IN SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. SC09-332
L.T. No. 1D07-4688

STEVEN W. MONTGOMERY,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

RICHARD M. SUMMA
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
SummaR@leoncountyfl.gov
(850) 606-1000

ATTORNEY FOR RESPONDENT
FLA. BAR NO. 890588

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

RULES

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **CASE NO. SC09-332**
L.T. No. 1D07-4688

STEVEN W. MONTGOMERY,

Respondent.
_____/

JURISDICTIONAL BRIEF OF RESPONDENT

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case. Respondent generally accept's Petitioner's statement of the facts, but with the following caveat. The cause of death was disputed. The defense presented an expert witness, Dr. Kessler, who opined that the victim's death was not caused by strangulation. (Trial, V, 575). Dr. Kessler also opined that there was no evidence of suffocation. (Trial, V, 605).

The theory of defense was self-defense. (Trial, VI, 699-700, 708, 709). Defense counsel argued that the injuries to the victim's extremities which appear to have been caused by a stick or pole could have resulted from an attempt to disarm a knife-wielding victim. (Trial, VI, 708). A purple broom handle and a metal rod were found at the scene. (Trial, IV, 230, 233). Either of these items could have been the "weapon" found by the jury. There were

stab marks in the bedroom wall which could have been caused by the victim throwing knives at Mr. Montgomery. (Trial, VI, 718).

> There was a fight going on there. There were things being thrown against the walls in the bedroom. We know they were thrown against the walls because of the impacts were there. Who's throwing them and why?

(Trial, VI, 709).

SUMMARY OF ARGUMENT

This Court possesses the discretion to exercise jurisdiction of the case because the First District Court of Appeal certified a question of great public importance and also certified conflict with Barton v. State, 507 So. 2d 638 (Fla. 5th DCA 1987), rev'd on other grounds, 536 So. 2d 1194 (Fla. 1988). The opinion of the First District Court of Appeal, however, does not constitute a misapplication of the law expressed in Garzon v. State, 980 So. 2d 1038 (Fla. 2008). Jurisdiction is not vested in this Court under the "misapplication" doctrine.

This Court should decline to exercise jurisdiction, however, because this Court has already addressed the error in the standard jury instruction for manslaughter by act and has amended the standard jury instruction to clarify that the offense of manslaughter by act does not require the state to prove that the defendant intended to cause the death of the victim. The opinion of the district court below conforms to the current instruction promulgated by this Court. Furthermore, the error that occurred in the trial court should no longer occur in light of the amended jury instruction.

ARGUMENT

ISSUE

WHETHER THIS COURT HAS JURISDICTION OF THE CASE AND, IF SO, WHETHER THIS COURT SHOULD EXERCISE ITS JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT BELOW?

STANDARD OF REVIEW

The determination of jurisdiction is a legal question. Jacobsen v. Ross Stores, 882 So. 2d 431 (Fla. 1st DCA 2004). Legal questions are determined *de novo*. Engle v. Liggett Group Inc., 945 So. 2d 1246, 1259 (Fla. 2006).

MERITS

A. Jurisdiction

This Court possesses the discretion to exercise jurisdiction of the case because the First District Court of Appeal certified and passed upon a question of great public importance and also certified conflict with Barton v. State, 507 So. 2d 638 (Fla. 5th DCA 1987), rev'd on other grounds, 536 So. 2d 1194 (Fla. 1988). See Fla. R. App. P. 9.030(a)(2)(A)(iv) & (v).

The opinion of the First District Court of Appeal, however, does not constitute a misapplication of the law expressed in Garzon v. State, 980 So. 2d 1038 (Fla. 2008). This Court possesses jurisdiction of a district court decision which expressly and directly conflicts with a decision of this Court "on the same question of law." See Fla. R. App. P. 9.030(a)(2)(A)(iv). This grant of jurisdiction is very narrowly tailored, however.

> A conflict of decisions . . . must be on a question of law involved and determined, and such that one decision would overrule the other if both were rendered by the same court; in other words, the decisions must be based practically on the same state of facts and announce antagonistic conclusions.

Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958).

The legal issue presented in Garzon is not related to the issue presented in this case. In Garzon, this Court considered whether the unobjected-to use of the "and/or" conjunctive between the names of the codefendants in a criminal case constituted fundamental error in the context of the particular case. The Court ultimately held that the use of the conjunctive was error, but not fundamental error as to any defendant under the totality of the circumstances.

