IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **CASE NO. SC09-332**

STEVEN W. MONTGOMERY,

Respondent.
_____/

On Discretionary Review from the First District Court of Appeal: Certified Question; Certified Conflict; Non-Certified Conflict

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INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Case--The State seeks discretionary review of Montgomery v. State, 2009 Fla.App.LEXIS 1092 (Fla. 1st DCA Feb.12, 2009). That decision reversed Montgomery's conviction for second degree murder, and announced a rule of *per se* fundamental error:

> [Montgomery] contends the trial court fundamentally erred in giving the standard jury instruction for manslaughter by act[.] ... We agree with Appellant because the standard instruction imposed an additional element on the crime of manslaughter by act, and that offense was one step removed from the crime for which Appellant was convicted.

2009 Fla.App.LEXIS 1092 *1.

The opinion certified conflict with Barton v. State, 507 So.2d 638 (Fla. 5th DCA 1987), *rev'd. on other grounds*, 536 So.2d 1194 (Fla. 1988). It also certified this question to be of great public importance:

> IS THE STATE REQUIRED TO PROVE THAT THE DEFENDANT INTENDED TO KILL THE VICTIM IN ORDER TO ESTABLISH THE CRIME OF MANSLAUGHTER BY ACT?

2009 Fla.App.LEXIS 1092 *16. Three other issues were deemed moot and not reached. *Id.* at *2. The State sought rehearing, etc., but its motion was denied. (See First DCA progress docket for case no. 1D07-4688, entries for Jan. 7-Feb. 12, 2009.)

The State filed notice to invoke this court's discretionary jurisdiction Feb,. 23, 2009. On March 5, it filed an amended notice, to include the "mis-application" ground advanced as Issue II in its jurisdictional brief to this court.

Below, Montgomery had appealed from the judgment entered upon conviction for the lesser included offense of second degree murder,

with a finding he carried, etc. a weapon. (R1:88-9). He was sentenced to 45 years. (R1:103-7).[1]

Facts--The State charged Montgomery with first degree murder and child abuse. (R1:13). He was convicted for the lesser included offense of second degree murder with the finding he carried a weapon. (R1:88-9; Trial6:769).

Montgomery was the victim's enraged boyfriend. He pursued her in a fatal struggle throughout their apartment. (Trial4:225-60). She died from strangulation and multiple blunt force injuries, including fractured ribs; and suffocated when fat particles migrated to her lungs as a result of the beating. (Trial4:276-314).

The prosecutor's closing detailed the evidence of the beating (Trial6:670-2, 679-82), and urged the beating rose to premeditation (Trial6:682, 692-5). The prosecutor alluded to the same facts and argued for second degree murder in the alternative; and, finally, that the crime was not manslaughter. (Trial6:696-99). As to manslaughter, the State said:

> Manslaughter can be as simple as you strike somebody in the head outside a bar. You hit them one time--it doesn't have to be outside a bar, and the person hits the ground and hits concrete and dies from having hit the ground. That's not what you have here, ladies and gentlemen.

(Trial6:698).

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1 The record below consisted of two volumes of filings cited (R[1 or 2]:[page no.]), and four volumes of trial transcript cited (Trial[vol. no.]:[page no.]). State-supplied emphasis is noted [e.s.].

Defense counsel closed by arguing against any heightened form of killing. Counsel also urged that if Montgomery used excessive force, he should be convicted for manslaughter. (Trial6:725). The State's rebuttal emphasized the extent and viciousness of the beating, to contend there was no self-defense and no manslaughter; but premeditated murder. (Trial6:726-39).

Using the standard jury instructions, the trial court explained that the crime charged (first degree murder) included second degree murder and manslaughter; and that the jury was first to decide if Montgomery killed the victim. If so, it then would decide whether the killing was first or second degree murder, manslaughter, or excused. (Trial6:743-44).

The trial court gave the definition of "act." (Trial6:745, 747,). It finished the first degree murder instruction, and gave the standard ones for second degree murder and manslaughter. (Trial6:747).

The manslaughter instruction required the State to prove Montgomery "intentionally caused [the victim's] death." (Trial6:748, lines 16-17). The trial court further explained:

> In order to convict of manslaughter by intentional act it is not necessary for the state to prove that the defendant had a premeditated design to cause death[.]

(Trial6:749). Montgomery did not object to this instruction during the charge conference (Trial6:653-666) or after the final instructions were given. (Trial6:766).

Discussing the verdict form, the court instructed the jury to return a verdict for the "highest offense which has been proven beyond a reasonable doubt [or acquittal]." (Trial6:760).

