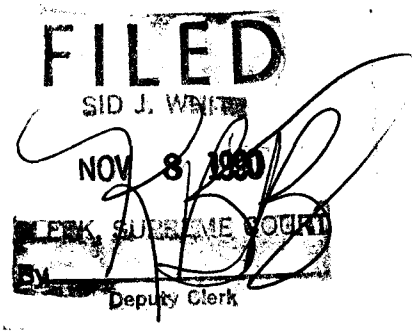

IN THE SUPREME COURT OF FLORIDA

JAMES ARMSTRONG,

Petitioner,

versus

CASE NO. 76,768

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

JAMES ARMSTRONG,

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STATE OF FLORIDA,

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Courts of the Ninth Judicial Circuit, in and for Orange County, and the Eighteenth Judicial Circuit, in and for Seminole County, Florida. Petitioner was the Appellant in the Fifth District Court of Appeal, and Respondent was the Appellee. In the brief Respondent will be referred to as "the State," and Petitioner will be referred to as he appears before this Honorable Court.

In this brief the following symbols will be used:

"R" - Record on appeal in Fifth District Court of Appeal Case Number 88-2293

"R-II" - Record on appeal in Fifth District Court of Appeal Case Number 88-2481

STATEMENT OF THE CASE

Petitioner was charged by an information filed in the Circuit Court of Orange County, Florida, with second-degree murder with a firearm. (R 358) He was tried by a jury on August 16 and 17, 1988, and found guilty as charged. (R 349, 382) He was sentenced on October 10, 1988, to seventeen years in prison, including a three-year minimum mandatory term, to be followed by ten years on probation. (R 390-391) On November 23, 1988, he entered a plea of nolo contendere in the Seminole County Circuit Court to violating probation for attempted aggravated assault and battery, and was sentenced to two consecutive 364-day sentences. (R-II 2, 9, 29-32)

He timely appealed and on March 8, 1990, the Fifth District Court of Appeal reversed his conviction for second-degree murder and reversed the probation revocation order, remanding that cause to the Seminole County Circuit Court for a new hearing. Armstrong v. State, 15 F.L.W. D653 (Fla. 5th DCA March 8, 1990). On September 20, 1990, the District Court granted Respondent's motion for rehearing en banc, and affirmed the Orange County murder conviction and the Seminole County probation revocation, remanding the Seminole County cause to the trial court for correction of the judgment, and certifying to this Honorable Court a question to be of great public importance. Armstrong v. State, 15 F.L.W. D2372 (Fla. 5th DCA September 20, 1990); Rule 9.030(a)(2)(V), Fla.R.App.P. (See Appendix.)

STATEMENT OF THE FACTS

Willie James McCall died on March 13, 1988, from brain damage and cranial hemorrhaging caused by a bullet fired at close range. (R 130, 131, 132, 139) His blood contained a "therapeutic level" of a sedative or hypnotic drug; a relatively low level of marijuana; and .237% alcohol, or a level which would have rendered him "seriously intoxicated." (R 141-142, 143, 145)

James Ralph Slack, Jr., a co-worker of Petitioner's and casual acquaintance of Willie McCall's, testified that in the afternoon of March 13th, he and Petitioner and Willie James McCall drove around together in Mr. Slack's truck, to liquor stores and various locations, including Petitioner's house, drinking gin. (R 58, 61, 62-64, 81) Other witnesses disputed Mr. Slack's estimation of the time when the men first gathered that afternoon. (R 61, 221, 224, 226, 246) Mr. Slack said that they all drank about the same amount of alcohol but were not very intoxicated; Petitioner testified that they were all very drunk, or "wasted." (R 81, 248, 262, 263) During the afternoon, the three men went to Petitioner's house where, Mr. Slack said, Petitioner got a gun case from a back room. (R 64, 65) He said he found Petitioner and Willie McCall wrestling over the gun, and after he took the gun away, he said Petitioner appeared to put it away, and he never saw the gun again. (R 68, 89, 91, 92, 93) Petitioner testified that Willie McCall had gotten the gun from on top of a china cabinet, and he told an Orange County deputy that he had never seen it before. (R 109, 248)

