

IN THE SUPREME COURT OF FLORIDA

Case No. SC21-1204

Lower Tribunal No(s): 3D18-1982;
132015CF0163540001

KEVIN F. TOMLINSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

**AMENDED
BRIEF OF PETITIONER ON JURISDICTION**

Respectfully submitted,

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RECEIVED, 09/20/2021 03:26:23 PM, Clerk, Supreme Court

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STATEMENT OF THE ISSUE

Whether the decision of the Third District Court of Appeals in this case directly conflicts with the decision of the Fifth District Court of Appeals in *Calamia v. State*, 125 So.3d 1007 (5th DCA 2013) on the issue of whether, in an extortion prosecution, actual malice is the correct definition to be applied in defining the term “maliciously” under Fla. Stat. 836.05.

INTRODUCTION

Petitioner, Kevin Tomlinson, seeks discretionary review of a decision of the Third District Court of Appeal that expressly and directly conflicts with a decision from another district court of appeal.

STATEMENT OF THE CASE AND OF THE FACTS

Mr. Tomlinson was convicted at trial of two counts of extortion in violation of Fla. Stat. 836.05 and sentenced on August 31, 2015. The issue in this case concerns the correct interpretation of that portion of the statute that provides in pertinent part “Whoever, either verbally or by a written or printed communication maliciously threatens to accuse another...” Fla. Stat. 836.05. Mr. Tomlinson appealed his conviction to the Third District Court of Appeal arguing

inter alia, that the trial court's failure to instruct the jury that actual malice is an element of the offense of extortion under Fla. Stat. 836.05 and to define the term maliciously as meaning actual malice was fundamental error requiring reversal of his extortion convictions.

On June 30, 2021, the Third District Court of Appeal rejected the above argument. In the course of its opinion the court first acknowledged that although malice is an essential element of the offense of extortion under Fla. Stat. 836.05 the statute does not define the term. Then, relying on the decisions of the Fourth District Court of Appeal in *Alonso v. State*, 447 So.2d 1029, 1030 (Fla. 4th DCA 1984) and the Second District Court of Appeal in *Dudley v. State*, 634 So.2d 1093, 1094 (Fla. 2d DCA 1994) generally defining malice in the context of the extortion statute as legal malice rather than actual malice, held that legal malice is the more appropriate standard to be applied in extortion cases and that the trial court's instructions defining the malice element of the crime of extortion as legal malice was not fundamental error.

On July 15, 2021, Mr. Tomlinson filed a Motion for Certification and For Issuance of Written Opinion. In his motion, Mr. Tomlinson

requested (1) that the Third District Court of Appeal certify that its decision was in direct conflict with *Calamia v. State*, 125 So.3d 1007 (5th DCA 2013); and (2) for the issuance of a written opinion on other meritorious issues he had raised. The motion was denied on July 19, 2021.

ARGUMENT

The decision below directly conflicts with the decision of the Fifth District Court of Appeal in *Calamia v. State*, 125 So.3d 1007 (5th DCA 2013). Contrary to the Third District Court of Appeal which has now adopted the lower standard of legal malice, *Calamia* squarely held that in an extortion case it is fundamental error to instruct the jury that legal malice rather than actual malice is the correct standard.

Prior to the Third District Court of Appeal's decision in this case, the only case squarely addressing the issue whether an actual malice or legal malice instruction is appropriate is *Calamia v. State*. Although the court below correctly observed that the *Calamia* court may have noted that it believed that legal malice is the more appropriate definition, it nonetheless held to the contrary,

recognizing it was compelled to follow this Court's decision in *Carricarte v. State*, 384 So.2d 1261 (Fla. 1980). See *Calamia*, 125 So. 3d at 1007 (“we are compelled to follow the Supreme Court’s directive in *Carricarte*” and “hold actual malice is the correct standard for extortion”).¹

The Third District Court of Appeal’s reliance on the Fourth District Court of Appeal’s decision in *Alonso v. State*, 447 So.2d 1029 (Fla. 4th DCA 1984), and the Second District Court of Appeal’s decision in *Dudley v. State*, 634 So.2d (Fla. 2d DCA 1994), is misplaced for the reason that neither of those decisions, unlike *Calamia*, addressed the specific issue in this case, i.e., whether the trial court should give an actual malice instruction in an extortion case especially, whereas here, the defendant had requested an actual malice instruction.

¹ *Carricarte* in turn relied on *State v. Gaylord*, 356 So.2d 313, 314 (Fla. 1978), where in rejecting a vagueness challenge to Fla. Stat. 827.03(3) (aggravated child abuse), the Court decided that the statute’s use of the term “maliciously” provided a definite standard of conduct - “Malice means ill will, hatred, spite, an evil intent,” i.e., actual malice. *Id.* at 314.