SUMMARY OF ARGUMENT

Issue I (Proof "Intent to Kill the Victim")--The certified question should be answered negatively. In so answering, this court should explain that the critical distinction between manslaughter by "act" versus manslaughter by "culpable negligence" is whether the defendant acted deliberately toward or upon the victim; not whether the defendant intended to kill.

Showing such intent would be important to proving the killing rose to second or first degree murder, but not to proving manslaughter. Proof of "intent to kill" should not be required to convict for manslaughter, although it could be present in a given case. Instead, a deliberate--not premeditated, recklessly indifferent or malicious--act causing death must be shown.

Assuming the certified question is answered negatively, the prior standard instruction on manslaughter used in Montgomery's trial was erroneous. This court should exercise its authority to fully dispose of this case, by deciding whether the instruction give rise to fundamental error.

Given the brutality of the beating suffered by the victim; closing arguments; and other pertinent jury instructions; the error was harmless. The First DCA's decision must be reversed, with directions to consider the three issues deemed moot.

Issue II (Mis-Application of *Garzon*/Fundamental Error)--In the opinion below, the rationale is inseparable from the holding. The court discerned fundamental error on one narrow facet of trial--that Montgomery's conviction for second degree murder was but one step removed from the lesser offense of manslaughter-by-act, for which the prior version of the standard instruction was given.

This court must recognize the mis-application of Garzon; and, pursuant to its authority to fully dispose of the case, analyze all pertinent events of trial. As argued in Issue I, it should conclude that use of the then-standard instruction on manslaughter by act was not fundamental error.

Issue III (Conflict with *Barton*)--This issue will be mooted by disposition of Issue I. However, this court rejected the Fifth DCA's rationale in Barton, which rested on the premise that attempted manslaughter includes "intent to kill." Based on the State's argument in Issue I, any viable conflict should be resolved by disapproving the Fifth DCA's decision in Barton.

ARGUMENT

ISSUE I

TO CONVICT FOR MANSLAUGHTER-BY-ACT, MUST THE STATE PROVE THE DEFENDANT "INTENDED TO KILL THE VICTIM?" (Restated).

A. Standard of Review

This issue is one of statutory interpretation; that is, what is the substantive content of the crime of manslaughter by "act," as defined by §782.07(1), Fla. Stat. Matters of statutory interpretation present questions of law reviewed *de novo*. *See* McDonald v. State, 957 So.2d 605, 610 (Fla. 2007) ("Our review of the [district court's] decision addressing this issue of statutory interpretation is de novo.").

B. Merits

The Answer to the Certified Question is "No"

The opinion below certified this question to be of great public importance:

> Is the state required to prove that the defendant intended to kill the victim in order to establish the crime of manslaughter by act?

2009 Fla.App.LEXIS 1092 *16. The State will begin by narrowing the question.

The certified question mentions "intent," but without distinguishing prior intent (premeditation) from contemporaneous intent which could be inferred from the deliberate nature of the "act." However, if conviction for manslaughter by act were to

require not just a deliberate act, or even "intent to kill," but intent which preceded the killing; it would be indistinguishable from premeditated murder.

To the extent the certified question contemplates "prior" intent, the ready answer is "no." *See* In re Std. Jury Instructions in Crim. Cases--Report No. 2007-10, 997 So.2d 403 (Fla. 2008) (amending the explanatory comment for the standard manslaughter by act instruction [7.7(2)(a)] to read: "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. [e.s.]) [hereinafter "Report No. 2007-10"].

Florida's statutory definition of manslaughter, in pertinent part, requires only an "act" for culpability to attach:

> [§782.07](1) The killing of a human being by the **act**, procurement, or culpable negligence of another, without lawful justification ... is manslaughter, a felony of the second degree .... [e.s.].

Had the Legislature desired to require "intent to kill" as a prima facie element of manslaughter by "act," it could easily have said so; at any time over the numerous decades that "manslaughter" has been a codified crime. *See* Reynolds v. State, 842 So.2d 46, 49 (Fla. 2002) (interpreting the animal cruelty [criminal] statute, and observing: "Furthermore, if the Legislature wanted the statute to include the specific intent to cause a cruel death or suffering, they could have specifically said so."). *See also* State v. Hearns, 961 So.2d 211, 219 (Fla.

2007) (explaining that the listing of specific types of battery in the forcible felony statute implied the exclusion of other types; and observing: "Had the Legislature intended to include all types of battery as forcible felonies, it would have listed simply 'battery' rather than only the specific types enumerated.").

