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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC14-860

THOMAS DAUGHERTY,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the appellant and Respondent was the appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as "the State."

In this brief, the symbol "A" will be used to denote the appendix. The symbol "IB" will be used to denote the Initial Brief on Jurisdiction and it may be followed by the appropriate page number for that document.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's Statement of the Case and Facts as set forth in his brief on jurisdiction for purposes of this Court's decision on whether to accept or decline jurisdiction except for any minor additions, corrections or clarifications in the argument that follows.

SUMMARY OF THE ARGUMENT

Issue I: As to Petitioner's contention that the trial court fundamentally erred in instructing the jury on manslaughter as a lesser included offense of Count I, this

Court should decline to accept jurisdiction. Although, as Petitioner notes, this Court reversed the decision of the lower court in Haygood v. State, 109 So. 3d 735 (Fla. 2013), the reversal does not provide a basis for jurisdiction on this issue. Among other things, the Fourth District did not cite the lower court case as controlling authority, and so, discretionary jurisdiction does not lie.

ISSUE II: As for the issue of whether the trial court fundamentally erred in giving an instruction on attempted voluntary manslaughter as a lesser included offense of Counts II and III, it is true that the Fourth District relied on Williams v. State, 40 So. 3d 72 (Fla. 4th DCA 2010), which was ultimately reversed by this Court in Williams v. State, 123 So. 3d 23 (Fla. 2013). Therefore, it might appear that this Court has discretionary jurisdiction to review the instant case pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981). However, the State would submit that the Williams case is distinguishable and so jurisdiction should be declined.

ARGUMENT

ISSUE I: THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION ON THE ISSUE OF WHETHER FUNDAMENTAL ERROR OCCURRED IN INSTRUCTING THE JURY ON MANSLAUGHTER AS A LESSER INCLUDED OFFENSE OF COUNT I. (Restated).

As this Court's decisions in Persaud v. State, 838 So. 2d 529, 532 (Fla. 2003), and Jollie v. State, 405 So. 2d 418 (Fla. 1981), make clear, this Court will review only those district court opinions that cite as "controlling authority" a case that is pending review or in or has been reversed by this Court. As this Court said in Persaud:

> In Jollie, we reaffirmed that "mere citation PCA decisions ... will remain nonreviewable by this Court" and distinguished those district court PCA opinions that cite as **controlling authority** "a case that is pending review in or has been reversed by this Court." 405 So.2d at 421.

Persaud, 838 So. 2d at 531-32 (emphasis added).

Here, the Fourth District certainly did not cite Haygood v. State, 54 So. 3d 1035 (Fla. 2d DCA), rev. granted, 61 So. 3d 410 (Fla. 2011), decision reversed, 109 So. 3d 735 (Fla. 2013), as controlling authority. Rather, the appellate court only referred to Haygood once, in a footnote, and only to explain that Haygood was **not** relevant to the instant case as follows:

> Accordingly, our resolution of this issue will not be affected by the Florida Supreme Court's ultimate determination regarding the certified question in Haygood v. State, 54 So. 3d 1035 (Fla. 2d DCA 2011), *rev. granted*, 61 So. 3d 410 (Fla. 2011).

Daugherty v. State, 96 So. 3d 1076, fn.1 (Fla 4th DCA 2012).

The Fourth District was correct in that Haygood and all of its progeny are totally irrelevant as to the

manslaughter conviction. Here, the jury was also instructed on the lesser included offense of third-degree felony murder. Daugherty, 96 So. 3d at 1078. Therefore, in this case, manslaughter was two steps removed from second degree murder, with third degree felony murder being an intervening offense. See Echols v. State, 484 So. 2d 568, 574 (Fla. 1985)(manslaughter was three steps removed from first degree murder). Haygood applies only when manslaughter is one step removed from the second degree murder conviction. "When the trial court fails to properly instruct on a crime two or more degrees removed from the crime for which the defendant is convicted, the error is not per se reversible, but instead is subject to a harmless error analysis." Pena v. State, 901 So. 2d 781, 787 (Fla. 2005). See also, McCloud v. State, 2014 WL 2217339 (Fla. 5th DCA 2014).

Under these circumstances, the State submits that this Court should, within the exercise of its discretion, not review this issue, even if it accepts jurisdiction to review Issue II.

