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IN THE SUPREME COURT OF FLORIDA

STANLEY McCLOUD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	DCA CASE NO. 5D09-3179
	)	CASE NO. SC14-1150
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

PETITIONER'S JURISDICTIONAL BRIEF

JAMES S. PURDY
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SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

At his jury trial for first-degree murder, the defendant admitted he had killed his wife; the sole disputed issue at trial was his mental state at the time. (VII 251-52, 265; XII 653-54, 677) In a confession obtained the night of the murder, the defendant said ten times that he shot his wife because she confessed to a recent infidelity that night and would not drop the subject. (XI 498, 499, 501, 502, 505-06, 509, 510, 514, 516, 521) The arresting officers testified that he repeatedly gave the same explanation in their patrol car. (IX 301-02, 308-09, 310-12, 314-16) The defense put on no case, but successfully argued for a special jury instruction explaining the "heat of passion" defense. (XI 621-29; XII 635-37)

The jury was instructed on first-degree premeditated murder, second-degree murder, third-degree murder predicated on aggravated assault, voluntary manslaughter, and culpable-negligence manslaughter. (XII 701-08) Third-degree murder was listed on the verdict form below second-degree murder and above manslaughter. (III 373-74) The jury returned a verdict of guilty of second-degree murder, and the court imposed a sentence of life in prison. (XII 767, 770, 789)

On direct review, the defendant relied on State v. Montgomery, 39 So. 3rd 252 (Fla. 2010). The District Court affirmed, citing to cases then pending review in this court on whether Montgomery required reversal of a second-degree murder

conviction although a culpable-negligence manslaughter instruction was given. McCloud v. State, 53 So. 3rd 1206 (Fla. 5th DCA 2011). This court, in case no. SC11-354, quashed the DCA's decision by order, remanding for reconsideration in light of Haygood v. State, 109 So. 3rd 735 (Fla. 2013). See McCloud v. State, 2014 WL 814911 (Fla. February 27, 2014). On remand, the DCA issued a decision and opinion on May 30, 2014, affirming the conviction as follows:

> In this case, the lesser included offense of manslaughter by act was two steps removed from the second-degree murder conviction due to the inclusion of the felony murder charge in the jury instructions and on the verdict form. Accordingly, pursuant to the ruling in Haygood v. State, 109 So. 3rd 735 (Fla. 2013), we have undertaken a harmless error analysis. See also Pena v. State, 901 So. 2d 781 (Fla. 2005). Based upon that analysis, we hold that the trial court's error in instructing the jury on the lesser included offense of manslaughter by act was harmless. Accordingly, we affirm McCloud's conviction and sentence for second-degree murder. See also Daugherty v. State, 96 So. 3rd 1076 (Fla. 4th DCA 2012), *rev. granted*, no. SDC13-1791 (Fla. May 1, 2014).

McCloud v. State, 2014 WL 2217339 (Fla. 5th DCA May 30, 2014). Timely notice invoking this court's discretionary jurisdiction was filed in the District Court on June 5, 2014.

SUMMARY OF ARGUMENT

The Fifth DCA, in its opinion issued on remand from this court, cited Daugherty v. State, 96 So. 3rd 1076 (Fla. 4th DCA 2012). If this court accepts Daugherty for review on the merits, it will have jurisdiction to review the DCA's decision pursuant to Jollie v. State, 405 So. 2d 418, 421 (Fla. 1981).

If this court does not accept Daugherty for review on the merits, it still has jurisdiction to review the Fifth DCA's decision on the ground of express and direct conflict with Herrington v. State, 538 So. 2d 850 (Fla. 1989), Jackson v. State, 622 So. 2d 182 (Fla. 1st DCA 1983), and Marshall v. State, 529 So. 2d 797 (Fla. 3rd DCA 1988), on the same question of law.

Further, the DCA's decision misapplies this court's decisions in Herrington, supra, and Reed v. State, 837 So. 2d 366 (Fla. 2002).

ARGUMENT

THE DISTRICT COURT'S DECISION "PAIRED" THIS CASE FOR REVIEW WITH A CASE THIS COURT MAY ACCEPT FOR REVIEW ON THE MERITS. FURTHER, THE DCA'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DCA'S. FURTHER, THE DCA'S DECISION MISAPPLIES PRECEDENT FROM THIS COURT.

JOLLIE v. STATE

The Fifth DCA, in its opinion issued in this case on remand from this court, cited Daugherty v. State, 96 So. 3rd 1076 (Fla. 4th DCA 2012). At that time, the Fifth DCA noted that this court had granted review in Daugherty in its case no. SC13-1791. In SC13-1791 this court granted Mr. Daugherty's petition seeking *belated* review, then closed case no. SC13-1791 and opened case no. SC14-860 to determine the merits of his claims. As of the date of this writing, the Respondent's jurisdictional brief in case no. SC14-860 is due to be filed June 20, 2014.

"A district court PCA opinion which cites as controlling a case that is *pending review* in...this Court" renders the PCA'd case reviewable in this court. Jollie v. State, 405 So. 2d 418, 421 (Fla. 1981) (emphasis added). "Pending review," for this purpose, means that the decision whether to accept discretionary review in the controlling case must already have been made; the controlling case

must be pending for disposition on the merits. Harrison v. Hyster Co., 515 So. 2d 1279, 1280 (Fla. 1987).

If this court accepts Daugherty for review on the merits, this court will have jurisdiction to review this matter pursuant to Jollie, supra.

