## NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

FAGNER BARROS-DIAS,	)
Appellant,	)
V.	)
STATE OF FLORIDA,	)
Appellee.	)

Case No. 2D08-1074

Opinion filed April 9, 2010.

Appeal from the Circuit Court for Hillsborough County; Daniel H. Sleet, Judge.

James Marion Moorman, Public Defender, and Maureen E. Surber, Assistant Public Defender, Bartow, for Appellant.

Bill McCollum, Attorney General, Tallahassee, and Richard M. Fishkin, Assistant Attorney General, Tampa, for Appellee.

VILLANTI, Judge.

Fagner Barros-Dias appeals his judgment and sentence for second-

degree murder. He argues that the trial court erred in instructing the jury on the lesser-

included offense of manslaughter because the standard jury instruction given at his trial

improperly added an additional element of "intent to kill" to the crime of manslaughter. Because he did not object to it at trial, Barros-Dias argues that the instruction was fundamentally erroneous. We affirm but certify conflict.

This court recently held that the standard jury instruction for manslaughter which was in effect at the time of Barros-Dias' trial<sup>1</sup> in 2007 was not fundamentally erroneous. <u>See Zeigler v. State</u>, 18 So. 3d 1239, 1245-46 (Fla. 2d DCA 2009). However, the First District in <u>Montgomery v. State</u>, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), <u>review granted</u>, 11 So. 3d 943 (Fla. 2009), concluded that the same standard instruction was fundamentally erroneous.<sup>2</sup> Accordingly, we affirm Barros-Dias' conviction and sentence and, as we did in <u>Zeigler</u>, certify conflict with <u>Montgomery</u>.

Judgment and sentence affirmed; conflict certified.

WALLACE and LaROSE, JJ., Concur.

<sup>&</sup>lt;sup>1</sup>The standard manslaughter jury instruction at issue in the case is no longer the standard instruction. It was modified by the supreme court in December 2008 and now reads: "In order to convict of manslaughter by intentional act, it is not necessary for the State to prove that the defendant had a premeditated intent to cause death, only an intent to commit an act which caused death."

<sup>&</sup>lt;sup>2</sup>We note that, unlike in <u>Zeigler</u> and <u>Montgomery</u>, the jury in this case was also instructed on the offense of manslaughter by culpable negligence.