

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-141
DCA CASE NO. 3D09-3209

RODRIGO BONILLA,

Petitioner,

-vs-

STATE OF FLORIDA

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Petitioner, Rodrigo Bonilla, was the defendant in the trial court and the appellant in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The parties shall be referred to as they stand in this Court.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

On the face of petitioner's brief on jurisdiction, respondent does not dispute the certified conflict in *Bonilla v. State*, 2009 WL 4927966, *1 (Fla. 3d DCA 2009) and believes that this Court has jurisdiction to review it. *See Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981)(concluding that "a district court of appeal *per curiam* opinion which cites as controlling authority a decision that is *either pending review in* or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction.)(emphasis supplied).

ARGUMENT

.PETITIONER'S APPLICATION FOR DISCRETIONARY REVIEW MAY BE GRANTED ACCORDING TO A PENDING CASE IN THIS COURT WHICH HAS BEEN CERTIFIED AS BEING IN CONFLICT WITH OTHER DISTRICT COURT OF APPEAL'S CASES AND THAT MAY HAVE AN EFFECT ON PETITIONER'S CASE.

Petitioner's conviction for second degree murder was affirmed on direct appeal. *See Bonilla v. State*, 19 So. 3d 431 (Fla. 3d DCA 2009). At the time petitioner's case was decided, in September 2009, the *Montgomery* decision had already been issued. *See Montgomery v. State*, --- So.2d ----, 2009 WL 350624 (Fla. 1st DCA 2009). Although the Third District Court of Appeal affirmed petitioner's conviction and sentence, petitioner later filed a timely *pro se* Writ of Habeas Corpus alleging ineffective assistance of appellate counsel. The Third District denied "the defendant's petition for writ of habeas corpus arguing ineffective assistance of appellate counsel. However, to preserve the defendant's rights, we certify direct conflict with *Montgomery v. State*, --- So.3d ---- (Fla. 1st DCA 2009), which is currently pending review before the Florida Supreme Court. *State v. Montgomery*, 11 So.3d 943 (Fla. 2009)." *See Bonilla v. State*, 2009 WL 4927966, *1 (Fla. 3d DCA 2009).

The *Montgomery* decision certified a question of great public importance and also certified conflict with decisions from the Second and the Fifth District Court

of Appeal regarding the meaning of the word “intent” within the manslaughter instruction and whether the State had to prove an intentional act in conflict with the second degree murder non-intent requirement. *Id.*

Oral argument was heard in this Court for *State v. Montgomery*, 11 So. 3d 943 (Fla. 2009) on October 7, 2009. A decision is still pending. Respondent surmises that if this Court decides that there is decisional conflict among the districts and *Montgomery* is ultimately meritorious, then petitioner’s claim of ineffective assistance of appellate counsel may be affected and should be fully considered in light of this Court’s ultimate decision in *Montgomery*.

Thus, on the face of petitioner’s brief on jurisdiction, respondent does not dispute the certified conflict in *Bonilla v. State*, 2009 WL 4927966, *1 (Fla. 3d DCA 2009) and believes that this Court has jurisdiction to review it. See *Jollie*, 405 So. 2d at 420.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully submits that this Court has jurisdiction to review this cause.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed to Ms. Gwendolyn Powell Braswell, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, FL 33125, on February 2, 2010.

NATALIA COSTEA
Assistant Attorney General

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing answer brief on jurisdiction was written using 14 point Times New Roman in compliance with Fla. R. App. P. 9.210(a)(2).

NATALIA COSTEA
Assistant Attorney General

