IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1458
L.T. CASE NO. 4D09-2159

AMOS AUGUSTUS WILLIAMS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

Petitioner Amos Augustus Williams was charged with attempted first degree murder as to the "brutal stabbing of his ex-girlfriend in her home while their ten-month-old daughter was present." Williams v. State, 40 So. 3d 72, 73 (Fla. 4th DCA 2010). "The victim sustained multiple stab wounds to her face, stomach, chest, leg, and side." *Id*. Although she had tried to flee, petitioner had "grabbed her by the neck of her clothes and continued to stab her." *Id*. He pulled her back into the house, locked her inside, "and stabbed her whenever she tried to move toward the door." *Id*. Later, when he was apprehended, petitioner said "that the victim tried to start a fight with him and wanted to cut him, he wrestled with the victim, and the victim fell on the knife." *Id*. He subsequently said "that he did not know what happened because 'the evil spirit just move upon me, evil.'" *Id*.

During the charge conference, pursuant to petitioner's request, the jury was instructed on the lesser included offenses of attempted second degree murder, attempted voluntary manslaughter, and aggravated battery. *Id*. The following attempted voluntary manslaughter instruction was given:

> To prove the crime of attempted voluntary manslaughter, the State must prove the following beyond a reasonable doubt: That Mr. Williams **committed an act which was intended to cause the death** of Ms. Lindsay and would have resulted in the death of Ms. Lindsay except that someone prevented [] Mr. Williams from killing Ms. Lindsay or he failed to do so,

> however, the Defendant cannot be guilty of attempted voluntary manslaughter if the attempted killing was either excusable or justifiable as I have previously explained those terms. It is not an attempt to commit manslaughter if the Defendant abandoned the attempt to commit the offense or otherwise prevented its commission under circumstances indicating a complete and voluntary renunciation of his criminal purpose. **In order to convict of attempted voluntary manslaughter, it is not necessary for the State to prove that the Defendant had a premeditated intent to cause death**.

Id. (emphasis in opinion).

Part of this instruction was repeated in the state's closing. *Id*. Petitioner was convicted of the lesser included offense of attempted second degree murder. *Id*. On appeal, he argued that the trial court committed fundamental error by giving the standard jury instruction on attempted manslaughter, as it required the jury to find that he "intentionally attempted to kill the victim." *Id*. For this, he relied on this Court's decision in State v. Montgomery, 39 So. 3d 252 (Fla. 2010). Williams, 40 So. 3d at 73-74.

The Fourth District Court of Appeal found an important distinction in petitioner's case, in that Montgomery involved an instruction on manslaughter while petitioner's involved attempted manslaughter. Williams, 40 So. 3d at 74. It noted, "our Supreme Court has not required a similar amendment to the standard jury instruction on the inchoate crime." *Id*. "In fact, there have been two amendments to the manslaughter jury instruction since the Montgomery trial." *Id*. at 74.

The Fourth District went on to note that the elements for manslaughter and attempted manslaughter differed, with attempted manslaughter being "'a general intent crime, requiring only an intentional act, rather than a specific intent to kill.'" *Id*. (citations omitted). It found that "[t]he error that occurs by instructing the jury that 'an intent to kill' is an element of manslaughter does not exist when instructing the jury that the defendant committed an act which was intended to cause the death of the victim." *Id*. at 75. The court wrote, "This may explain why the Supreme Court has not amended the attempted manslaughter instruction, even though it has twice amended the manslaughter instruction within the last two years." *Id*.

The district court also found that the instruction given in petitioner's case did not confuse the jury because, by finding him guilty of attempted second degree murder, it necessarily found that he "'intentionally committed an act' that would have resulted in the death of the victim **and** that the act was imminently dangerous to another and demonstrated a depraved mind, without regard for human life." *Id*. (emphasis in original). The jury had exercised its inherent pardon power by returning a verdict less than attempted first degree murder. *Id*.

