IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES – INSTRUCTION 7.7.	CASE NO. SC10-113

COMMENTS

THE INSTRUCTIONS

These comments refer to the standard jury instruction at issue in the First District's decision in *Montgomery v. State*, Case No. 1D07-4688 (Fla. 1st DCA Feb. 12, 2009) (hereinafter "*Montgomery*") as the "previous instruction." See *In re Standard Jury Instructions In Criminal Cases--No. 2006-1*, 946 So. 2d 1061 (Fla. 2006).

These comments refer to the standard jury instruction that cite to the Second District's decision in *Hall v. State*, 951 So. 2d 91 (Fla. 2d DCA 2007) as the "revised instruction." See *In re Standard Jury Instructions in Criminal Cases-Report No. 2007-10*, 997 So. 2d 403 (Fla. 2008).

These comments refer to the standard jury instruction at issue in the case at bar as the "interim instruction." See *In re Amendments to Standard Jury Instructions in Criminal Cases-Instruction 7.7*, --- So.3d ----, 35 Fla. L. Weekly S209 (Fla. 2010).

SUMMARY

The offense of manslaughter by act criminalizes actions that intentionally and unintentionally result in death. Although not expressly mentioned in the statute, the applicable case law separates manslaughter by act into two categories: voluntary manslaughter by act; and, involuntary manslaughter by act.

Traditionally encompassing homicides that involve heat of passion or imperfect/excessive self-defense, the crime of voluntary manslaughter by act requires an intent to kill.

Traditionally encompassing intentional acts that unintentionally result in death (e.g. a single punch fist fight), the crime of involuntary manslaughter by act, also known as "misdemeanor manslaughter", does not require an intent to kill.

The distinction between voluntary and involuntary manslaughter by act plays two, critically important roles. First, the distinction allows trial courts to instruct juries on the appropriate form of manslaughter as a lesser included offense of murder. Second, the distinction eliminates any unnecessary confusion with regard to the offense of attempted manslaughter.

Manslaughter as a lesser included offense of murder

The answer to the certified question in *State v. Montgomery*, Case No. SC09-332 (Fla. Apr. 8, 2010) (hereinafter "*Montgomery II*") ("IS THE STATE REQUIRED TO PROVE THAT THE DEFENDANT INTENDED TO KILL THE VICTIM IN ORDER TO ESTABLISH THE CRIME OF MANSLAUGHTER BY ACT")

depends on whether the State pursues a theory of voluntary or involuntary manslaughter. If the former, then the State must prove an intent to kill; if the latter, then the State need not establish any intent to kill.

In *Montgomery*, the State charged the defendant with the crime of first degree murder. The previous instruction, however, correctly defined the crime of voluntary manslaughter by act. That instruction appropriately directed trial courts to instruct juries on the crime of voluntary manslaughter by act only if "manslaughter is being defined as a lesser included offense of first degree premeditated murder."

Essentially, the defendant in *Montgomery* complained that he did not receive a jury instruction on the crime of involuntary manslaughter by act. Yet, the First District's decision in *Montgomery* does not address whether or not the facts supported an instruction on involuntary manslaughter by act as a lesser included offense.

The First District's failure in *Montgomery* to recognize that the standard jury instruction correctly defined the crime of voluntary manslaughter by act resulted in an unnecessary finding of *per se* fundamental error.

Attempted Manslaughter

An inchoate crime, attempted manslaughter can only occur if a defendant possesses an intent to complete the underlying offense.

Therefore, only the voluntary form of manslaughter by act, which requires an intent to kill, can support an attempted manslaughter instruction.

Entitled "Attempted Voluntary Manslaughter", the current, standard jury instruction on attempted manslaughter correctly distinguishes between the voluntary and involuntary forms of manslaughter by act. Additionally, the instruction correctly requires the State, in order to prove the crime of attempted manslaughter, to establish that the defendant possessed an intent to kill.

The Interim Instruction

The interim instruction unnecessarily eliminates the distinction between voluntary and involuntary manslaughter by act. In essence, the interim instruction incorporates a lowest common denominator approach that only requires the State to prove an intentional act that unintentionally results in death.

Whereas the previous instruction defined the crime of voluntary manslaughter by act to the exclusion of the crime of involuntary manslaughter by act, the interim instruction accomplishes the converse: it defines the crime of involuntary manslaughter by act to the exclusion of the crime of voluntary manslaughter by act.