In Bautista v. State, 863 So.2d 1180 (Fla. 2003), this court addressed related language in the DUI manslaughter statute. It first recounted the history of Florida's manslaughter statute:

> The first manslaughter statute was enacted in 1868. ... [n5 & n6 retained] This statutory language, which has remained unchanged since 1892, ... [n7 omitted.]
>
> _____
>
> n5. In 1868, the Florida Legislature codified the common law of homicide. Ch. 1637, Laws of Fla. (1868). The statute set out a general definition of manslaughter: "The killing of one human being, by the act, procurement, or omission of another, in cases where such killing shall not be murder, according to the provisions of this chapter, is either justifiable or excusable homicide or manslaughter." *Id.* ch. III, §3.
>
> n6. In 1892, the Legislature revised and consolidated the homicide statute. Degrees of manslaughter were eliminated, and certain common-law manslaughters (misdemeanor manslaughter, heat of passion killings, involuntary killing of a trespasser, and killing through negligence) were no longer specifically listed in the statute but became subsumed within the general definition of manslaughter. The general definition was amended to read: "The killing of a human being by the act, procurement, or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide or murder . . . shall be deemed manslaughter ...." §2384, Fla. Rev. Stat. (1892).

Id. at 1186 & n.5,6.

As the quoted language illustrates, "intent to kill" has never been in the statutory definition of manslaughter. This history, and equally-long use of "act" alone, exclude a requirement of specific

intent to kill. Instead, the State must prove a deliberate act resulting in death--from which intent to kill could, but not necessarily, be inferred.

The crucial distinction in manslaughter cases is not the intended result, but whether the defendant acted deliberately to cause death. As Bautista's sixth footnote observed, codification of common law manslaughter merged numerous degrees or types of that crime--most done by deliberate act. However, the statute also separately recognized manslaughter by culpable negligence. Thus, the statutory distinction is between deliberate and negligent acts causing harm, not between intentional and unintentional deaths as a result. If "intent to kill" were necessary to the completed crime of manslaughter by "act," such distinction would have been appeared in the manslaughter statute long ago.

Recently, this court amended the standard manslaughter-by-act jury instruction to clarify that the State does not have to prove "premeditated intent to cause death:"

> [W]e modify instruction 7.7 as follows:
>
> > 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**. *See* Hall v. State, 951 So.2d 91 (Fla. 2d DCA 2007). We authorize publication and use of the instruction as modified. [**bold-underline** italicized in original].

Report No. 2007-10, 997 So.2d at 403.

The bold-underlined language all but answers the certified question negatively. When this court modified the standard

instruction, it could have specified "intent to kill" be proven, only that such intent need not be premeditated. However, the court went further, to require only the proof of an intent to commit an act which caused death. As clarified by the change in Report No. 2007-10, the manslaughter-by-act instruction now requires only a deliberate act causing death. Although the facts of a particular case might incidentally prove death was the intended result, such proof is not required as part of the State's prima facie case. Again, the answer to the certified question is "no."[2]

This result squares with the better-reasoned decisions in Florida caselaw. For example, in Hall v. State, 951 So.2d 91, 93 (Fla. 2d DCA), *rev. den.*, 962 So.2d 336 (Fla. 2007) (en banc), the Second DCA affirmed the conviction for manslaughter by act, when the defendant's single punch flexed the victim's head; severing a vertebral artery and causing a fatal brain hemorrhage. In Hall, there was but one punch thrown. The defendant told responding officers he regretted punching the victim and hoped the victim would be okay. *Id.* at 93. Nevertheless, this

unintended killing was properly tried (and conviction upheld) as manslaughter by act.

Rejecting "intent to kill" in favor requiring a deliberate act resulting in death should also end the occasional confusion--arising from the notion of "voluntary" versus "involuntary" manslaughter--that a deliberate act causing a clearly unintended

2 If this court were to conclude "intent to kill" must be proven, then Montgomery's jury was properly instructed. No error would have been committed.

death is somehow manslaughter by culpable negligence. *Compare* Brinkley v. State, 874 So.2d 1199, 1201 (Fla. 5th DCA 2004) (upholding denial of dismissal on appeal from conviction for manslaughter by culpable negligence, when defendant shot and killed his live-in partner's adult daughter thought to be a burglar) *and* Light v. State, 841 So.2d 623, 624 (Fla. 2d DCA 2003) (directing judgment be entered for manslaughter by culpable negligence, when defendant and victim scuffled in "mosh pit;" the defendant picked up the victim and slammed him to the floor; and the victim later died from resultant head injury); *to* Davison v. State, 688 So.2d 338, 340 (Fla. 1st DCA 1996), *rev. den.*, 697 So.2d 510 (Fla. 1997) (upholding conviction for manslaughter by culpable negligence, when driver crashed into a tree and killed passenger; and the driver had been consuming alcohol, was driving at excessive speed, was driving in total darkness on a two-lane, canopy road, etc.).

