IN THE SUPREME COURT OF FLORIDA

JESSIE CLAIRE ROBERTS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC15-1320
L.T. No(s). 1D14-321;
16-2010-CF-5108

REPLY TO RESPONSE TO ORDER TO SHOW CAUSE

Respondent, State of Florida, (hereinafter the State), files its Reply to Petitioner's Response to this Court's Thursday, June 9, 2016, Order to Show Cause and in support thereof states:

1. This Court has ordered Petitioner to show cause, "why in light of this Court's decision to discharge jurisdiction in Garrett v. State, SC14-2110, this Court should not decline to accept jurisdiction in this case."

2. Petitioner contends this Court should accept jurisdiction in the instant case because the First District's opinion in Roberts v. State, 168 So. 3d 252 (Fla. 1st DCA 2015), "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." See Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). Specifically, Petitioner asserts the First District misinterpreted decisions from this Court when holding that fundamental error did not occur when the trial court failed to instruct the jury on the

necessarily lesser included offense of attempted manslaughter; Petitioner was convicted of attempted second degree murder.

3. In its written opinion, the First District summarized Petitioner's argument as follows:

> Appellant notes it is well-established that if an instruction is requested, "the failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible." State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978). Appellant acknowledges that in Morris v. State, 658 So. 2d 155 (Fla. 1st DCA 1995), this court found it is not fundamental error to fail to instruct on a necessarily lesser included offense in a non-capital case. However, she argues Morris is no longer good law. She argues the Morris court reached that determination by misconstruing the supreme court's decision in Jones v. State, 484 So. 2d 577 (Fla. 1986). She further argues Morris was implicitly overruled by [State v.]Montgomery, 39 So. 3d [252 (Fla. 2010)] and Haygood v. State, 109 So. 3d 735, 741 (Fla. 2013), in which the supreme court held that an inaccurate instruction on manslaughter as a lesser-included offense only one step removed can constitute fundamental error.
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> Alternatively, appellant argues that if this court finds Morris correctly interpreted Jones as holding that the failure to request an instruction on a necessarily lesser-included offense in a non-capital case is not fundamental error, then appellant argues Jones is inconsistent with Montgomery, Haygood, and State v. Lucas, 645 So. 2d 425, 426-27 (Fla. 1994), all of which held an incomplete or erroneous instruction on manslaughter as a lesser-included offense only one step removed may be fundamental error.
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> As will be discussed below, we find (A) Morris correctly interpreted Jones, which held the failure to instruct on a necessarily lesser-included offense is not fundamental error in a non-capital case; and (B) Jones is not inconsistent with Lucas, Montgomery, or Haygood.

Roberts, 168 So. 3d at 254-55.

In discussing Jones, the First District explained:

> In Jones, 484 So. 2d at 579, the supreme court recognized that 'a capital defendant, as a matter of due process, is entitled to

have the jury instructed on all necessarily lesser included offenses," and waiver of this right must be made by the defendant personally, not merely by counsel. However, the Jones court declined to extend this rule to non-capital cases, finding that 'to apply the label 'fundamental error'" in non-capital cases would "stray from the long and unbroken lines of precedent conditioning a right to jury instructions on lesser included offenses upon a request for such instructions . . . and requiring a contemporaneous objection as a predicate to proper appellate review. Id. (citing State v. Bruns, 429 So. 2d 307 (Fla. 1983); Harris v. State, 438 So. 2d 787 (Fla. 1983); Griffin v. State, 414 So. 2d 1025 (Fla. 1982); Ray v. State, 403 So. 2d 956 (Fla. 1981); Wheat v. State, 433 So. 2d 1290 (Fla. 1st DCA 1983); Chester v. State, 441 So. 2d 1165 (Fla. 2d DCA 1983)). Thus, the court concluded "no personal waiver is required in order to guarantee fundamental fairness in the non-capital context." Id.

Appellant argues that Jones merely held a personal waiver of an instruction on a necessarily lesser-included offense is not required in a non-capital case. However, it seems appellant overlooks the Jones court's acknowledgement of the "long and unbroken line of precedent conditioning a right to jury instructions on lesser included offenses upon a request for such instruction . . . and requiring a contemporaneous objection as a predicate to proper appellate review." Jones, 484 So. 2d at 579.

