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IN THE SUPREME COURT OF FLORIDA

STEVE LAWRENCE GRIFFIN, JR.

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

SC13-2450
DCA Case No. 2D11-4728

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts.

SUMMARY OF THE ARGUMENT

In Griffin v. State, 38 Fla. L. Weekly D1972 (Fla. 2d DCA Sept. 18, 2013), the Second District held that an erroneous jury instruction on manslaughter by act was not fundamental error because the element of intent was never in dispute. This holding does not expressly and directly conflict with any cases from this Court or another district court. Therefore, this Court may not exercise its jurisdiction to review the opinion of the Second District.

ARGUMENT

ISSUE

DOES THIS COURT HAVE SUBJECT MATTER JURISDICTION, WHERE NO EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE SECOND DISTRICT'S OPINION IN GRIFFIN AND ANY CASES FROM THIS COURT OR ANY OTHER DISTRICT COURT OF APPEAL? (Restated by Respondent)

Petitioner asserts that this Court has jurisdiction to review the Second District's decision in Griffin v. State, 38 Fla. L. Weekly D1972 (Fla. 2d DCA Sept. 18, 2013), under authority of article V, section 3(b)(3) of the Florida Constitution. More specifically, Petitioner alleges that Griffin expressly and directly conflicts with the following cases: State v. Montgomery, 39 So. 3d 252 (Fla. 2010); State v. Wimberly, 498 So. 2d 929 (Fla. 1986); Pena v. State, 901 So. 2d 781 (Fla. 2005); State v. Abreau, 363 So. 2d 1063 (Fla. 1978); and Willis v. State, 70 So. 3d 739 (Fla. 5th DCA 2011). However, as Respondent will demonstrate, no conflict exists between these cases and Griffin, and this Court should decline review accordingly.

Petitioner was charged with and convicted of second-degree murder, and his jury received the faulty instruction for the lesser included offense of manslaughter by act. On appeal, he argued that inclusion of that instruction constituted fundamental error. The Second District rejected this claim,

holding that the error was not fundamental because intent was never in dispute. In reaching this conclusion, the Second District relied on this Court's recent opinions in Haygood v. State, 109 So. 3d 735 (Fla. 2013) and Daniels v. State, 121 So. 3d 409 (Fla. 2013), in which this Court reiterated that a jury instruction is fundamental error *only when the element at issue is disputed and material to the jury's consideration of the charges*. In both cases, this Court held that the instruction was fundamental error because the issue of intent was disputed. See Haygood, 109 So. 3d at 742 ("The elements of the offense were disputed and the instructions were pertinent and material to what the jury must consider in order to convict Haygood of any of the offenses."); Daniels, 121 So. 3d at 419 ("[B]ecause the record reflects that the issue of whether Daniels intentionally caused [the victim's] death was disputed and was pertinent and material to what the jury had to consider...we hold the error was fundamental in this case.").[1]

According to Petitioner, this Court's opinion in Montgomery requires reversal *whenever* the erroneous manslaughter instruction is given, as long as that offense is no more than one step removed from the offense for which the defendant is

[1] Contrary to Petitioner's assertion, Griffin did not depart from Second District precedent. Petitioner moved for rehearing en banc on the basis of intra-district conflict between Griffin and Curry v. State, 64 So. 3d 152 (Fla. 2d DCA 2011), but the motion was denied.

convicted. In so arguing, Petitioner relies on a single segment of the Montgomery opinion:

> Because Montgomery's conviction for second-degree murder was only one step removed from the necessarily lesser included offense of manslaughter...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, 39 So. 3d at 259.

However, Petitioner fails to recognize that Montgomery requires more than the one-step-removed conviction to find fundamental error; as this Court relayed earlier in its opinion, it also requires that the erroneous manslaughter instruction be "pertinent or material to what the jury must consider in order to convict." Montgomery, at 258 (quoting State v. Delva, 575 So.2d 643, 645 (Fla. 1991)). Thus, under Montgomery, giving the erroneous instruction is per se reversible error *only* when: (1) the erroneous instruction was pertinent and material to what the jury had to consider; and (2) the defendant was convicted of a crime one step removed from manslaughter by act. The Second District in Griffin determined that the former requirement was not met. In other words, because intent was not in dispute, the errant manslaughter instruction – which was faulty only because of its intent requirement – was not pertinent and material to the jury's considerations. This holding does not expressly and

directly conflict with Montgomery. To the contrary, Griffin entirely adheres to Montgomery's dictates.

Likewise, Griffin does not expressly and directly conflict with Wimberly, Pena, and Abreau, which Petitioner cites as foundational case authority for the Montgomery opinion. This Court will not strain to recognize that these cases are distinguishable from Griffin, and therefore do not offer a basis for conflict jurisdiction. Wimberly simply stands for the proposition that a trial judge must instruct on necessarily lesser included offenses. Wimberly, 498 So. 2d at 932. Pena held that no fundamental error occurred when the jury was not instructed on excusable and justifiable homicide, where the defendant was convicted of an offense three steps removed, where there was no request for that instruction and no objection to the instructions as given, and where the evidence did not support any jury argument relying on the omitted instruction. Pena, 901 So. 2d at 788. Abreau held that failure to instruct the jury on an offense two steps removed from the charged offense is not per se reversible error, but that omitting an instruction only one step removed is. Abreau, 363 So. 2d at 1064. However, Abreau did not involve a faulty instruction, as in Griffin, but rather, an instruction that was omitted entirely. Id. Moreover, the omitted instruction in Abreau was two steps removed from the charged offense, contrasting with

Griffin, where the charged offense was one step removed from the challenged instruction of manslaughter by act.

As to the Fifth District's decision in Willis, it too is distinguishable from Griffin. The defendant in that case was charged with attempted first-degree murder, but convicted of attempted second-degree murder. Willis, 70 So. 3d at 740. His jury received the erroneous manslaughter instruction, and he argued on appeal that this constituted fundamental error. Id. The Fifth District stated that "Willis' defense was mistaken identity," Id., but the court engaged in absolutely no analysis of whether and how intent was disputed in that case. Without such analysis, there is no parallel between Willis and Griffin.

It is well settled that under article V, section 3(b)(3), conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Reaves v. State, 485 So. 2d 829 (Fla. 1986). Isolated, out-of-context statements from various opinions do not qualify as the express and direct conflict required for jurisdiction in this case. The cases relied upon by Petitioner contain no facts or language from which this Court can extrapolate disagreement on any point of law. Moreover, "implied" conflict cannot serve as a basis to invoke this Court's jurisdiction. Department of Health and Rehabilitative Services v. National, 498 So. 2d 888 (Fla. 1986). Because Petitioner has failed to establish that

any express and direct conflict exists, this Court must decline to exercise jurisdiction.

CONCLUSION

This Court does not have jurisdiction to review the Second District's opinion under article V, section 3(b)(3) of the Florida Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served electronically via the Florida Courts eFiling Portal to Karen M. Kinney, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, at kkinney@pd10.state.fl.us and mjudino@pd10.state.fl.us on this 2nd day of January, 2014.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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