

IN THE SUPREME COURT OF FLORIDA

JESSIE CLAIRE ROBERTS,

Petitioner,

v.

Case NO. **SC15-1320**

STATE OF FLORIDA,

1ST DCA CASE NO. 1D14-321

Respondent.

Cir. Ct. NO. 16-2010-CF-5108

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RESPONSE TO ORDER TO SHOW CAUSE

Petitioner Jessie Claire Roberts, by and thorough her undersigned counsel, hereby responds to this Court's Order to Show Cause as to why jurisdiction should not be dismissed in her case because of this Court's dismissal of jurisdiction in **Garrett v. State**, SC14-2110. For the reasons stated below, Petitioner urges this Court to accept jurisdiction to resolve the conflict the lower appellate tribunal created when it misinterpreted decisions of this Court, and held that no fundamental error occurred when the trial court failed to instruct her jury on the necessary lesser included offense of attempted manslaughter.

Petitioner was convicted of Attempted Second Degree Murder, among other charges, after a jury trial, and she was sentenced to a minimum mandatory sentence of 35 years in prison. On direct appeal, Petitioner raised three issues, one of which is the subject matter of this response. On issue one, Petitioner argued the trial court committed fundamental, reversible error,

when it failed to instruct her jury on the necessary lesser offense of attempted manslaughter, a lesser which is one-step removed of the main charge of attempted second degree murder. Petitioner argued she was entitled to have her jury instructed as to the law applicable to her offense which includes the necessary lesser of attempted manslaughter. Moreover, Petitioner argued the action of the trial court in failing to instruct the jury as to the necessary lesser included offense of attempted manslaughter deprived her of the right to have the jury return a lawful verdict for the lesser offense of attempted manslaughter, an offense that could reasonable be supported by the evidence adduced at trial. The lower appellate tribunal disagreed and held that no fundamental error occurred because Petitioner's counsel did not request the instruction, and that per Jones v. State, 484 So.2d 577 (Fla.1986), the complete failure to give an instruction on a lesser included offense can never be fundamental error in a non-capital case. The opinion of the lower tribunal can be found at Roberts v. State, 168 So.3d 251 (Fla. 1st DCA 2015).

The opinion of the lower appellate tribunal misconstrued State v. Montgomery, 39 So.3d 252 (Fla. 2010); Haygood v. State, 109 So.3d 375 (Fla.2013), and State v. Lucas, 645 So.2d 425 (Fla. 1994), all of which held that a defendant is entitled to have his/her jury instructed correctly, and completely, as to the law

of the case, specially as to the lesser included offense of manslaughter, attempted manslaughter in this cause, and that even if not objected at trial, the incomplete or incorrect instruction amounted to fundamental error in their non-capital cases.

Moreover, the opinion of the lower tribunal misconstrued Jones, which merely held that a criminal defendant could waive the giving of a jury instruction in non-capital cases through counsel.

Specifically, in State v. Montgomery, 39 So.3d 252 (Fla.2010), a non capital offense, this Court found the issue of the incorrect manslaughter jury instruction to be fundamental error eventhough Montgomery did not object. This Court held in

Montgomery:

We have held that "[j]ury instructions are 'subject to the contemporaneous objection rule, and absent an objection at trial, can be raised on appeal only if fundamental error occurred. *State v. Weaver*, 957 So.2d 586, 588 (Fla. 2007) (quoting *Reed v. State*, 837 So.2d 366,370 (Fla. 2002)). Because Montgomery did not contemporaneously object to the manslaughter instruction, we apply a fundamental error analysis here. This Court has explained the proper standard for determining whether an erroneous jury

instruction constitutes fundamental error:

To justify not imposing the contemporaneous objection rule, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." In other words, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict."

State v. Delva, 575 So.2d 643, 644-645 (Fla. 1991) (quoting Brown v. State, 124 So.2d 481, 484 (Fla. 1960); Stewart v. State, 420 So.2d 862, 863 (Fla.1982)). Where the erroneous instruction, or the lack of instruction, pertains to an element it is material to the jury's deliberation and is in dispute, fundamental error occurs, as our precedent indicates, if that offense is one step removed from the crime for which the defendant is convicted. Haygood v. State, 109 So.3d 735 (Fla. 2013).

In Williams v. State 123 So.3d 23 (Fla. 2014), this Court held that manslaughter, attempted manslaughter here, is a necessarily lesser included offense of second degree murder; Stockton v. State, 544 So.2d 1006, 1007-1008 (Fla. 1989) (manslaughter is a residual offense, defined by reference to what it is not); Haygood v. State, 109 So.3d 735, 741 (Fla. 2013) (second-degree murder is no more than one step removed from the lesser offense of manslaughter); State v. Montgomery, at 258. This Court has made it clear that a jury must be instructed on category one lesser included offenses:

Manslaughter [attempted manslaughter here] is a category one lesser included offense of first-degree murder. At trial, the jury must be instructed on category one lesser included offenses, whether the jury is instructed on category two lesser included offenses depends on the trial judge's determination of whether the elements of 'category 2' crimes may have been alleged and proved.

State v. Wimberly, 498 So.2d 929, 931 (Fla. 1986) (quoting Fla. Std. Jury Instr. (Crim.) notes (2d 2d 1981)). The Court continued to explain in **Wimberly**:

A "necessarily lesser included offense" is as the name implies, a lesser offense that is always included in the major offense. **The trial judge has no discretion in whether to instruct the jury on a necessarily lesser included offense.** Once the judge determines that the offense is a necessarily lesser included offense, an instruction must be given.

Montgomery, at 259.

Because the lower appellate tribunal misconstrued several decisions of this Court as outlined above, jurisdiction must be granted to resolve the conflict. Article V, Section 3(b)(3), Florida Constitution, Rule 9.03(A)(2)(A)(iv), Fla. R. App. P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Angela Hensel, Assistant Attorney General, at crimapptlh@myfloridalegal.com, Hon. Ronnie Fussell, Clerk of the Court, Duval County, 501 East Adams Street, Room 1262, Jacksonville, Florida 32202, Hon. Jon S. Wheeler, Clerk of the Court, First District Court of Appeal, 2000 Drayton Dr, Tallahassee, FL 32311, Hon. Mark Hulsey, III, 501 W Adams St. Rm 7236, Jacksonville, FL 32202-4603 and, by U.S. mail, to appellant, Jessie C. Roberts, Doc#J51716, Lowell Correctional Institution-Annex, 11120 NW Gainesville RD, Ocala, FL 34482, on this 24th day of June, 2016.

Respectfully submitted,

NANCY A. DANIELS
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