In *Alonso v. State*, 447 So.2d 1029 (Fla. 4th DCA 1984), the defendant challenged the trial court's jury instruction on extortion arguing that a correct definition of malice required the state to show that the defendant acted "with the knowledge that injury or damage will or may be caused to another person or the property of another person." After the court rejected that argument, it simply observed that the malice requirement is satisfied if the threat is made willfully and purposely to the prejudice and injury of another. *Id.* (citing Black's Law Dictionary, 4th Ed.). In *Alonso*, the defendant never raised the issue of whether actual versus legal malice was the appropriate standard, that issue was never briefed and the Court therefore did not squarely address that issue.

Nor did *Dudley v. State*, 634 So.2d 1093 (Fla.2d DCA), address the issue raised by Mr. Tomlinson in this case. Rather, the *Dudley* Court addressed a double jeopardy challenge based on the argument that the elements of a conviction under Fla. Stat. § 836.10, making a written threat to kill or do bodily injury are subsumed within the offense of extortion, Fla. Stat. § 836.05. The defendant in *Dudley* never challenged the trial court's jury instruction defining malice,

and once again, the issue was never briefed or squarely addressed or decided by the Court.

Although in 2013, the *Calamia* court certified that its decision was in conflict with the decisions of the Fourth District Court of Appeals in *Alonso* and the Second District Court of Appeals in *Dudley*, this Court declined to address the apparent conflict at that time. Instead, in 2014 the Florida Supreme Court Standard Jury Instruction Committee proposed Florida Standard Jury Instruction 8.23 Extortion, to provide alternative definitions for the term malice:

The appellate courts are in conflict as to whether the extortion statute requires actual malice or legal malice. In the absence of clarification from the legislature or the Florida Supreme Court, trial judges must choose one of the following:

Dudley v. State, 634 So.2d 1093 (Fla. 2d DCA 1994);
Alonso v. State, 447 So.2d 1029 (Fla. 4th DCA 1984).

“Maliciously” means intentionally and without any lawful justification.

Calamia v. State, 125 So.3d 1007 (Fla. 5th DCA 2013).

“Maliciously” means with ill will, hatred, spite, or an evil intent.

Neither the legislature nor this Court has resolved the conflict. Moreover, as this Court explained in its July 14, 2014 Opinion authorizing the use of the instruction,

In authorizing the publication and use... [of Florida Standard Jury Instruction 8.23], we express no opinion on [its] correctness and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions or contesting the legal correctness of these instructions. We further caution all interested parties that any comments associated with the instructions reflect only the opinion of the Committee and are not necessarily indicative of the views of this Court as to their correctness or applicability.

This Court should now resolve conflict that exists concerning the correct definition of malice that must be given to the jury in an extortion case. In *Calamia*, recognizing that it was bound to follow this Court's decision in *Carricarte*, the Fifth District Court of Appeal decided that actual malice is the correct definition. The Third District Court of Appeals believing it was not bound by *Carricarte* and relying on *Alonso* and *Dudley* (neither of which directly addressed the precise instructional error raised by Mr. Tomlinson) concluded that legal malice is the appropriate standard.

Florida Standard Jury Instruction 8.23, adopted after the decision in *Calamia v. State*, leaves the issue unresolved. Without

clarifying whether actual malice or legal malice is the correct definition, the instruction simply tells the trial judge to select one of the two alternatives. The instruction ignores the constitutional implications of permitting such unbridled discretion.

The *Calamia* court correctly observed that “To convict a defendant, the State must prove all essential elements of guilt beyond a reasonable doubt.” 125 So. 3d at 1010-11. And that “It is fundamental error to use the definition of legal malice when that of actual malice is appropriate because it reduces the State’s burden on an essential element of the offense charged.” *Id.* at 1011.

This Court should now resolve the conflict and decide the correct standard to be used in all cases. And, that standard should be the actual malice standard. Otherwise, individuals charged with extortion will run the constitutionally impermissible enhanced risk of being convicted where, depending on the whim of the trial judge, the jury is instructed the State need only prove legal malice.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Amended Petitioner’s Jurisdictional Brief has been electronically filed via the Florida E-filing portal and furnished to Assistant Attorney General, Brian H. Zack, brian.zack@myfloridalegal.com and CrimAppMIA@myfloridalegal.com on this 20th day of September, 2021.

/s/ John E. Bergendahl
John E. Bergendahl

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that in compliance with Fla.R.App.P. Rule 9.210(a)(2) the foregoing Brief was written using 14 point in Bookman Old Style and contains 1475 words.

/s/ John E. Bergendahl
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