

IN THE SUPREME COURT OF FLORIDA

MICHAEL J. MCCOY,

Petitioner,

V.

STATE OF FLORIDA,

Respondent.

CASE NO. SC16-1316
First DCA No. 1D14-5914

_____ /

ON DISCRETIONARY REVIEW OF THE DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

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JURISDICTIONAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Petitioner seeks review of the decision in McCoy v. State, 2016 WL 3402432 (Fla. 1st DCA June 21, 2016) (attached as an appendix to this brief). Petitioner was the Appellant and Respondent was the Appellee in the proceedings in the First District Court of Appeal. The parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

After a trial by jury, Petitioner Michael J. McCoy was found guilty of one count of manslaughter (a lesser) and one count of aggravated battery with a firearm (a lesser). McCoy v. State, 2016 WL 3402432 (Fla. 1st DCA June 21, 2016). Petitioner was sentenced to twenty years in prison on Count I, and twenty-five years in prison on Count II, minimum mandatory, pursuant to the 10-20-Life statute, imposed consecutively.

On direct appeal, Petitioner challenged his conviction and sentence for aggravated battery, arguing that “the jury instructions and verdict form were fundamentally erroneous because the aggravated battery was listed after the attempted manslaughter option.” McCoy at 1. Petitioner asserted that the law required the lesser offenses to be listed on the verdict form in descending order by degree of offense. Id. In this case, the lesser offense of attempted manslaughter, a third-degree felony, with a maximum sentence of five years in prison, was listed before the aggravated battery, a second-degree felony, with a maximum sentence of fifteen years in prison (which here was enhanced to a minimum mandatory sentence of twenty-five years in prison under the 10-20-Life statute). Id. Petitioner argued that the error was fundamental; defense counsel did not object to the order of offenses on the verdict form. Id. The First District Court rejected Petitioner’s argument and followed its

previous holding in Graham v. State, 100 So.3d 755 (Fla. 1st DCA 2012). The First District Court held that, "An error in the trial court's listing of lesser-included offenses on a verdict form and in jury instructions is not fundamental error in this district." The First District certified conflict with Thomas v. State, 91 So.3d 880 (Fla. 5th DCA 2012), in which the Fifth District Court held that failure to list lesser included offenses on a verdict form in descending order by degree of offense was fundamental error. McCoy at 1. Petitioner filed a petition for discretionary review in this Court. The petition was granted.

SUMMARY OF THE ARGUMENT

Under article V, § 3(b)(3), Florida Constitution, this Court has jurisdiction and the discretion to exercise that jurisdiction to review the First District Court's decision in McCoy, where the court certified conflict with Thomas, 91 So.3d 880. The issue raised by this conflict is whether an error in a verdict form which results in lesser included offenses being listed in incorrect order (not in descending order of degree) is fundamental error. The First District Court held that it is not fundamental error, while the Fifth District Court held that the error is fundamental. This Court should exercise its jurisdiction and resolve the conflict.

ARGUMENT

**THE COURT SHOULD ACCEPT JURISDICTION TO
RESOLVE THE CONFLICT BETWEEN MCCOY AND
THOMAS.**

This Court has jurisdiction to review the First District Court's decision in McCoy under article V, § 3(b)(3), of the Florida Constitution. In McCoy, the First District certified conflict with the Fifth District Court's decision in Thomas v. State, 91 So.3d 880 (Fla. 5th DCA 2012).

The issue raised by the First District Court's decision is whether it is fundamental error for lesser included offenses to be listed in incorrect order (not in descending order of degree) on a verdict form. In Petitioner's case, the verdict form listed the lesser offense of attempted manslaughter, a third-degree felony, with a maximum sentence of five years in prison, before the aggravated battery, a second-degree felony, with a maximum sentence of fifteen years in prison (which here was enhanced to a minimum mandatory twenty-five years in prison under the 10-20-Life statute). McCoy at 1. Defense counsel did not object to the order of offenses on the verdict form, nor did he affirmatively waive the issue. The jury found Petitioner guilty of aggravated battery, the lesser offense that was listed last on the verdict form. Petitioner was sentenced to twenty-five years in prison, minimum mandatory (pursuant to 10-20-Life),

consecutive to his twenty year sentence for manslaughter on Count I.

In Thomas, the verdict form listed the offenses in the following order: attempted second-degree murder, aggravated battery, attempted voluntary manslaughter, and battery. Thomas at 881. The jury found the defendant guilty of aggravated battery. Id. The Fifth District Court found that the failure to list the lesser included offenses in descending order of degree was erroneous and not a harmless error because:

... based on the order in which the charges were set forth in the instructions and verdict form, the jury could reasonably have concluded that the offenses were presented in descending order of seriousness and that attempted voluntary manslaughter was less serious than aggravated battery. As such, "it is impossible to determine whether the jury, if given the opportunity, would have 'pardoned' the defendant," State v. Abreau, 363 So.2d 1063, 1064 (Fla.1978), by convicting him of attempted voluntary manslaughter under a proper instruction.

Thomas at 882. The Fifth District held that the trial court "fundamentally erred."

In McCoy, the First District Court followed its previous holding in Graham v. State, 100 So.3d 755 (Fla. 1st DCA 2012), maintaining that, "An error in the trial court's listing of lesser-included offenses on a verdict form and in jury instructions is not fundamental error in this district." The court rejected Petitioner's argument that the erroneous listing of the lesser offenses on the verdict form was fundamental error.

The First District Court affirmed Petitioner's convictions and sentences, finding that "the jury was accurately instructed and the evidence supports McCoy's convictions obtained." McCoy at 1. The court certified conflict with the Fifth District Court's decision in Thomas. McCoy at 1.

The First District Court's certification of conflict with Thomas provides this Court with jurisdiction and with the discretion to exercise that jurisdiction. This Court should accept jurisdiction and resolve the conflict between McCoy and Thomas.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, Petitioner requests that this Court exercise its discretion to accept jurisdiction of this case and order briefing on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail, to Thomas Duffy, Assistant Attorney General, Office of the Attorney General, at crimapptlh@myfloridalegal.com, and a true and correct copy has been sent via US Mail to: Michael J. McCoy, DOC # Q29802, Northwest Florida Reception Center-Annex, 4455 Sam Mitchell Drive, Chipley, Florida 32428, on this 1st day of August, 2016.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210, this brief was typed in Courier New 12 Point.

Respectfully submitted,

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