IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1350

MYNOR SOLANO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

* *

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

* *

RESPONDENT'S BRIEF ON JURISDICTION

BILL McCOLLUM
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Bureau Chief, Criminal Appeals

DOUGLAS J. GLAID
Florida Bar No. 0249475
Senior Assistant Attorney General
Department of Legal Affairs
444 Brickell Avenue, Ste. 650
Miami, Florida 33131
Tel. (305) 377-5441

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

The Respondent, the State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the trial court of the Eleventh Judicial Circuit, in and for Miami-Dade County. The Petitioner was the appellant and the defendant, respectively in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" refers to the Appendix attached to this jurisdictional brief, which solely includes a conformed copy of the district court's opinion. Unless otherwise indicated, all emphasis has been supplied by Respondent.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts appearing on pages 2-4 of his jurisdictional brief to the extent that it is non-argumentative and accurate. Respondent sets forth the following additional facts pertinent to the jurisdictional issue before this Court:

On appeal, Petitioner raised, *inter alia*, the issue of whether there was fundamental error in the manslaughter jury instruction given in the case. In support of his argument, Petitioner relied on the First District's decision in Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009). The district court, on April 7, 2010, issued its opinion affirming Petitioner's conviction upon determining that the trial court's giving of the standard instruction on manslaughter did not constitute fundamental error. (A. 1-12). Specifically, the court opined:

> Assuming *arguendo* that *Montgomery* is correctly decided, the defendant would not be entitled to any relief under the fundamental error doctrine. That is so because the defense requested, and the trial court gave, a special instruction making the point that if the defendant was found to have used excessive force in self-defense, then the jury could convict on manslaughter. The jury instruction read, in part, as follows with the special instruction being in bold face type:
>
> * * *

> **I further instruct you that if you find that the defendant over-reacted [and] used excessive force to defend himself from the attack of the victim, [and that] such excessive force resulted in the death of the victim, then manslaughter is proven.**

(A. 7-9). The Third District's opinion went on to conclude:

> We conclude that the special instruction sufficiently addressed the issue **under the circumstances of this case**. The defense wanted the court to spell out that if the defendant used excessive force in self-defense, then the defendant could be convicted of manslaughter, and that is what the special jury instruction said. We conclude that there is no fundamental error.

(A.10); (Emphasis added).

On June 8, 2010, the district court denied Petitioner's motion for rehearing. Petitioner thereafter timely filed his notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

Petitioner has failed to demonstrate that the decision of the Third District Court of Appeal expressly and directly conflicts with a decision of this Court on the same question of law, or that it falls under any of the subdivisions provided in Fla. R. App. P. 9.030(a)(2), or Art. V, Section 3(b)(3), Fla. Const. (1980), for review by this Court. Express and direct conflict simply does not appear within the four corners of the Third District's decision. As such, this Court should decline to exercise discretionary jurisdiction in this matter.

ARGUMENT

THIS COURT SHOULD DECLINE DISCRETIONARY JURISDICTION IN THIS CAUSE SINCE THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT'S DECISION IN STATE v. MONTGOMERY, 35 Fla. Law Weekly S204 (Fla. April 8, 2010), ON THE SAME QUESTION OF LAW.

Petitioner seeks review through conflict jurisdiction pursuant to Article V, Section 3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv), which provides that the discretionary jurisdiction of the Supreme Court may be sought to review a decision of a district court of appeal which expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. Petitioner, however, presents no legitimate basis for the invocation of this Court's discretionary jurisdiction.

Petitioner's allegation that the district court's decision below expressly and directly conflicts with recent decision of this Court in State v. Montgomery, 35 Fla. Law Weekly S204 (Fla. April 8, 2010), is incorrect. The Third District's opinion expressly makes clear that, notwithstanding this Court's decision in Montgomery, the trial court's use of the standard jury instruction on manslaughter did not constitute fundamental error in light of the unique facts presented in the case. These

unique facts include the fact that the trial judge, upon the defense's request, gave a special instruction which instructed the jury that if the defendant was found to have used excessive force in self-defense, then it could convict on manslaughter. Thus, unlike Montgomery, the special instruction given by the trial court allowed the jury two options in finding the second element of manslaughter by act; either that Petitioner "intentionally caused the death" or that Petitioner "used excessive force to defend himself" which resulted in the victim's death. In contrast to Montgomery, the jury was therefore given a fair opportunity to exercise its inherent "pardon" power by returning a guilty verdict as to the next lesser offense of manslaughter by the use of excessive force in self-defense. Cf. Salonko v. State, 35 Fla. L. Weekly D376 (Fla. 1st DCA Feb. 12, 2010) (finding that extra instruction on culpable negligence was enough to distinguish the case from Montgomery); accord Singh v. State, 36 So. 3d 848 (Fla. 4th DCA 2010); Dowe v. State, 39 So. 3d 407 (Fla. 4th DCA 2010). Consequently, since the facts involved in the instant case are clearly not substantially the same controlling facts as those involved in the Montgomery case, this Court's discretionary jurisdiction cannot be invoked on a conflict basis. See Wilson

v. Southern Bell Telephone and Telegraph Co., 327 So. 2d 220, 221 (Fla. 1976) (where there was no direct conflict between decision of district court of appeal and any other appellate decision since same principles were applied to reach different results on different facts, the supreme court lacked jurisdiction to proceed on certiorari basis); Nielson v. City of Sarasota, 117 So. 2d 731, 734-35 (Fla. 1960) (stating that the principal situations justifying the invocation of discretionary jurisdiction because of alleged conflicts are (1) the announcement of a rule of law which conflicts with a rule previously announced by the court, or (2) the application of a rule of law to produce a different result in a case which involves *substantially the same controlling facts* as a prior case), accord Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975).

In light of the foregoing, it is clear that no express and direct conflict exists between the Third District's decision and this Court's decision in Montgomery. Furthermore, it is well established that any inherent or "implied" conflict cannot serve as a basis for the discretionary jurisdiction of this Court. See Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986). Accordingly, since Petitioner has not shown any express

and direct conflict of decisions within the four corners of the district court's opinion, this Court's jurisdiction has not been established. See Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986); Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980).

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Honorable Court DECLINE to accept discretionary jurisdiction of this cause.

Respectfully submitted,

BILL McCOLLUM
Attorney General

_____
RICHARD L. POLIN
Bureau Chief, Criminal Appeals

_____
DOUGLAS J. GLAID
Florida Bar No. 0249475
Senior Assistant Attorney General
Department of Legal Affairs
444 Brickell Avenue, Ste. 650
Miami, Florida 33131
(305) 377-5441
Facsimile (350) 377-5665

CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction was furnished by U.S. Mail to Andrew Stanton, Asst. Public Defender, Counsel for Petitioner, 1320 NW 14th Street, Miami, FL 33125, on this ____ day of September, 2010, and that the 12 point Courier New font used in this brief complies with the requirements of Fla. R. App. P. 9.210(a)(2).

_____
DOUGLAS J. GLAID
Senior Assistant Attorney General

APPENDIX