While finding the case distinguishable from Montgomery, the district court certified conflict with Lamb v. State, 18 So.3d 734 (Fla. 1st DCA

2009). Williams, 40 So. 3d at 76. It also certified two questions of great public importance:

> (1) Does the standard jury instruction on attempted manslaughter constitute fundamental error?
>
> (2) Is attempted manslaughter a viable offense in light of *State v. Montgomery*, 39 So. 3d 252, 2010 WL 1372701 (Fla. Apr. 8, 2010)?

Williams, 40 So. 3d at 76.

Petitioner filed a notice to invoke discretionary jurisdiction based on the certified conflict case and the two certified questions. However, on September 21, 2010, this Court issued an order postponing jurisdiction and ordering the parties to file jurisdictional briefs.

SUMMARY OF THE ARGUMENT

This court should not exercise its discretionary jurisdiction. At most, it should stay this case pending resolution of Rushing, which is presently before this Court on the same issue as contained in the first certified question. The district court did not pass on the second certified question, as it was required to do, and the certified case is not in direct conflict.

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review decisions from the district courts that "pass upon a question certified to be of great public importance," Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), or "are

certified to be in direct conflict with decisions of other district courts of appeal," Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi). However, discretionary jurisdiction based on a certified question requires three prerequisites, *see* Floridians for a Level Playing Field v. Floridians Against Expanded Gambling, 967 So. 2d 832, 833 (Fla. 2007), and discretionary jurisdiction based on certified direct conflict requires direct and express conflict, *see* Edwards v. State, 679 So. 2d 772, 772 (Fla. 1996).

ARGUMENT

THIS COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION IN THIS CASE; HOWEVER, IF IT DECIDES TO DO SO, IT SHOULD STAY THIS CASE UNTIL RESOLUTION OF ITS PENDING CASE OF RUSHING.

A. Prerequisites for certified questions.

As set forth in the facts, the Fourth District certified two questions of great public importance. This Court has explained that, "In order to have discretionary jurisdiction based on a certified question, there are essentially three prerequisites that must be met." Floridians for a Level Playing Field v. Floridians Against Expanded Gambling, 967 So. 2d 832, 833 (Fla. 2007). "First, it is essential that the district court of appeal pass upon the question certified by it to be of great public importance. We have previously discharged jurisdiction where the district court of appeal has not in fact

passed upon the question certified." *Id*. "Second, there must be a district court 'decision' to review," such as a clear majority decision on the issue rather than no resolution on the merits. *Id*. Third, a majority must certify the question. *Id*.

B. The first certified question is already pending before this Court in State v. Rushing, SC10-1244, so this Court should stay any decision pending resolution of that case.

The first question certified was whether the standard jury instruction on attempted manslaughter constituted fundamental error, which was the issue in the case. However, there is a case already pending before this Court, State v. Rushing, SC10-1244, wherein the same issue is presented as to the same instruction on attempted voluntary manslaughter. In the first issue in that case, the state is asking this Court to consider conflicts within at least three districts as to the standard jury instruction on attempted manslaughter, and whether the intent to kill is an element of the offense. *See* this Court's file, Rushing v. State, SC10-1244, Jurisdictional Brief of Petitioner, pp.3-8. It appears the jurisdictional briefs in that case were filed in June and July 2010.

In his jurisdictional brief in this case, petitioner Williams points out that his decision implicates the same issues as Rushing. *See* Petitioner's Brief on Jurisdiction, pp.12-13.

The Rushing opinion is factually very similar to this opinion at issue. As here, the Rushing appellant was charged with attempted first degree murder, was found guilty of attempted second degree murder, and the jury received the standard jury instruction on the lesser included offense of attempted voluntary manslaughter. Rushing v. State, --- So. 3d ---, 35 Fla. L. Weekly D1376, 2010 WL 2471903 (Fla. 1st DCA June 2, 2010). The district court found that the standard instruction on attempted manslaughter was fundamental error, suffering from the same infirmities as the manslaughter instruction in Montgomery. *Id*. at *2.

This case should be stayed pending Rushing.

