

IN THE SUPREME COURT OF FLORIDA

CATALINO BURGOS, :  
 :  
 Petitioner, :  
 :  
 vs. : Case No.  
 :  
 STATE OF FLORIDA, :  
 :  
 Respondent. :  
 :  
 \_\_\_\_\_ :

DISCRETIONARY REVIEW OF DECISION OF THE  
DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Catalino Burgos was charged with second degree murder with a weapon. The case was tried to a jury on April 29, 2008. The jury was instructed on the lesser included offense of manslaughter. The instruction on manslaughter stated that the State had to prove that the victim was dead and that the defendant intentionally caused his death. Mr. Burgos was convicted of second degree murder.

Mr. Burgos appealed to the Second District Court of Appeals. Mr. Burgos relied on the First District Court of Appeals decision in Montgomery v. State, 34 Florida Law Weekly D360 (Fla. 1<sup>st</sup> DCA Feb. 12, 2009), rev granted, 11 SO. 3d 943 (Fla. 2009). The decision held that it was fundamental error for the trial court to give the standard instruction on manslaughter by act because it erroneously suggested that intent to kill was an element of the crime of manslaughter. The First District certified the question: "Is the State Required to Prove That the Defendant Intended to Kill the Victim in Order to Establish the Crime of Manslaughter by Act," as one of great public importance. The certified question was accepted for review by this Court, and is presently pending. (SC09-322)

On November 6, 2009, the Second District Court affirmed Mr. Burgos' case *per curiam*. Mr. Burgos filed a Motion for Rehearing

requesting the Court to issue an opinion based upon conflict between its ruling in this case, and the First District decision in Montgomery v. State, 34 Florida Law Weekly D360 (Fla. 1<sup>st</sup> DCA Feb. 12, 2009).

The Second District Court of Appeals granted Mr. Burgos' motion, withdrew its prior opinion, and issued a written opinion. Burgos v. State, 34 Fla. L. Weekly D2611 (Fla. 2d DCA Dec. 18, 2009). That opinion affirmed the conviction, and held that the standard manslaughter by Act jury instruction was not fundamentally erroneous citing its opinion in Zeigler v. State, 18 So.3d 1239 (Fla. 2d DCA 2009). The Court of Appeals certified conflict with Montgomery.

A timely Notice to Invoke Jurisdiction was filed on January 12, 2010.

SUMMARY OF THE ARGUMENT

The Second District certified its decision below to be in conflict with the First District's decision in Montgomery v. State, pending before this Court. See also Jollie v. State, 405 So. 2d 418 (Fla. 1981).

The standard jury instruction for Manslaughter by Act given to Mr. Burgos' jury could be misunderstood by jurors to require Mr. Burgos to intend to kill the victim. The instruction for Second Degree Murder did not require intent to kill. Therefore, the instruction for manslaughter not only erroneously required an additional incorrect element, but the element could have forced the jury to convict of the higher offense, Second Degree Murder, which did not require intent to kill, whereas Manslaughter, the lesser did. That the jury convicted Mr. Burgos of Second Degree Murder shows they did not find an intent to kill.

Mr. Burgos requests this Court accept certified conflict jurisdiction to resolve the conflict between Montgomery and Burgos concerning whether giving the jury instruction for Manslaughter by Act was fundamental error.

ARGUMENT  
ISSUE

THE DECISION OF THE SECOND DISTRICT COURT OF APPEALS IN THIS CASE IS IN DIRECT CONFLICT WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEALS IN MONTGOMERY V. STATE, 34 FLW D360 (Fla. 1<sup>st</sup> DCA, Feb. 12, 2009), REVIEW GRANTED, 11 SO.3D 943 (FLA. 2009).

The Second District in this matter held that the Manslaughter by Act instruction given at trial did not require intent to kill. The First District Court of Appeals in Montgomery v. State, 34 Florida Law Weekly D360 (Fla. 1<sup>st</sup> DCA Feb. 12, 2009), found that the same instruction could be understood by jurors to require intent to kill. Such misunderstanding could result in jurors convicting of the greater offense, Second Degree Murder, because it does not require intent to kill, while refusing to convict of the lower offense, Manslaughter by Act, because it appeared to require intent to kill. This Court recognized the problem because it amended the same jury instruction to clarify the specific element of what intent was required fir Manslaughter by Act. Re: Standard Jury Instructions in Criminal Cases- Report No. 2007-10, 997 So.2d 403 (Fla. 2008).

Petitioner respectfully requests this Court grant discretionary review and resolve the certified conflict by quashing the decision below.

CONCLUSION

This Court has discretionary jurisdiction based upon certified conflict and the Court should exercise that jurisdiction to consider the merits of Petitioner's argument.



APPENDIX

1. Burgos v. State, 34 FL. L. Weekly D2611  
(Fla. 2d DCA, Dec. 18, 2009).

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Diana K. Bock, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this \_\_\_\_\_ day of January, 2010.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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Enclosures as stated