EXPRESS AND DIRECT CONFLICT

If this court does not accept Daugherty for review on the merits, this court still has jurisdiction to review the Fifth DCA's decision in this case on the ground of express and direct conflict with another decision of this court, or another DCA, on the same question of law. In its opinion, the Fifth DCA relied both on Daugherty and on Pena v. State, 901 So. 2d 781 (Fla. 2005), for a rule that manslaughter is two steps removed from second-degree murder in any case where the verdict form lists third-degree felony murder above manslaughter. This court's opinion in Pena does so hold. 901 So. 2d at 787. Accord Echols v. State, 484 So. 2d 568, 574 (Fla. 1985), cited in Daugherty.

The rationale behind Pena, Echols, and Daugherty is that the "one step" rule announced in State v. Abreau, 363 So. 2d 1063 (Fla. 1978), is satisfied if the jury had *any* opportunity to issue a jury pardon in the case. Abreau holds that if an erroneous jury instruction is given on a lesser offense one step removed from the offense at conviction, the conviction is reversed *per se*, but that if the error

affected any other lesser offense, harmless error analysis is appropriate.

Pena, Echols, and Daugherty conflict with Herrington v. State, 538 So. 2d 850 (Fla. 1989), Jackson v. State, 622 So. 2d 182 (Fla. 1st DCA 1983), and Marshall v. State, 529 So. 2d 797 (Fla. 3rd DCA 1988). In Herrington, the defendant was convicted of second-degree murder; his jury was instructed on the lesser-included offense of manslaughter by act, but not on the lesser-included offense of third-degree felony-murder. This court reversed his conviction, holding that "[e]ven though the court gave an instruction on manslaughter, which, like third-degree felony murder, is a second-degree felony, the failure to instruct on third-degree felony-murder cannot be deemed harmless error because third-degree felony-murder is only one step removed from the crime charged." 538 So. 2d at 851. Jackson v. State, 622 So. 2d 182 (Fla. 1st DCA 1993), relies on Herrington to reverse on indistinguishable facts, citing also to Marshall v. State, 529 So. 2d 797 (Fla. 3rd DCA 1988).

Marshall involved a conviction for attempted second-degree murder; the defendant argued on appeal that failure to instruct on the third-degree felony of attempted manslaughter was reversible error. The Third DCA agreed, holding that the fact Marshall's jury was instructed on the additional third-degree felony of attempted third-degree felony-murder did not salvage the conviction, since "even

if the trial court gives an instruction on an offense one step removed, the failure to instruct, upon the defendant's request, on another offense one step removed from the offense for which the defendant was convicted, is *per se* reversible." 529 So. 2d at 798.

Herrington, Jackson, and Marshall hold that a lesser offense is "one step removed" from the offense at conviction if it is one degree in severity lower than that offense; those cases thus hold that in any given case more than one lesser offense can be "one step removed." Pena, Echols, and Daugherty appear to hold, in contrast, that the "one step" analysis depends exclusively on how the verdict form is ordered, and thus that in any given case only one offense can be "one step removed" from the offense at conviction. This court should accept review of this case to resolve the conflict.

MISAPPLICATION OF THIS COURT'S PRECEDENT

After it decided that Abreau does not apply, the Fifth DCA conducted harmless-error analysis and held that failure to give a correct manslaughter instruction was harmless. This court holds that "fundamental error occurs in a jury instruction where the instruction pertains to a disputed element of the offense and the error is pertinent or material to what the jury must consider to convict." Haygood v. State, 109 So. 3rd 735 (Fla. 2013). This court further holds that

fundamental error cannot be deemed harmless. Reed v. State, 837 So. 2d 366, 369-70 and n.3 (Fla. 2002).

At common law, heat of passion killings were treated as voluntary manslaughter. See Olds v. State, 44 Fla. 452, 33 So. 296, 299-300 (Fla. 1902). "The law reduces the killing of a person in the heat of passion from murder to manslaughter...because in such case there is an absence of malice." Febre v. State, 158 Fla. 853, 857, 30 So. 2d 367, 369 (1947) (citations omitted). Justice Canady, in his dissent in Haygood, cites Febre, noting that a sudden heat of passion "could provide [a] basis for a rational jury to return a verdict for manslaughter by act." 109 So. 3rd at 747 (Canady, J., dissenting).

In this case, what went on in the defendant's mind when he fired was the only disputed issue, and his heat of passion defense was amply supported by the evidence. The second-degree felony of manslaughter, like the second-degree felony of third-degree murder, is one step removed from second-degree murder. Herrington. A misleading instruction on manslaughter cannot be deemed impertinent or immaterial to what the jury must consider on the facts of this case, regardless which second-degree felony is listed higher on the verdict form. The DCA misapplied Reed and Herrington when it held the error was harmless in this case, and this court should exercise its discretionary jurisdiction on that basis.

CONCLUSION

If this court accepts Daugherty v. State, 96 So. 3rd 1076 (Fla. 4th DCA 2012), for review on the merits, it may review this matter pursuant to Jollie v. State, supra. If this court does not accept Daugherty for review on the merits, it should still exercise its discretionary jurisdiction based on express and direct conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed to the Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida, 32118, crimappdab@myfloridalegal.com and Kristen L. Davenport, kristen.davenport@myfloridalegal.com, on this 16th day of June, 2014.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

Nancy Ryan

Nancy Ryan