The three men drove from Petitioner's house towards Orlando, during which drive Mr. Slack said he did not observe a struggle or hear any arguing, although he thinks he would have noticed had there been any. (R 69, 70, 93) He said he suddenly heard a shot and, when he asked, "Did you shoot him?", he said Petitioner said, "Yeah, I think I did." (R 70, 94, 99) Mr. Slack said when he told Petitioner he was going to call "the law," Petitioner grabbed the steering wheel and asked Mr. Slack to help him get rid of the body. (R 70) When Mr. Slack pulled his truck into the parking lot of a Circle K convenience store to call the police, he said Petitioner threw something to the floor and ran down the road. (R 70, 71, 74, 96)

Petitioner testified that he thought Willie McCall had put the gun away back at the house but instead, during the drive, Willie McCall brought the gun out and started playing with it. (R 249, 251) When Petitioner tried to get him to put it away, they "tussled" and the gun went off, by accident. (R 249, 250, 251, 259) Petitioner said he does not think he said anything about hiding the body, and that his running from the convenience store was the result of his being panicked, very drunk, and very scared. (R 260, 252, 264) He later called the police to give himself up. (R 253, 261) He testified that he did not remember throwing the gun away, but he told a deputy that he had dropped the gun somewhere behind a drive-in near the convenience store. (R 260, 109) Eight days after the incident, some children found a similar weapon behind the drive-in. (R 166-170) A firearms

expert testified that the weapon's being slightly rusted impeded his ability to identify whether that gun had fired the bullet which killed Willie McCall. (R 188, 195, 198, 204)

Although Petitioner did not know whose gun it was that Willie McCall had that day, one of Petitioner's brothers testified that about a week before the incident an old schoolmate had pawned it to Willie McCall for twenty or thirty dollars. (R 231, 237, 239) Petitioner testified that Willie McCall always had a gun with him. (R 252)

Petitioner was exceedingly remorseful for the accident that killed Willie McCall. (R 263-264) Petitioner's brothers and sister-in-law testified that Petitioner and Willie McCall were like brothers, and always together. (R 219, 220, 223, 228, 229, 230, 231, 242, 244, 252, 255) Willie McCall had been married to Petitioner's sister, and his fifteen-year-old daughter, Petitioner's niece, still visited with Petitioner's family. (R 40, 220, 242-243, 252)

Petitioner entered a plea of nolo contendere to violation of probation in Seminole County Circuit Court on the basis of his Orange County conviction for second-degree murder, reserving his right to appeal the trial court's acceptance of the plea. (R-II 23-27, 26)

SUMMARY OF ARGUMENT

The failure to fully instruct a criminal jury on the complete definition of excusable and justifiable homicide contemporaneously with the instruction on manslaughter is reversible, fundamental error which is not waived by trial counsel's request for an abbreviated version of the instruction, where the accused is convicted of second-degree murder. Particularly because there is no evidence that Petitioner personally invited or even acquiesced in the error, his conviction for second-degree murder must be reversed.

ARGUMENT

PETITIONER'S COUNSEL'S REQUEST FOR AN ABBREVIATED INSTRUCTION ON JUSTIFIABLE AND EXCUSABLE HOMICIDE DID NOT WAIVE THE FUNDAMENTAL ERROR OF FAILING TO ADEQUATELY INSTRUCT THE JURY ON MANSLAUGHTER AT PETITIONER'S TRIAL FOR SECOND-DEGREE MURDER.

In its instructions to the jury at Petitioner's trial, the trial court read:

> THE COURT: The killing of a human being is justifiable homicide and lawful if it was necessarily done while resisting an attempt to murder or commit a felony upon the defendant or to commit a felony in any dwelling house in which the defendant was at the time of the killing.
>
> The killing of a human being is excusable and, therefore, lawful when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent.

(R 330-331)

The trial later instructed the jury on manslaughter:

> THE COURT: Before you can find the defendant guilty of manslaughter, the state must prove the following two elements beyond a reasonable doubt:
>
> One, the victim is dead.
>
> Two, the death was caused by the act, procurement or culpable negligence of the defendant.
>
> I will now define culpable negligence for you. Each of us has

> a duty to act reasonably towards others. If there is a violation of that duty without any conscious intention to do harm, that violation is negligence.
>
> Culpable negligence is more than a failure to use ordinary care for others. Negligence, to be called culpable negligence, must be gross and flagrant. The negligence must be committed with utter disregard foer the safety of others.
>
> Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known or reasonably should have known was likely to cause death or great bodily injury.
>
> * * *

(R 333-334)

During the trial, Petitioner's trial counsel asked the trial court to give an abbreviated form of the standard jury instruction on excusable homicide, and at the close of the jury instructions announced that the defense had no objection to the instructions as given. (R 6, 7, 77, 267, 268, 342)

In its en banc decision, the Fifth District Court of Appeal wrote:

> Failure to give the complete initial instruction on justifiable and excusable homicide is fundamental error in the sense that the harmless error doctrine does not apply and the error need not be preserved below by contemporaneous objection by trial counsel. Rojas [v. State, 552 So.2d 914 (Fla. 1989)]; Ortagus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987); Alejo v. State, 483 So.2d 117 (Fla. 2d DCA

> 1986). However, none of the reported appellate cases in Florida addresses the question of whether or not this type of fundamental error can be waived by action of defense counsel. [Citations omitted.]