The State suggests that Brinkley and Light, although reaching the right result, actually involved manslaughter by act when death was plainly not intended; while Davison was correctly treated as manslaughter by culpable negligence. The useful distinction is not the defendant's intended result, but whether the defendant acted deliberately toward the victim.

In Bolin v. State, 2009 Fla.App.LEXIS 2284 (Fla. 2d DCA Mar. 20, 2009), the court observed:

> Florida law distinguishes between voluntary manslaughter, which is committed by act or procurement, and involuntary manslaughter, committed by culpable negligence. Whereas voluntary manslaughter is a crime of intent, involuntary manslaughter is not.

Id. at *3. The distinction between "voluntary" and "involuntary" manslaughter has long been present, and long been confusing, in Florida law.

By depending on the purpose of the perpetrator's acts toward or upon the victim, the distinction between "voluntary" and "involuntary" manslaughter allows a deliberate act to be treated as culpably "negligent" simply because death was not intended. If the certified question is answered negatively--with the explanation that "act" as used in §782.07(1) includes all deliberate acts regardless of their intended result--this court would end the unnecessary distinction between voluntary and involuntary manslaughter, and better differentiate manslaughter by act from manslaughter by culpable negligence.

"Procurement" aside, the manslaughter statute distinguishes between "act" and "culpable negligence" only--it does not further divide manslaughter by "act" into "voluntary" and "involuntary." However, by shooting an acquaintance thought to be a burglar (Brinkley), or by slamming someone to the mosh pit floor (Light), the perpetrator acted deliberately; with absolutely nothing to indicate negligence. Those cases are better perceived as deliberate killings, but without the mental state (premeditation or malice) to sustain a conviction for the higher degrees of murder.

For all these reasons, the certified question should be answered negatively. In so answering, this court should explain that the critical distinction between manslaughter-by-act versus

manslaughter by culpable negligence is whether the defendant acted deliberately toward or upon the victim. Whether the defendant intended to kill would be important to proving the crime rose to second or first degree murder. Such proof, however, would not required to convict for manslaughter, although it could be present in a given case. Instead, a deliberate act--not premeditated, recklessly indifferent or malicious--causing death must be shown.

No Fundamental Error Occurred

If the certified question is answered negatively, the prior standard instruction on manslaughter, given here, was erroneous. This court should exercise its authority to fully dispose of this case, by deciding whether the erroneous instruction gave rise to error which was fundamental.

"[O]nce this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal. Savoie v. State, 422 So.2d 308, 312 (Fla. 1982) Here, this court can and should consider the question of whether fundamental error arose, because such question is dispositive apart from the three issues the First DCA did not reach. *Cf. id.* ("This authority to consider issues other than those upon which jurisdiction is based ... should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case.").

> This court has:
> cautioned appellate courts to exercise their discretion concerning fundamental error 'very guardedly. Fundamental error should be applied only in the rare cases

> where a jurisdictional error appears or where the interests of justice present a compelling demand for its application.

Farina v. State, 937 So.2d 612, 629 (Fla. 2006), *cert. den.*, 549 U.S. 1183 (2007). Here, the opinion below was far from "guarded." It ignored all but a fragment of the trial record, to manufacture fundamental error.

The opinion below did not consider opening statements, the brutality of the victim's beating at Montgomery's hand, closing arguments, or other pertinent jury instructions. Had the court done so, it could not have found any error to be fundamental.

Turning to the facts, the stunning event was the extent of the beating. Montgomery lodged many blows with rods and a clothes-iron. He pursued the victim in her futile attempt to flee, all over the house, and continued to beat her. Some evidence showed he attempted to strangle her. (Trial4:225-60). The beating was so severe that the victim died from multiple blunt force injuries, including fractured ribs; and suffocated when fat particles migrated to her lungs as a result of the beating. A second cause of death was strangulation. (Trial4:276-314). No reasonable jury would conclude such a beating was manslaughter.

The state's closing argument lessened any harmful effect of the manslaughter instruction. The prosecutor alluded to the same facts and argued for second degree murder in the alternative; and, finally, that the crime was not manslaughter. (Trial6:696-99). Notably, the prosecutor urged:

> Manslaughter can be as simple as you strike somebody in the head outside a bar. You hit them one time--it doesn't have to be outside a bar, and the person hits the ground and hits concrete and dies from having hit the ground. That's not what you have here, ladies and gentlemen.

(Trial6:698). Thus, the State advanced an example not requiring any intent to kill, without objection. Its rebuttal emphasized the beating, to contend there was no self-defense and no manslaughter; but premeditated murder. (Trial6:726-39). The jury agreed there was second degree murder. There is no hint the verdict would have dropped to manslaughter but for the disputed instruction.