C. The district court did not pass upon the second question it certified.

As to the second question certified here—whether attempted manslaughter is still a viable offense in light of this Court's Montgomery decision—this Court is without jurisdiction. The Fourth District did not in fact pass upon this question, as it was required to do. Instead, it simply asked it. In its opinion, the district court noted that in the 1983 case of Taylor v. State, 444 So. 2d 931, 934 (Fla. 1983), this Court had "held that attempted manslaughter is a cognizable crime in the State of Florida." Williams, 40 So. 3d at 75. The Fourth District then made no further comments related to this prior to certifying its question.

This Court has clearly stated, "This Court has no jurisdiction to answer a question certified by a district court when that court has not first *passed upon* the question certified." Salgat v. State, 652 So. 2d 815, 815 (Fla. 1995) (emphasis in original); s*ee also* Floridians for a Level Playing Field, 967 So. 2d at 833 ("We have previously discharged jurisdiction where the district court of appeal has not in fact passed upon the question certified."); Pirelli Armstrong Tire Corporation v. Jensen, 777 So. 2d 973, 974 (Fla. 2001) ("Because in rendering its decision, the Second District did not pass upon the question certified to this Court, we are without jurisdiction to review this case.").

D. There is no direct conflict between this decision and Lamb v. State.

While this Court has discretionary jurisdiction to review a district court's certification of direct conflict with another case, it may conclude that the two decisions do "not expressly and directly conflict" with each other. Edwards v. State, 679 So. 2d 772, 772 (Fla. 1996). This Court may dismiss a petition regardless of the certified conflict. *Id*. (dismissing after accepting jurisdiction based on certified conflict).

This Court's conflict jurisdiction involves express and direct conflict with a decision from another Florida district court of appeal or from this Court, on the same point of law, appearing "within the four corners of the

majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). The only relevant facts are "those facts contained within the four corners of the decisions allegedly in conflict." *Id*. This is so because this Court's powers "to review decisions of the district courts of appeal are limited and strictly prescribed." Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980).

Here the Fourth District Court of Appeal certified conflict with Lamb v. State, 18 So. 3d 734 (Fla. 1st DCA 2009). However, Lamb is a one-paragraph decision that gives virtually no facts. Rather, it states only that based on Montgomery, "the trial court committed fundamental error by giving the standard jury instruction for attempted manslaughter by act, which adds the additional element that the defendant 'committed an act intended to cause the death' of the victim when attempted manslaughter by act requires only an intentional unlawful act." *Id*. at 735.

The opinion does not state the charges against the appellant. It does not indicate if the jury instruction was as to the charged crime or if it was a lesser included offense of another crime. It gives no facts or actual legal analysis. It is possible that the Lamb defendant was not charged with attempted first degree murder and/or attempted second degree murder, and that the jury was not instructed as to these. It is possible the Lamb court was

finding that the jury instruction, even standing alone, was fundamental error. This cannot be discerned from the brief opinion.

Petitioner also states that his opinion conflicts with Rushing and Coiscou v. State, 43 So. 3d 123 (Fla. 3d DCA 2010). As already noted in this brief, Rushing is presently pending before this Court, so any decision as to this case should be stayed pending Rushing's resolution. As to Coiscou, it appears that court misstated the law, as it discusses what it perceives was the "**then existing** standard" instruction on attempted voluntary manslaughter, which it states was disapproved of in Montgomery. Coiscou, 43 So. 3d at 124 (emphasis supplied). However, the standard instruction on attempted manslaughter has not been changed to date; it remains the same as it was prior to the Coiscou decision.

There is no way to determine that there is direct and express conflict between this and the certified case, so conflict jurisdiction would not be appropriate.

CONCLUSION

For the foregoing reasons, discretionary review should not be granted as to the certified conflict case or the certified questions, or this case should be stayed pending resolution in Rushing, which is presently before this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been forwarded via courier to counsel for petitioner: Dea Abramschmitt, Assistant Public Defender, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401, on October 29, 2010.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman 14-point type and complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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Counsel for Respondent