

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1350

MYNOR SOLANO,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondents.

BRIEF OF PETITIONER ON JURISDICTION

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

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TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
THE DISTRICT COURT’S OPINION CONFLICTS WITH THIS COURT’S DECISION IN <i>STATE V. MONTGOMERY</i>, 35 Fla. L. Weekly S204 (Fla. April 8, 2010).	6
CONCLUSION	9
CERTIFICATE OF SERVICE	10
CERTIFICATE OF FONT	10

TABLE OF CITATIONS

CASES	PAGE(S)
<i>Montgomery v. State</i> , 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009)	3
<i>State v. Montgomery</i> , 35 Fla. L. Weekly S204 (Fla. April 8, 2010).....	<i>passim</i>
<i>Pena v. State</i> , 901 So. 2d 781 (Fla. 2005)	7

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INTRODUCTION

This is a petition for discretionary review on the grounds that the district court opinion expressly and directly conflicts with a decision of this court. In this brief of petitioner on jurisdiction, all references are to the slip opinion in the appendix attached to this brief, identified as “A.” followed by page numbers.

STATEMENT OF THE CASE AND FACTS

The circuit court adjudicated Mynor Solano guilty of second-degree murder, and Mr. Solano appealed. (A. 2). The Third District Court of Appeal affirmed.

(A. 12). As relevant here, the district court stated the facts as follows:

Defendant-appellant Solano had a romantic and sexual relationship with the victim, Gregorio Rodriguez, for approximately four years. Eventually the victim began dating another man and the defendant found out about it. The defendant and the victim quarreled about this. The State contended that the defendant had killed the victim out of jealousy. The defendant testified that during the quarrel, the victim attacked him and the defendant killed the victim in self-defense.

(A. 2).

The trial court instructed the jury on manslaughter as a lesser-included offense, and included defense-requested language concerning excessive force in self-defense. As read by the trial judge, the instruction stated:

Before you can find the defendant guilty of manslaughter, the state must prove the following two elements beyond a reasonable doubt:

1. Gregorio Rodriguez is dead.
2. Mynor Solano intentionally caused the death of Gregorio Rodriguez.

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. 9) (emphasis supplied by the district court).

Mr. Solano argued the trial court committed fundamental error in giving an erroneous jury instruction that required jurors to find intent to kill in order to convict him of manslaughter as a lesser included offense, relying on *Montgomery v. State*, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), *affirmed*, 35 Fla. L. Weekly S204 (Fla. April 8, 2010). (A.7).

The district court issued its opinion on April 7, 2010. (A. 1). Though that court noted that its prior decisions concerning the manslaughter instruction were in conflict with the First District Court of Appeal's opinion in *Montgomery*, it decided the issue as follows

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 judge 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.

In this appeal the defense argues that, even though the trial court gave the defense-requested instruction, the instruction failed to eliminate or modify item 2 of the manslaughter instruction, which stated "Mynor Solano intentionally caused the death of Gregorio Rodriguez." That language was left in place and the court added the special instruction to it.

* * *

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.

The day after the district court released its opinion, this Court issued its decision in *Montgomery*.

The Petitioner filed his notice invoking this Court's discretionary jurisdiction on July 6, 2010.

SUMMARY OF ARGUMENT

The district court held that it was not fundamental error to instruct the jury that manslaughter requires proof of intent to kill. That holding expressly and directly conflicts with this Court's opinion in *State v. Montgomery*, 35 Fla. L. Weekly S204 (Fla. April 8, 2010). Here, the trial court used precisely the same instruction this Court found to be fundamental error in *Montgomery*. The district court held, however, that there was no fundamental error because the jury was also instructed that excessive force in self-defense was manslaughter. That supplemental instruction did not address intent. The jury was told that manslaughter required intent to kill, and the district court's holding that the instruction was not fundamental error conflicts with *Montgomery*.