Using the standard jury instructions, the trial court explained that the crime charged (first degree murder) included second degree murder and manslaughter; and the jury first had to decide if Montgomery killed the victim. If so, it then had to decide whether the killing was first or second degree murder, manslaughter, or excused. (Trial6:743-44).

The trial court gave the definition of "act." (Trial6:745, 747). It finished the first degree murder instruction, and gave the standard ones for second degree murder and manslaughter. (Trial6:747). The manslaughter instruction required the State to prove Montgomery "intentionally caused death." (Trial6:748, lines 16-17). The trial court further explained:

> In order to convict of manslaughter by intentional act it is not necessary for the state to prove that the defendant had a premeditated design to cause death[.]

(Trial6:749).

The opinion below attached no importance to reading these instructions together. The jury was clearly told no premeditation was required, only an intentional act causing death. In light of the facts, the verdict for second degree murder was not influenced by any error in the manslaughter instruction.

When discussing the verdict form, the court instructed the jury that it should return a verdict for the "highest offense which has been proven beyond a reasonable doubt." [e.s.]. (Trial6:760). Jurors are presumed to follow instructions. *See* Carter v. Brown & Williamson Tobacco Corp., 778 So.2d 932, 942 (Fla. 2000), *cert. den.* 533 U.S. 950 (2001) ("Absent a finding to the contrary, juries are presumed to follow the instructions given them."), *citing* Sutton v. State, 718 So.2d 215, 216 (Fla. 1st DCA 1998), *rev. den.* 728 So.2d 205 (Fla. 1998) ("[B]y applying the well-established presumption that juries follow trial court instructions ...."). Presumably, the jurors worked down from first degree murder to the charge-of-conviction (second degree murder), and never got to manslaughter. His speculation aside, Montgomery offers nothing to overcome this presumption.

The jury was out for three hours. (Trial6:767, 769). This was enough time for thoughtful deliberation, but not long enough to raise the possibility of confusion. There were no questions during deliberation (Trial6:768-9), and the jurors discerned between first and second degree murder. Inferentially, their concern was whether Montgomery planned the killing. There was no question he acted deliberately.

This court must presume the jurors followed the instruction to convict for the highest offense proven. The only ground advanced by the opinion below to overcome this presumption is the use of the then-standard instruction on manslaughter by act. In light of the larger record, giving that instruction did not vitiate the fairness

of trial. No fundamental error occurred. *See* Garzon, 980 So.2d at 1045 (holding use of "and/or" in jury instructions not fundamental error; implying that such error is not always fundamental), *disapproving among others*, Davis v. State, 922 So.2d 279 (Fla. 1st DCA 2006) (finding fundamental error solely because the "the conjunction 'and/or' was included between appellant's name and the name of appellant's co-defendant in pertinent portions of the jury instructions"); Martinez v. State, 981 So.2d 449, 457 (Fla. 2008) (holding that use of the forcible-felony instruction when the defendant is not charged with an independent forcible felony is error, but not fundamental in Martinez's trial; and declaring: "[W]e disapprove of those district court decisions which hold that an erroneous reading of the forcible-felony instruction always constitutes fundamental error." [e.s.]).

Martinez is particularly helpful. There, the jury instruction on self-defense included the countervailing instruction on "forcible felony;" but, without objection, showed the felonies charged rather than an independent one. There was no objection. 981 So.2d at 450. The Third DCA concluded that such error was not fundamental when, among other things, numerous injuries to the victim the minor injury to Martinez were inconsistent with self-defense. *Id.* at 451. This Court accepted review due to conflict with other decisions holding that placing the charged crime in the forcible felony instruction was always fundamental error. *Id.* Ultimately, it agreed the error was not fundamental. *Id.* at 455-6.

Summarizing Florida jurisprudence on fundamental error in the context of jury instructions, this court observed:

> We have never held that the failure to give an instruction or to give an erroneous instruction on an affirmative defense always constitutes fundamental error. [e.s.].

Id. at 455. If outright failure to instruct on a matter as important as an affirmative defense is not always fundamental, then an erroneous instruction adding to the State's proof for a lesser included offense cannot always be fundamental.

Martinez's claim of self defense was very weak, to the point of frivolity. *Id.* at 456. Here, much the same is true. Given the brutality of the beating, Montgomery's claim of self-defense was very weak; not warranting much mention even in the defense closing. (Trial6:716-18). Again, Montgomery was not deprived of a fair trial. The First DCA should not have found use of the prior manslaughter instruction to be fundamental. *Cf. id.* at 457 (emphasizing that an error, to be fundamental, must deprive the defendant of a fair trial).