The present case is distinguishable from Garzon, however, on a number of grounds. The present case does not concern the use of the "and/or" conjunctive. The present case does not involve multiple defendants. The present case does not involve the law of principals. Finally, Garzon did not involve a conviction for manslaughter, or a claim of error in the manslaughter instruction. The district court did not "misapply" Garzon because Garzon is not applicable to the present case. Jurisdiction is not vested in this Court under the "misapplication" doctrine because Garzon does not represent a decision on the "same question of law" and is factually diverse from the present case.

B. Exercise of jurisdiction

The grounds for the exercise of jurisdiction are not compelling. Both the certified question and the certified conflict concern the same legal issue, i.e., whether the offense of manslaughter requires proof of intent to kill. This Court, however, has already considered this question and promulgated changes to the standard jury instruction which clarify that manslaughter by act does not require proof of intent to kill.

> In order to convict of manslaughter by intentional act, it is not necessary for the State to prove that the defendant had a premeditated intent to cause death, only an intent to commit an act which caused death.

In re: Std. Jury Instr. In Crim Cases - Report No. 2007-10, 33 Fla. L. Weekly S965 (Fla. Dec. 11, 2008). The issue decided by the district court below is not likely to recur in light of the recently amended jury instruction. The exercise of jurisdiction would amount, therefore, to a waste of judicial resources.

The state contends that the district court misapplied the Garzon fundamental error doctrine because the district court "failed to analyze the error in context of the entire trial, . . ." (Petitioner's Jurisdictional Brief at 4). Petitioner, however, fails to comprehend the basic difference between Garzon and the present case. The present case involved an error in defining a disputed element of a charged offense (manslaughter by act). Garzon did not involve an error in defining an element of a charged

offense. Garzon involved the ambiguity which may inure in the verdict when charging multiple defendants conjunctively (and/or) as principals to the commission of a crime. In Garzon, this Court noted a number of factors which nullified any claim of ambiguity in the verdict, including: Garzon had knowledge of the layout of the victims' home; the law of principals was properly explained in closing argument; the jury was properly advised of the "multiple defendants instruction," explaining that separate counts were charged against each defendant and that a verdict rendered against one should not affect the verdict rendered against another; the acquittal of Garzon and Coles on the extortion count reflected the jury's independent consideration of each charge. In sum, there was a rational basis in the record to confirm the validity of the trial and instill confidence in the verdict.

The present case, however, demonstrates a decided lack of confidence in the verdict as well as an erroneous instruction on a disputed element of the offense of manslaughter by act. By its verdict of guilty on the charge of second degree murder, the jury found that the state failed to prove an intent to kill. Had the jury been properly instructed that manslaughter by act likewise does not require proof of intent to kill, the jury would have been faced with the choice of two possible verdicts, second degree murder or manslaughter by act. The erroneous instruction on

manslaughter by act, however, deprived the jury of this choice and compelled the jury to find Respondent guilty of the greater offense – second degree murder. This intrusion into the jury's deliberative processes brought this case within the purview of well established legal rules defining fundamental error. The erroneous manslaughter instruction "reach[ed] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the [alleged] error." State v. Delva, 575 So. 2d 643, 644 (Fla. 1991). The error in the manslaughter instruction was also "pertinent or material to what the jury must consider in order to convict." Id. at 645. Because the error in the manslaughter instruction intruded upon the jury's prerogative to choose between verdicts of second degree murder and manslaughter, the error was "pertinent or material to what the jury must consider in order to convict." Moreover, unlike the situation in Garzon, there is no rational way to determine whether the jury may have returned a different verdict if properly instructed on the offense of manslaughter by act. The erroneous manslaughter instruction given by the trial court had the effect of coercing a verdict. The fairness of the trial was compromised, as was the confidence in the verdict and the reliability of the outcome. The district court correctly concluded, on this basis, that the error was fundamental.

CONCLUSION

For the reasons expressed above, Respondent respectfully requests that the Court decline to exercise jurisdiction of this case.

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Charlie McCoy, Assistant Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and to respondent, Steven W. Montgomery, #129394, Mayo C.I., 8784 Hwy. 27, West, Mayo, FL 32066, on this ____ day of March, 2009.

I also certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

RICHARD M. SUMMA
Assistant Public Defender
Florida Bar No. 890588
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
SummaR@leoncountyfl.gov
(850) 606-1000

ATTORNEY FOR RESPONDENT