The district court's opinion further conflicts with *Montgomery* with respect to the proper fundamental-error analysis. The district court found that there was no fundamental error because Mr. Solano got what he wanted: An instruction that excessive force in self-defense is manslaughter. In *Montgomery*, however, the Court explained that the erroneous instruction is per se fundamental error where (as here) the defendant was convicted of second-degree murder, an offense one-degree separated from the necessarily lesser included offense of manslaughter.

ARGUMENT

THE DISTRICT COURT'S OPINION CONFLICTS WITH THIS COURT'S DECISION IN *STATE V. MONTGOMERY*, 35 Fla. L. Weekly S204 (Fla. April 8, 2010).

The Third District Court of Appeal concluded that the jury instruction requiring an intent to kill to prove manslaughter, if faulty, would not amount to fundamental error. It reasoned that any error was cured by an additional instruction on excessive force in self-defense. The district court's conclusion conflicts with this Court's decision in *Montgomery v. State* with regard to both the effect of the supplemental instruction and appropriate fundamental error analysis.

The trial court unquestionably gave the precise instruction condemned in *State v. Montgomery*. (A. 9). The district court, however, pointed to the additional instruction stating:

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. 9) (emphasis supplied by the district court). The court wrote:

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).

The supplemental instruction does nothing to correct or ameliorate the error. In *Montgomery*, the Court held that the same manslaughter instruction used here falsely told jurors that they must conclude the defendant “intentionally caused the death” of the victim. The excessive force instruction does not address the issue of intent. The *only* instruction on intent Mr. Solano’s jury heard told it that intent to kill was a necessary element of manslaughter. In *Montgomery*, this Court found that an additional instruction that *did* address the issue of intent¹ did not cure the error in the instruction. Slip op. 7-8. The district court’s conclusion that the manslaughter instruction in this case could not be fundamental error conflicts with this Court’s decision in *Montgomery*.²

The district court’s opinion further conflicts with *Montgomery* by applying an erroneous fundamental-error analysis. The district court held there was no fundamental error because Mr. Solano got what he wanted, an instruction that excessive force in self-defense is manslaughter. This analysis directly conflicts with *Montgomery*. Relying on its opinion in *Pena v. State*, 901 So. 2d 781 (Fla. 2005), the Court explained its determination of fundamental error thus:

¹ That instruction informed jurors that the prosecution need not prove premeditation. Slip op. 7-8.

The lesser included offense of manslaughter is just one step removed from second-degree murder. Because Montgomery's conviction for second-degree murder was only one step removed from the necessarily lesser included offense of manslaughter, under *Pena*, fundamental error occurred in his case which was per se reversible where the manslaughter instruction erroneously imposed upon the jury a requirement to find that Montgomery intended to kill Ellis.

Montgomery, slip op. at 13 (footnote omitted).

Mr. Solano, like Montgomery, was convicted of second-degree murder. As in *Montgomery*, the judge erroneously instructed jurors that intent to kill is an element of manslaughter. As the Court observed in *Montgomery*, second-degree murder is one step removed from the necessarily lesser-included offense of manslaughter. The error in the present case is fundamental and per se reversible, and the district court's holding to the contrary expressly and directly conflicts with *Montgomery*.

² If the jurors concluded that petitioner "over-reacted and used excessive force" but did not intend to kill, they could not return a verdict of manslaughter.

CONCLUSION

For the foregoing reasons, the Court should grant discretionary jurisdiction based upon express and direct conflict of decisions, where the district Court's opinion expressly and directly conflicts with this Court's decision in *State v. Montgomery*, 35 Fla. L. Weekly S204 (Fla. April 8, 2010).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to counsel for the respondent, Assistant Attorney General Douglas J. Gaid, Office of the Attorney General, Suite 650, 444 Brickell Avenue, Miami, FL 33131, this 13th day of July, 2010.

ANDREW STANTON
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

ANDREW STANTON
Assistant Public Defender