Armstrong v. State, 15 F.L.W. D2372 (Fla. 5th DCA September 20, 1990). (Appendix.) [Footnotes omitted.] The District Court then certified the following question to this Honorable Court to be one of great public importance:

> DOES TRIAL COUNSEL FOR A DEFENDANT WAIVE FOR HIS CLIENT FUTURE OBJECTION TO FAILURE TO GIVE THE FULL AND COMPLETE INITIAL INSTRUCTION ON JUSTIFIABLE AND EXCUSABLE HOMICIDE AS PART OF THE MANSLAUGHTER INSTRUCTION WHEN THE TRIAL ATTORNEY SPECIFICALLY REQUESTS AN ABBREVIATED INSTRUCTION, WHICH OTHERWISE WOULD CONSTITUTE FUNDAMENTAL ERROR?

Id.

The certified question, particularly under the circumstances of this case, should be answered in the negative.

In Ray v. State, 403 So.2d 956 (Fla. 1981), this Honorable Court said that it could have found waiver of the error in giving a improper instruction on a lesser included offense because:

> [I]t is not fundamental error to convict a defendant under an erroneous lesser included charge when he had an opportunity to object to the charge and failed to do so if: 1) the improperly charged offense is lesser in degree and penalty than the main offense or 2) defense counsel requested the improper charge or relied on that charge as evidenced by argument to the jury or other affirmative action. Failure to timely object

> precludes relief from such a conviction. These conditions have not been met in the instant case, and the district court opinion is quashed.

Id., 403 So.2d at 961. The basis for the decision in Ray was that, as Ray contended, even if fundamental error can be waived, no waiver had been shown. Ray does not hold that fundamental error can be waived but only that "constitutional error might not be fundamental error and [. . .] even constitutional rights can be waived if not timely presented." Id., 403 So.2d at 961.

In Ray, the Court cited district court cases which had held that instructing on a crime not charged does not necessarily constitute reversible error, including Achin v. State, 387 So.2d 375 (Fla. 4th DCA 1980). In Achin, the defendant had been charged with extortion. His lawyer requested that the jury be instructed on the crime of attempted extortion, which this Honorable Court held was a nonexistent crime. Achin v. State, 436 So.2d 30 (Fla. 1982). The District Court had decided to affirm Achin's conviction for the nonexistent crime of attempted extortion even though one normally cannot be convicted of a crime that does not exist, because:

> [T]he error is not invariably fundamental and where the error is deliberately invited and the instruction not objected to, the defendant shall not be heard to complain about the result.
>
> * * *
>
> . . . [Defense counsel] did more, much more than just remain silent and we must again borrow Judge

> Schwartz' language and remark that such "gotcha" maneuvers should not be allowed to succeed . . .

Id., 387 So. 2d at 376, 377.

This Honorable Court agreed that attempted extortion is a nonexistent crime but rejected the District Court's conclusion that fundamental error may be waived, even by the defendant's invitation, if the error is indeed fundamental. Achin v. State, 436 So.2d 30 (Fla. 1982). Because the error was **invited** by the defense, this Honorable Court held that Achin's retrial was not barred by the double jeopardy clause; but his conviction for a nonexistent crime was reversed, even though it was by definition in all respects identical to the main charge, **because the jury instruction on that charge constituted fundamental error.** Art. I s. 9, Fla. Const.; Amends. V and XIV, U. S. Const.

Not all invasions of constitutional rights are fundamental errors. See, e. g., Clark v. State, 363 So.2d 331 (Fla. 1978). As the Second District Court of Appeal recently reiterated, however, the error which occurred here is fundamental:

> We recognize that the defendant did not object to this omission. Nevertheless, it is reviewable because a proper jury instruction in a criminal case is a fundamental right, the denial of which can be appealed without objection. . . .

Hayes v. State, 564 So.2d 161 (Fla. 2d DCA 1990).

