

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC

Lower Tribunal No. 3D09-740

CARL LEGGETT, JR.,

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

BILL McCOLLUM
Attorney General

RICHARD L. POLIN
Bureau Chief, Criminal Appeals
Florida Bar No. 0230987

HEIDI MILAN CABALLERO
Florida Bar No. 0022386
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
Tel.: (305) 377-5441
Fax: (305) 377-5655

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INTRODUCTION

Petitioner, CARL LEGGETT, was the Defendant in the trial court and the Appellant in the Third District. Respondent, THE STATE OF FLORIDA, was the Prosecution in the trial court and the Appellee in the Third District. The parties shall be referred to as they stand in this Court. In this brief, all references to the opinion under review will be referred to as they exist in the published opinion, Leggett v. State, ___ So.3d ___ (Fla. 3d DCA March 10, 2010)(attached hereto as Appendix "A").

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with second degree murder. (App. "A" at p. 2).The jury was instructed on manslaughter by intentional act as a lesser included offense. *Id.* After a jury trial in February 2006, Petitioner was convicted of second degree murder. His conviction and sentence were affirmed in 2007. *See, Leggett v. State*, 961 So.2d 951 (Fla. 3d DCA 2007). *Id.*

Petitioner filed a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel "for failing to raise a claim of fundamental error in the giving of the standard jury instruction on manslaughter by intentional act. (App. "A" at p. 2).

Relying on its earlier precedent in *Valdes-Pino v. State*, 23 So.3d 871 (Fla. 3d DCA 2009), the Third District Court of Appeal found that there was no fundamental error in the giving

of the standard jury instruction. (App. "A" at p. 2). The Third District certified direct conflict with *Montgomery v. State*, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009). *Id.*

SUMMARY OF ARGUMENT

Respondent concedes that there is a direct conflict between the decision under review and *Montgomery v. State*, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009). *Montgomery*, however, is currently pending before this court. See, *State v. Montgomery*, 11 So.3d 943 (Fla. 2009). Under these circumstances, Petitioner's application for discretionary review must be stayed pending resolution of *State v. Montgomery*.

ARGUMENT

PETITIONER'S APPLICATION FOR DISCRETIONARY
REVIEW MUST BE STAYED PENDING RESOLUTION OF
STATE v. MONTGOMERY, 11 So.3d 943 (Fla.
2009).

The Third District Court of Appeal certified direct conflict with *Montgomery v. State*, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009) review granted 11 So.3d 943 (Fla. 2009). Oral argument was heard in this Court for *State v. Montgomery*, 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 and believes that this Court has jurisdiction to review it. Respondent believes, however, that this matter should be stayed pending resolution of *State v. Montgomery*.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that this Court stay review of this cause.

Respectfully submitted,

BILL McCOLLUM
Attorney General

RICHARD L. POLIN
Florida Bar No. 0230987
Bureau Chief, Criminal Appeals

HEIDI MILAN CABALLERO
Florida Bar No. 0022386
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
Tel.: (305) 377-5441
Fax: (305) 377-5655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed and this ___ day of March, 2010 to AMY WEBER, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

HEIDI MILAN CABALLERO

CERTIFICATE REGARDING FONT SIZE AND TYPE

The foregoing Brief of Respondent on Jurisdiction was typed in Courier New, 12-point font, in accordance with the Florida Rules of Appellate Procedure.

HEIDI MILAN CABALLERO