The supreme court has repeatedly relied on Jones to reiterate that a contemporaneous objection is required to preserve a claim that the court erred in failing to give an instruction on a necessarily lesser-included offense. See McKinney v. State, 579 So. 2d 80, 83-84 (Fla. 1991)("[T]he trial court's failure to instruct on the [one step removed] lesser-included offense . . . is not preserved for review unless the trial counsel objects to the instruction given,")(citing Jones, 484 So. 2d 577); Parker v. Dugger, 537 So. 2d 969, 972 (Fla. 1988)(noting in Jones, the court "reaffirmed in a noncapital context the well-established rule 'conditioning a right to jury instructions on lesser included offenses upon a request for such instructions . . . and requiring a contemporaneous objection as a predicate to proper appellate review.'").

District courts have also found the failure to instruction on manslaughter or attempted manslaughter as a necessarily lesser-included offense one step removed in not fundamental error, and instead counsel must preserve the issue by requesting the instruction. See Cosme v. State, 89 So. 3d 1096, 1097 (Fla. 4th DCA

> 2012)(failure to instruction on attempted voluntary manslaughter as a necessarily lesser-included offense one step removed was not fundamental error where counsel failed to request the instruction); Firsher v. State, 834 So. 2d 921, 922 (Fla. 3ed DCA 2003)(finding the failure to instruct on manslaughter as a necessarily lesser-included offense one step removed did not require reversal because counsel waived the issue by failing to request the instruction).
>
> In summation, appellant's argument that Morris misinterpreted Jones is without merit. Jones clearly held the failure to instruct on a lesser-included offense in a non-capital case is not fundamental error. Whether or not Jones is inconsistent with Lucas, Montgomery, and Haygood is discussed below.

Id. at 255-56.

The First District went on to explain that "the holdings in those three cases are consistent with well-established precedent that held *if* a jury instruction is given, that instruction constitutes fundamental error if it leaves the jury with an incomplete or inaccurate statement of the law on an element of the offense that the jury must consider in order to convict." Id. at 256 (emphasis supplied). The First District noted that Lucas requires a complete instruction when one is given and "Montgomery and Haygood are based on the well-established principle, as stated in [State v.]Delva, 575 So. 2d 643, 645 (Fla. 1991), that it is error to give a jury instruction that omits or misstates the law on a disputed element of the offense that the jury must consider in order to convict." Id. at 258.

The Court went on to explain:

> Stated differently, the supreme court has made the distinction that the defendant must preserve a request to have the jury instructed on a necessarily lesser-included offense, but once the jury is instructed on that offense, that instruction must be a correct statement of the law. If it is not, and if the error is pertinent to a disputed element that the jury must consider, and the

> defendant is convicted of an offense not more than one step removed, then the error is fundamental.

Id. at 258.

Thus, the First District held:

> Similarly here, counsel's failure to request a manslaughter instruction essentially expressed a desire not to have a manslaughter instruction given; however, if that instruction had been given in an incomplete or inaccurate instruction, the error would have been fundamental. Thus, the holdings in Lucas, Montgomery, and Haygood that an incomplete or erroneous instruction on manslaughter as a necessarily lesser-included offense can be fundamental error are not inconsistent with Jones, which held the failure to give any instruction on a necessarily lesser-included offense is not fundamental error in non-capital cases. As such, we find the failure to instruct on attempted manslaughter was not fundamental error in this case.

Id. at 258.

4. Thus, this Court should decline to exercise its discretionary jurisdiction in the instant case because there is no express or direct conflict between the instant case and any of the cited cases. In fact, the First District thoroughly explained the distinction between each and the instant case. Because the conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision," there is no conflict in the instant case. 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).

WHEREFORE, the State of Florida hereby files this Reply to Petitioner's Response to this Court's Order to Show Cause and asserts that that this Court

should decline to exercise its discretionary jurisdiction because there is no express and direct conflict.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by ELECTRONIC MAIL to: MARIA INES SUBER, Assistant Public Defender, at Ines.Suber@flpd2.com on this 5th day of July 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Trisha Meggs Pate
By: TRISHA MEGGS PATE
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0045489

/s/ Angela R. Hensel
By: ANGELA R. HENSEL
Assistant Attorney General
Florida Bar No. 0093420

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300 (VOICE)
(850) 922-6674 (FAX)

Attorney for the State of Florida
AGO#: L15-1-08967