In Hankerson v. State, 831 So.2d 235 (Fla. 1st DCA 2002), the court found fundamental error under different facts. Hankerson was charged and convicted for second degree murder of a child. The defense requested an instruction on the necessarily lesser included offense of manslaughter, but opposed one on aggravated manslaughter. The court overruled the objection, and instructed on aggravated manslaughter both by act and by culpable negligence:

> 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 defendant A) intentionally caused the death of the victim;

> B) caused the death of the victim by culpable negligence;
> C) [the victim] was under the age of 18.

Id. at 236. [e.s.]. The First DCA concluded it was error to give the instruction on "aggravated" manslaughter, and that the instruction itself was incorrect. *Id.*

> Significantly, the jury had this question during deliberation:
> For aggravated manslaughter to apply the defendant must intentionally cause the death of the victim. The conditions for second-degree murder do not seem to contain the word intentional. Is intent necessary for the second-degree murder to apply?

Id. The trial court told the jurors to rely on the instructions already given.

> From these events, the First DCA concluded:
> [T]he additional element of intent in the lesser included offense instruction confused the jury [and] ... effectively precluded the jury from returning a not guilty verdict on any lesser included offense. The jury was also not given the opportunity to consider the appropriate lesser included offense of simple manslaughter which the defense had requested.
>
> * * *
>
> The addition of an element regarding a lesser included offense is the inverse situation and equally taints the underlying fairness of the entire proceeding. ... In this case, the jury may not have returned a verdict as to a lesser included offense because it found there was insufficient proof of intent to kill. The jurors' question indicated that they were influenced by the inappropriate instruction.

Id. at 236-7. [e.s.].

Unlike the defendant in Hankerson, Montgomery was charged with manslaughter by act, not culpable negligence. Unlike the Hankerson jury instructions, the alleged inaccuracy here was for

a lesser included offense twice removed from the crime charged. The jury, by convicting Montgomery for second degree murder,

> demonstrated it was not prevented from returning a verdict on "any" lesser included offense; but that it would not pardon below second degree murder.

The jury here did not ask any questions. (Trial6:768-9). Based on the facts of the beating, the prosecutor's closing argument, other jury instructions, and the conviction for the lesser offense of second degree murder; any error was harmless[3] and could not have been fundamental. *See* Reed v. State, 837 So.2d 366, 370 (Fla. 2002) ("If the error was not harmful, it would not meet our requirement for being fundamental.").

The right to jury instructions on lesser-included offenses is not constitutional in stature:

> 'Lesser included offense' in regard to jury alternatives is different from what that term means in regard to double jeopardy. The former implements the nonconstitutional right of an accused to an instruction which gives the jury an opportunity to convict of an offense with less severe punishment than the crime charged. [e.s.].

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3 Harmless error analysis is available because the inaccurate instruction was not for the charged offense. *See* Reed, 837 So.2d at 369-70 (holding, in trial for aggravated child abuse, that use of erroneous definition for "maliciously" was fundamental error, because such element was disputed and "reduc[ed] the state's burden of proof on an essential element of the offense charged." [e.s.; internal quotes omitted]). *Cf.* Sochor v. State, 619 So. 2d 285, 290 (Fla. 1993), *cert. den.*, 510 U.S. 1025 (1993) (finding that not giving an instruction on voluntary intoxication was not fundamental error because voluntary intoxication was a defense, and not an essential element of the charged crime [e.s.]); Moore v. State, 903 So.2d 341, 343 (Fla. 1st DCA 2005) (concluding fundamental error arose when the issue of whether the pellet gun constituted a "concealed weapon" was disputed at trial, and was "pertinent and material to what the jury was required to consider in order to convict Moore of the charged offense" [e.s.]).

State v. Baker, 456 So. 2d 419, 422 (Fla. 1984).

With the rarity of "fundamental" error and the non-constitutional stature of a lesser offense in mind, this court's recent discourse on the "pardon power" bears mention:

> Notwithstanding its role in the criminal justice system, however, the jury pardon remains a device without legal foundation. It is ... essentially a not guilty verdict rendered contrary to the law and evidence' and is an aberration. [quotes & cite omitted].

Sanders v. State, 946 So. 2d 953, 957 (Fla. 2006). Ultimately, the court held "as a matter of law, the possibility of a jury pardon cannot form the basis for a finding of prejudice under Strickland [v. Washington, 466 U.S. 668 (1984)]." *Id.* at 960.

