* because four justices in *Dean* agreed that the jury pardon power should be abrogated. Justice Polston wrote a concurring opinion that explicitly abrogates the pardon power. *Dean*, 230 So. 3d at 425. The opinion notes that Justices Canady and Lawson concur with Justice Polston's position. *Id.* at 425. Justice Lewis joined the majority. *Id.* If Justice Lewis wanted to affirm because manslaughter is not a lesser included, he would have joined Justice Quince's opinion instead of the majority opinion. If Justice Lewis believed in maintaining the pardon power, and that manslaughter is a necessarily lesser included offense, he would have joined Justice Pariente's opinion. However, he joined the majority, which explicitly incorporates Justice Polston's concurrence that affirms based on the abrogation of the pardon power. *Id.*

Further, the majority in *Dean* cannot reach their conclusion that manslaughter is a necessarily lesser included offense of second-degree felony murder and affirm the Fourth Circuit without determining that the jury pardon power no longer justifies an immediate finding of fundamental error. Because the First DCA in

*Knight* reached the same conclusion as this Court in *Dean*, there is no conflict between the cases.

Appellant also cites *Roberts v. State*, 2018 WL 1100825 (Fla. Mar. 1, 2018) as an example of *Knight* conflicting with this court's holdings. *Roberts* is not in conflict with *Knight*. In *Roberts*, the defendant was charged with attempted second-degree murder and the manslaughter instruction was not given at all. In *Knight*, Petitioner was charged with attempted first-degree murder, and a faulty manslaughter instruction was given. These distinctions justify the different findings of harmless versus fundamental error. Further, in *Knight*, the First District noted that the error was waived.

The conflict that exists in this area of the law are between this Court's decisions in *Roberts*, *Dean*, *Walton* and *Williams*, not with the lower court's decisions in cases like *Knight*. *Walton v. State*, 208 So. 3d 60 (Fla. 2016); *Williams v. State*, 123 So. 3d 23 (Fla. 2013). Accepting jurisdiction in *Knight* will not cure the conflict between this Court's current cases, because *Knight* is not in conflict with these cases.

Further, there is no conflict with *Caruthers*. *Caruthers* does not address the holding in *Dean*, it only states that the Fourth

DCA has chosen not to apply *Dean* because it is not a majority decision and is not binding. This is a not a dispute between the circuits as to a point of law. In fact, *Caruthers* acknowledges the holding in *Dean* by quoting the language from the opinion that recedes from the jury pardon doctrine. *Caruthers* represents only a disagreement as to whether *Dean* is a majority opinion, not a conflict in the law. Because there is no conflict in the law, under Article V, §3(b)(4) this court should decline conflict jurisdiction.

D. Why This Court Should Decline Jurisdiction as to the Certified Question

This case is not the proper vehicle for this court to consider the issue of waiver. The First DCA noted in *Knight* that their ruling that the error was waived in this case based on the “specific facts presented.” *Knight*, 2018 WL at 3. Judge Kelsey states in *Knight*: “[w]e emphasize that our waiver analysis is limited to the specific factors at play here.” *Id.* at 5. Since this is a fact specific ruling, this case is not the proper vehicle for this court to consider the issue of waiver. This court previously declined jurisdiction on the same question in *Moore v. State*, 181 So. 3d 1186, 1186-1187 (Fla. 2016), and the State urges this Court to again decline jurisdiction on this matter.

### **CONCLUSION**

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction regarding a conflict between *Knight*, *Caruthers* and *Dean* because there is no express and direct conflict, and similarly decline jurisdiction as to the certified question because this case is not the proper vehicle for the consideration of the issue of wavier.

**CERTIFICATE OF SERVICE**

I certify that a copy hereof has been furnished to the following by email on April 25, 2018 to Glen P. Gifford, Esq. at glen.gifford@flpd2.com.

**CERTIFICATE OF COMPLIANCE**

I certify that this brief was computer generated using Courier New 12-point font.

Respectfully submitted and certified,  
PAMELA JO BONDI  
ATTORNEY GENERAL

          /s/ Trisha M. Pate  
TRISHA M.PATE  
ASSISTANT ATTORNEY GENERAL  
Florida Bar No. 0045489

          /s/ Kaitlin R. Weiss  
KAITLIN R. WEISS  
ASSISTANT ATTORNEY GENERAL  
Florida Bar No. 106130  
Attorney for Respondent, State of Fla.  
Office of the Attorney General  
PL-01, The Capitol  
Tallahassee, FL 32399-1050  
crimapptlh@myfloridalegal.com  
Kaitlin.Weiss@myfloridalegal.com  
(850) 414-3300  
(850) 922-6674 (FAX)

AG#: L18-1-02403