Admittedly, the crime of involuntary manslaughter by act requires a lower level of intent (general intent to commit an unlawful act) than the crime of voluntary manslaughter by act (specific intent to

kill). Essentially, the revised instruction incorporates a lowest common denominator approach with regard to the *mens rea* element (the intent to commit an unlawful act). Instead of simplifying the law, however, this approach creates the strong potential for unnecessary confusion when trial courts try to instruct juries on: (1) manslaughter as a lesser included offense of murder; and/or, (2) attempted manslaughter.

A New Instruction

To alleviate the confusion present in *Montgomery*, this Court should issue a new standard jury instruction on manslaughter that separates the crime of manslaughter by act into two categories: (1) voluntary (which requires an intent to kill); and, (2) involuntary (which requires an intent to commit an unlawful act). Accordingly, a new instruction should provide the trial court with three possible forms of manslaughter on which it can instruct the jury: (1) voluntary manslaughter by act; (2) involuntary manslaughter by act; and, (3) involuntary manslaughter by culpable negligence.

ANALYSIS

Voluntary Versus Involuntary Manslaughter by Act

Section 782.07(1), Florida Statutes defines the crime of manslaughter as the "killing of a human being by the act, procurement, or culpable negligence of another" without adequate justification or excuse. Although *Section 782.07(1)* lists three different means to commit the offense [(1) by act; (2) by procurement; and, (3) by

culpable negligence], it nonetheless incorporates the two common law categories of voluntary and involuntary manslaughter. See *Fortner v. State*, 161 So. 94, 96 (Fla. 1935)

> At common law manslaughter consisted in the unlawful killing of another without malice either express or implied. It was commonly divided into ***voluntary*** and ***involuntary*** manslaughter. ***Voluntary*** manslaughter was the intentional killing of another in a sudden heat of passion due to adequate provocation, and not with malice. ***Involuntary*** manslaughter consisted in the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself...
>
> Our general statute on the subject of manslaughter, section 7141, C. G. L., appears to cover, in substance, both ***voluntary*** and ***involuntary*** manslaughter as they existed at common law, and reads as follows: 'The killing of a human being by the act, procurement or culpable negligence of another..." (Emphases added)

See also *Bautista v. State*, 863 So. 2d 1180, 1186 n.6 (Fla. 2003):

> 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).

See also *Rodriguez v. State*, 443 So. 2d 286, 289-90 (Fla. 3d DCA 1983):

> Although the common-law crime of manslaughter was codified by statute in 1868, its definition as the "killing of a human being, by the act, procurement, or culpable negligence of another," which is neither excusable or justifiable, nor otherwise condemned as murder, has

remained unchanged since 1892. Since that time, the quoted statutory language has been construed as embracing both ***voluntary*** and ***involuntary*** manslaughter, a construction which first led the courts to the perfectly logical conclusion that there is such an offense as assault with intent to commit manslaughter. (Emphases added)

See also *Ibid*, n.8:

In 1868, the Florida Legislature codified the law of homicide. Ch. 1637, Laws of Fla. (1868). The statute laid out a general definition of manslaughter, which is almost identical to Section 782.07.

> "Sec. 3. 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."

The chapter continued with various sections listing certain acts, some common law manslaughter killings, others not, and assigning to them degrees of manslaughter. ***Voluntary*** heat of passion killing was listed as third-degree manslaughter. ***Involuntary*** heat of passion killing, committed under circumstances not constituting excusable homicide, was listed as fourth-degree manslaughter. In 1892, the Legislature revised the homicide statute. Title 2, Ch. 2, Fla.Rev.Stat. (1892). Manslaughter was defined exactly as it is today in Section 782.07 (§ 2384, Fla.Rev.Stat. (1892)). Degrees of manslaughter were eliminated. Certain killings (assisting self-murder, killing of an unborn child, abortion, unnecessary killing to prevent an unlawful act, killing by mischievous animal, drowning in an overloaded vessel, death from racing a steamboat, and killing by an intoxicated physician), all of which had appeared in the 1868 statute, were specifically listed as manslaughter. Other classic common-law manslaughters (misdemeanor manslaughter, heat of passion killings, involuntary killing of a trespasser, and killing through negligence) were no longer specifically listed but became subsumed within the general definition. The present manslaughter statute continues this structure. Classic manslaughters are contained within the general definition, and certain specific killings are separately defined as manslaughter. See §§ 782.08, 782.09, 782.11, Fla.Stat. (1981); § 316.1931(2), Fla.Stat. (Supp. 1982). (Emphases added)