The State recognizes this case involves direct appeal, not postconviction relief. However, the logic is the same. It is undisputed that the jury had opportunity to pardon down to manslaughter. However, given the beating inflicted by Montgomery, a conviction for manslaughter would represent a "pardon" rather than a reasonable doubt as to Montgomery's mental state.

Therefore, any inaccuracy or ambiguity in the manslaughter instructions had, at most, a constraining effect on the jury's exercise of pardon power--a "device without legal foundation." The words of Sanders ring true:

[A]ny finding of prejudice resulting from defense counsel's failure to request an instruction on lesser-included offenses necessarily would be based on a faulty premise: that a reasonable probability exists

> that, if given the choice, a jury would violate its oath, disregard the law, and ignore the trial court's instructions.

Id. at 959.

Montgomery does not show reasonable "likelihood" or "probability" the jury was swayed from pardoning him down to manslaughter by the standard instruction. He cannot make the heightened and rare showing of error vitiating the fairness of the entire trial. Without more, use of the prior manslaughter-by-act instruction cannot rise to fundamental error; even when the conviction is for an offense only one step removed.

When the jury convicted for second degree murder, it implicitly recognized the brutality of the beating; and that the beating was the product of uncontrolled rage instead of premeditation. The jury exercised its constitutional role, implicitly finding a reasonable doubt as to premeditation. It also implicitly declined its non-constitutional role, by not pardoning down to manslaughter. As noted, there is no constitutional right to a jury pardon. *Cf.* Insko v. State, 969 So.2d 992, 1002 n.3 (Fla. 2007) ("As we recently explained, the jury's "pardon power" is its ability to convict a defendant of a lesser offense despite evidence supporting the greater one." *citing* Sanders).

This court, pursuant to its authority to fully dispose of the case, must analyze all pertinent events of trial and conclude there was no error rising to fundamental. It should remand for consideration of the three issues deemed moot.

ISSUE II

DID THE DECISION BELOW MIS-APPLY GARZON, BY CONCLUDING--WITHOUT REVIEW OF THE ENTIRE TRIAL

RECORD--THAT USE OF THE PRIOR, STANDARD MANSLAUGHTER-BY-ACT JURY INSTRUCTION ROSE TO FUNDAMENTAL ERROR?

A. Standard of Review

This court's review is *de novo*. *See* Hasegawa v. Anderson, 742 So.2d 504, 506-7 (Fla. 2d DCA 1999).("Whether an error is fundamental is reviewed as a question of law.").

B. Merits

Misapplication of Garzon--The opinion below is one of those rare instances in which the rationale is inseparable from the holding. To be clear, the opinion did not cite Garzon v. State, 980 So.2d 1038 (Fla. 2008). However, by not looking to the entire record of trial, it badly mis-applied that decision.

Montgomery's jury was given the full, then-correct instruction on manslaughter. There was no failure to instruct on the only disputed element, his state of mind. Instead, the manslaughter instruction required the State to prove Montgomery "intentionally caused [the victim's] death." (Trial6:748, lines 16-17). The trial court further explained:

> In order to convict of manslaughter by intentional act it is not necessary for the state to prove that the defendant had a premeditated design to cause death[.]

(Trial6:749). This instruction did not reduce the State's burden of proof. As the opinion below declared, it "imposed an additional element on the crime." (opinion, p.2).

In Garzon, this court said:

> We likewise agree that this is not a case where the court failed to correctly instruct on an element of the crime over

> which there was a dispute, as in Delva and Reed. Since this case does not present a Delva/Reed error, the Fourth District was correct in examining the totality of the record to determine if the "and/or" instruction met the exacting requirements of fundamental instruction error.

Id. at 1043. The same logic applies here.

In State v. Delva, 575 So.2d 643 (Fla. 1991), the court failed to instruct the jury on the knowledge element of cocaine possession; however, the error was not fundamental in the absence of dispute. *See id.* at 645 ("Because knowledge that the substance in the package was cocaine was not at issue as a defense, the failure to instruct the jury on that element of the crime could not be fundamental error ...."). In Reed v. State, 837 So.2d 366 (Fla. 2002), the standard jury instruction for "malice" was erroneous; so it "reduc[ed] the state's burden of proof on an essential element of the offense charged." 837 So.2d at 369 [e.s.; internal quote omitted].

This case does not involve a failure to instruct, or an erroneous instruction reducing the State's burden of proof as to a disputed element. Therefore, it does not involve Delva or Reed error. Just as the absence of such error required examination of the full record in Garzon, the absence of such error required examination of the full record here.

No Fundamental Error--As argued in Issue I, the entire record of trial must be examined, and the error found not fundamental.

ISSUE III

THE CERTIFIED CONFLICT WITH BARTON V. STATE, 507 SO.2D 638 (FLA. 5TH DCA 1987) IS NOT GENUINE, AND WILL BE RESOLVED BY THE HOLDING IN ISSUE I.