Constitutional errors may be waived; but in order for a constitutional right to be valid under the due process clause, the waiver must be "an intentional relinquishment or abandonment

of a known right." Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). There is nothing in the record of Petitioner's trial to demonstrate that he ever personally, knowingly, and intelligently waived his right to have his jury properly instructed on the definition of excusable and justifiable homicide, or that he was even consulted on the matter. (R 267-276)

The error in failing to give the full and complete instruction on excusable and justifiable homicide is fundamental and reversible. Petitioner's counsel's request for an abbreviated definition of excusable and justifiable homicide did not waive the error, particularly where Petitioner did not personally relinquish his right to a full and complete instruction at his trial for second-degree murder. This Honorable Court should answer the certified question in the negative, and reverse Petitioner's conviction for second-degree murder and the revocation of his probation.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court answer the question certified by the District Court in the negative, and reverse his conviction for second-degree murder and the order revoking his probation.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. James Armstrong, P. O. Box 667, Bushnell, Florida 33513, this 6th day of November, 1990.

ATTORNEY

IN THE SUPREME COURT OF FLORIDA

JAMES ARMSTRONG,

Petitioner,

versus CASE NO. 76,768

STATE OF FLORIDA,

Respondent.

A P P E N D I X

Criminal law—Trial counsel for defendant waives for his client any future objection to failure to give full and complete initial jury instruction on justifiable and excusable homicide as part of the manslaughter instruction when counsel specifically requests an abbreviated instruction, which otherwise would constitute fundamental error—Question certified—Judgment incorrectly listed attempted aggravated assault as third degree felony rather than first degree misdemeanor

JAMES ARMSTRONG, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case Nos. 88-2293, 88-2481. Opinion filed September 20, 1990. Appeal from the Circuit Court for Seminole County, Robert B. McGregor, Judge. Appeal from the Circuit Court for Orange County, Gary L. Formet, Sr., Judge. James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and James N. Charles, Assistant Attorney General, Daytona Beach, for Appellee.

ON MOTION FOR REHEARING EN BANC
[Original Opinion at 15 F.L.W. D653]

(SHARP, W., J.) We grant the state's motion for rehearing *en banc*. Accordingly, we vacate our prior opinion and issue in its place the following.

Armstrong brings two appeals: one challenging his conviction for second degree murder, committed while on probation;[1] and the other questioning the trial court's revocation of that probation. We consolidate them for appeal purposes, *sua sponte*, because they are necessarily interrelated.

During Armstrong's trial for second degree murder, defense counsel specifically requested the trial judge read a *limited* version of the instruction on justifiable and excusable homicide as part of the manslaughter instruction. The trial judge granted this request. Armstrong now argues that the failure of the judge to read the instructions fully when originally charging the jury was reversible error. *Rojas v. State*, 552 So.2d 914 (Fla. 1989). We agree error occurred, but we hold it was waived.

Failure to give the complete initial instruction on justifiable and excusable homicide is fundamental error in the sense that the harmless error doctrine does not apply and the error need not be preserved below by contemporaneous objection by trial counsel. *Rojas; Ortagus v. State*, 500 So.2d 1367 (Fla. 1st DCA 1987); *Alejo v. State*, 483 So.2d 117 (Fla. 2d DCA 1986).[2] However, none of the reported appellate cases in Florida[3] addresses the question of whether or not this type of fundamental error can be waived by action of defense counsel. *Carter v. State*, 512 So.2d 284 (Fla. 3d DCA 1987); *Blackwelder v. State*, 489 So.2d 95 (Fla. 2d DCA), *rev. denied*, 494 So.2d 1149 (Fla. 1986); *Allen v. State*, 463 So.2d 351 (Fla. 1st DCA 1985).

The concept of waiver occurring because trial counsel requests the later-found-to-be faulty instruction was suggested in *Ray v. State*, 403 So.2d 956 (Fla. 1981). The Florida Supreme Court said in *Ray* that if Ray's attorney had requested the erroneous instruction (improper instruction on a lesser included offense) the court could have upheld the conviction on the basis of waiver or invited error.[4] It cited to *Clark v. State*, 363 So.2d 331 (Fla. 1978), *abrogated by State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986), which holds that defense counsel must object to prosecutorial comment on a defendant's right to remain silent.