ISSUE II: THE DECISION OF THE FOURTH DISTRICT HAS BEEN CERTIFIED TO BE IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL; HOWEVER, JURISDICTION SHOULD BE DECLINED. (Restated)

As for the issue of whether the trial court fundamentally erred in instructing the jury on attempted voluntary manslaughter as a lesser included offense of Counts II and III, the Fourth District did certify in this case that its decision was in conflict with the decisions of other courts of appeal. Moreover, the Fourth District relied on its own prior precedent in Williams v. State, 40 So. 3d 72 (Fla. 4th DCA 2010), which was ultimately reversed by this Court in Williams v. State, 123 So. 3d 23 (Fla. 2013). Therefore, pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981), this Court might seem to have jurisdiction.

The State would note that the Fourth District certified conflict almost two years ago. There have been multiple opinions issued since then which hold that the alleged error in the instructions is not fundamental if intent is not at issue. E.g., Ebron v. State, 134 So. 3d 481 (Fla. 1st DCA 2013)(instruction on attempted manslaughter did not rise to level of fundamental error because it did not involve a disputed element of the crime; in Ebron, the intent to kill was not a disputed element); Griffin v. State, 128 So. 3d 88, (Fla. 2d DCA 2013). Consequently, the State suggests there are insufficient

facts in the instant record based on which this Court could conclude that a true conflict **presently** exists.

There is another reason this Court should decline to accept jurisdiction, but it, admittedly, relies on facts not within the four corners of the opinion. In response to a contention that one may not normally rely on facts outside the four corners of the opinion, the State notes that this prohibition seems best applied to cases involving express and direct conflict. In those cases, a petitioner actually has to show that, based on the facts set forth in the opinion, an express and direct conflict exists between that opinion and the opinion of another court. The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition).

In cases involving a certification of conflict, however, it is possible for a court to certify conflict with another court without citing to any facts whatsoever. That being so, it becomes difficult for a party to show that there is, in fact, no conflict, without citing to

facts outside the opinion. It is true that the lower court has certified conflict, and that is enough for this Court's jurisdiction, if it chooses to assert it. But, the question of whether this Court should, in its discretion, accept, or not accept, jurisdiction still remains, and it may not be possible to fully address this question without bringing out facts that do not lie within the four corners of the opinion. Therefore, facts that are outside the four corners of the opinion can nonetheless be relevant to the question of whether this Court should exercise its jurisdiction.

Assuming this Court can, in fact, rely on facts outside the four corners of the instant opinion in a case where conflict has been certified, for the purposes of determining whether a true conflict exists, then another reason for declining to accept jurisdiction in the instant case becomes apparent. The instant case presents a fact pattern not presented in, or governed by, Williams. Here, the jury was instructed, among other things, on the lesser included offenses of aggravated battery with a deadly weapon and/or great bodily harm which is the same level offense as, if not an even higher level offense than, attempted manslaughter with a weapon. Attempted manslaughter with a weapon is a second degree felony. § 782.07(1), Fla. Stat.; § 777.04, Fla. Stat.; § 775.087,

Fla. Stat. Aggravated battery is at least a second degree felony. § 784.045(2), Fla. Stat.

If the jury had the option of convicting the defendant for a lesser included offense of the charged crime, which was at least equal to attempted manslaughter, yet less than attempted second degree murder, and the jury consciously chose to reject that option and find the defendant guilty of attempted second degree murder, why should the alleged error in the instructions be deemed fundamental? Notably, in this case, the striking with the bat provides the intentional act for both the aggravated battery and the attempted manslaughter. Therefore the crimes cannot be distinguished in this manner.

Under the circumstances, the alleged error is not fundamental and Williams is distinguishable. That being so, this Court should decline to accept jurisdiction on Issue II as well as on Issue I.

CONCLUSION

In conclusion, the State respectfully requests this Court DECLINE to accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND CERTIFICATE OF E-FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on Jurisdiction" complete with Appendix has been furnished by electronic transmission (e-mail) to: Donna Duncan, Esquire, Sanders and Duncan, P.A., 80 Market Street, P.O. Box 157, Apalachicola, FL 32329 at ddduncan@fairpoint.net on June 20, 2014.

/s/ Jeanine Germanowicz
Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Administrative Order of this Court dated July 13, 1998, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type.

/s/ Jeanine Germanowicz
Of Counsel