A. Standard of Review

If reached, any conflict between the decision below and Barton would be resolved *de novo*. *See* Nelson v. State, 875 So.2d 579, 581 (Fla. 2004) (describing the "point of conflict" and noting review of "this question of law is de novo"), *citing* State v. Glatzmayer, 789 So.2d 297, 301 n.7 (Fla. 2001).

B. Response

There is no need to reach this issue, as it will be mooted by the court's holding in Issue I. However, this court's decision in Barton rejected the Fifth DCA's rationale--that attempted manslaughter included the intent to kill, while aggravated battery did not. Had the opinion below evaluated Barton in light of this court's decision, it would have realized there was no conflict.

Barton was convicted for attempted manslaughter and aggravated battery, by using a "hawk-billed knife" to take a single swipe across the victim's neck. On appeal to the Fifth DCA, he claimed conviction for both crimes violated double jeopardy. 507 So.2d at 639. The court rejected double jeopardy, but then reasoned:

> The instant case, then, turns on Barton's intent. If, when he committed his single act of cutting his victim, he had the specific intent to kill (whether premeditated or otherwise), the defendant was guilty of attempted murder or attempted manslaughter and there was no aggravated battery. This is so because any intent to kill negates an implied element of aggravated battery (the absence of an intent to kill). The converse is also true: If Barton had no intent to kill, then he could not be guilty of any

> attempted homicide. Thus, attempted manslaughter and aggravated battery are mutually exclusive crimes. [e.s.]

507 So.2d at 641.

Such rationale--that attempted manslaughter was mutually exclusive of aggravated battery because it included "specific intent to kill"--is where the decision below found conflict. *See* Montgomery, 2009 Fla. App. LEXIS 1092 *15 ("In determining that there is no intent-to-kill element in manslaughter by act, we have come into conflict with the Fifth District [in Barton].").

Barton concluded the greater offense must be vacated. *Id.* at 642. On review, this court agreed that conviction for both crimes did not violate double jeopardy but, employing a Carawan analysis, concluded both convictions could not stand. State v. Barton, 523 So.2d 152, 153 (Fla. 1988).

> This court then turned to the "remedy." It observed:
> We do not agree, however, that the greater rather than the lesser crime must be reversed.
>
> * * *
>
> We cannot accept this analysis. We are unaware that the absence of an intent to kill is an essential element of the crime of aggravated battery. The crimes of attempted manslaughter and aggravated battery are not mutually exclusive. [e.s.].

523 So.2d at 153. By rejecting the conclusion that attempted manslaughter and aggravated battery were mutually exclusive, this court rejected the Fifth DCA's reasoning. Nominal conflict between that court's Barton decision and the decision below is academic.

As a matter of proof, attempted manslaughter presents a much more difficult question of intent than when the killing is completed. *Cf.* Montgomery, 2009 Fla.App.LEXIS 1092 *9 n.2 (recognizing attempted

manslaughter without intent to kill is "difficult to fathom"). Given that Barton was convicted for attempted manslaughter, the State respectfully questions whether the First DCA's perceived conflict is real.

Montgomery's intent was made evident by the brutal and prolonged nature of the beating. In contrast, the opinion below certified conflict, in part, based on this observation:

> ... Barton leaves a gap in the law, as it would not allow for a manslaughter conviction in cases where the defendant commits an unlawful act that unintentionally results in the death of the victim. [e.s.].

2009 Fla.App.LEXIS 1092 *15. The facts and verdict show Montgomery possessed the maliciousness required for second degree murder.

Whatever "gap" Barton may have left in the law matters not. As the State has argued in Issue I, manslaughter by act requires only a deliberate action which results in death, not intent the victim die. Any viable conflict must be resolved by disapproving Barton.

CONCLUSION

The certified question should be answered negatively. This court should fully dispose of the case by reviewing the entire record, determine that no fundamental error occurred, and remand for consideration of the three issues the First DCA deemed moot.

Alternatively, the decision below must be reversed for its failure to consider the entire record when discerning fundamental error. Again, this court should consider the entire record, and concluding no fundamental error occurred.

The certified conflict is mooted by the answer to the certified question. The decision below should be approved to the extent it holds the crime of manslaughter by act does not include an element of "intent to kill."

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 9.210

I certify a copy of this INITIAL BRIEF has been sent by U.S. mail to Respondent's attorney: **RICHARD M. SUMMA**, Assistant Public Defender, Leon County Courthouse Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301; on May ___, 2009. I also certify this brief complies with Fla.R.App.P. 9.210.

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