We are, however, somewhat puzzled by the additional language in *Ray*, that "constitutional error might not be fundamental error, and because even constitutional rights can be waived if not timely presented." *Ray* at 961. In *Rojas* the erroneous manslaughter/justifiable homicide instruction was held to be "fundamental" error. We take that to mean the harmless error doctrine and requirement of a contemporaneous objection do not apply. We also hold this type of fundamental error can be waived by trial counsel proposing the erroneous instruction.[5] However, since there is no case law guidance on this point relating to the initial incomplete manslaughter instruction, we certify the following question to the Florida Supreme Court as being one of great public importance.[6]

> DOES TRIAL COUNSEL FOR A DEFENDANT WAIVE FOR HIS CLIENT FUTURE OBJECTION TO FAILURE TO GIVE THE FULL AND COMPLETE INITIAL INSTRUCTION ON JUSTIFIABLE AND EXCUSABLE HOMICIDE AS PART OF THE MANSLAUGHTER INSTRUCTION WHEN THE TRIAL ATTORNEY SPECIFICALLY REQUESTS AN ABBREVIATED INSTRUCTION, WHICH OTHERWISE WOULD CONSTITUTE FUNDAMENTAL ERROR?

Finally, it is conceded by both sides that the judgment which resulted after Armstrong's probation was revoked, incorrectly listed the attempted aggravated assault offense as a third degree felony, when it is, in fact, a first degree misdemeanor. We therefore remand to the trial court to correct that judgment accordingly.

AFFIRMED. (DAUKSCH, COWART, GOSHORN, HARRIS, PETERSON and GRIFFIN, JJ., and DANIEL, C. W., Judge, Retired, concur. COBB, J., concurs specially with opinion, with which DAUKSCH, J., concurs.)

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[1]Armstrong was on probation for attempted aggravated assault and battery.

[2]*Compare*, Henry v. State, 564 So.2d 212 (Fla. 1st DCA 1990).

[3]*Compare* Brady v. State, 518 So.2d 1305, 1308 (Fla. 3d DCA 1987), *rev. denied*, 523 So.2d 576 (Fla. 1988); Register v. State, 514 So.2d 1122, 1124 (Fla. 1st DCA 1987); Robinson v. State, 442 So.2d 284 (Fla. 2d DCA 1983).

[4]"'If Ray's counsel had requested the improper instruction, or had affirmatively relied on that charge, as evidence by argument to the jury or other affirmative action, *we could uphold* a finding of waiver....'" (emphasis supplied). Ray v. State, 403 So.2d 956, 961 (Fla. 1981).

[5]The invited error doctrine includes, under limited circumstances, waiver of *constitutional* rights by a defendant's conduct. *See, e.g.*, Ellison v. State, 349 So.2d 731 (Fla. 3d DCA 1977), *cert. denied*, 357 So.2d 185 (Fla. 1978).

[6]Fla.R.App.P. 9.030(a)(2)(V). We have identified a few instances where other courts have considered the general issue. United States v. Espinal, 757 F.2d 423, 426 (1st Cir. 1985); United States v. Gray, 626 F.2d 494, 501 n.2 and accompanying text (5th Cir. 1980), *cert. denied, sub nom*, Wright v. U.S., 449 U.S. 1038, 101 S.Ct. 616, 66 L.Ed.2d 500 (1980); State v. Dozier, 163 W.Va. 192, 255 S. E. 2d 552 (W.Va. 1979). *See also* McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971).

(COBB, J., concurring specially.) The holding in *Ray v. State*, 403 So.2d 956 (Fla. 1981) is set forth on page 961 of that opinion:

> We hold, therefore, that it is not fundamental error to convict a defendant under an erroneous lesser included charge when he had an opportunity to object to the charge and failed to do so if. . . defense counsel requested the improper charge. . . . (Footnote omitted).

This pronouncement, which was not dictum, governs the instant case because defense counsel for Armstrong requested the improper charge. The holding in *Ray* has not been modified or receded from by any subsequent opinion of the Florida Supreme Court. *Ray* is good law and good sense. I concur in the majority result. (DAUKSCH, J., concurs.)

* * *

Injunctions—Agency—Termination of agency relationship between Airlines Reporting Corporation and travel agent—Error to issue temporary injunction prohibiting principal from terminating agency relationship—Error to enter temporary injunction without requirement of adequate bond

AIRLINES REPORTING CORPORATION, Appellant, v. INCENTIVE INTERNATIONALE TRAVEL, INC., etc., Appellee. 5th District. Case No. 90-584. Opinion filed September 20, 1990. Non-Final Appeal from the Circuit