Despite the fact that the current statutory definition of manslaughter incorporates the "classic" forms of manslaughter, some courts still wrangle with the distinction between voluntary and involuntary manslaughter. For example, the Fifth District Court of Appeal correctly notes that voluntary manslaughter, which requires an intent to kill, can only encompass manslaughter by act or procurement. See *Barton v. State*, 507 So. 2d 638, 641 (Fla. 5th DCA 1987):

> *Taylor v. State*, 444 So. 2d 931 (Fla. 1983), held that an intent to kill is a prerequisite for conviction of assault with intent to commit manslaughter pursuant to *Williams v. State*, 41 Fla. 295, 26 So. 184 (1899). Adopting the *Williams* rationale, *Taylor* held that the crime of attempted manslaughter exists in situations where, if death resulted from an act of the defendant, the defendant would be guilty of ***voluntary*** (i.e., intentional) manslaughter at common law. ***Voluntary*** manslaughter at common law (as to which there can be an attempt) has been statutorily enacted in Florida as "the killing of a human being by the act (or) procurement ... of another, without lawful justification." § 782.07, Fla.Stat. (1985). The words "act" and "procurement" obviously refer to acts evidencing an intent to kill, as required at common law for ***voluntary*** manslaughter. (Emphases added)

However, the Fifth District incorrectly suggests that the common law crime of involuntary manslaughter is now codified exclusively as manslaughter by culpable negligence. *Ibid* ("***Involuntary*** (i.e., negligent) manslaughter at common law has been statutorily enacted in Florida as a killing caused by 'culpable negligence' (see § 782.07, Fla. Stat. (1985)) - and there is no such crime as 'attempted manslaughter by culpable negligence.'").

Overlooked by the Fifth District, involuntary manslaughter can include an intentional act or procurement that unintentionally causes death. See *Hall v. State*, 951 So. 2d 91, 96 (Fla. 2d DCA 2007):

> [I]f the crime of manslaughter by act did not include intentional acts that result in unintentional deaths, then there would be no applicable offense for such crimes... [W]e hold that a conviction for manslaughter by act does not require an intent to kill but only an intentional act that causes the death of the victim.

See also *Montgomery v. State*, Case No. 1D07-4688 *9 (Fla. 1st DCA Feb. 12, 2009) ("[W]e hold that manslaughter by act also requires only an intentional unlawful act, rather than an intent to kill."). Often exemplified by the single punch fist fight that results in death, the misdemeanor manslaughter form of involuntary manslaughter necessarily involves manslaughter by act (an intentional act that unintentionally results in death). See e.g. *Hall*, supra, at 92 ("This case is another tragic instance of manslaughter by single punch to the head."); see also e.g. *Acosta v. State*, 884 So. 2d 112, 113 (Fla. 2d DCA 2004):

> Although the evidence suggests that John Acosta killed his victim with the first punch during an after-school fight among high school students, in light of all the circumstances, we conclude that the evidence permitted the jury to convict him of manslaughter.

See LaFave and Scott, *Criminal Law, §15.5*(d) p.539 (2d ed.)

> [I]t is almost universally held, as a specific instance of unlawful-act manslaughter, that one is guilty of involuntary manslaughter who intentionally inflicts bodily harm upon another person, as by a moderate blow with his fist, thereby causing an unintended and unforeseeable death to the victim (who, unknown to his attacker, may have a weak heart or a thin skull or a blood deficiency).

But see *Weir v. State*, 777 So. 2d 1073, 1074 (Fla. 4th DCA 2001):

> We affirm Weir's conviction and sentence on the charge of ***manslaughter by culpable negligence***...
>
> At some point in the argument, Weir raised his arm and punched Martin right between the eyes. At the time Weir struck him, Martin's hands were down by his side.
>
> The punch, described as loud and sounding like a water balloon, caused the victim to fall backward, his head swung back, and he hit his back against the kitchen counter. The victim got up, took about two or three steps toward Weir, then collapsed forward toward the coffee table; he was transported to the hospital, never recovered, and died when taken off life support several days later. (Emphasis added)

Also called "unlawful act" manslaughter, misdemeanor manslaughter requires an intent to commit an "unlawful" act. See generally *Todd v. State*, 594 So. 2d 802, 803 (Fla. 5th DCA 1992):

> The issue, as presented to us, is whether Florida recognizes the misdemeanor manslaughter rule. Reduced to basics, the misdemeanor manslaughter rule is that an unintended homicide which occurs during the commission of an unlawful act not amounting to a felony constitutes the crime of involuntary manslaughter. It is sometimes referred to more broadly as "unlawful act manslaughter." The only express mention of the misdemeanor manslaughter rule that either party has cited in Florida case law is a passing reference in a footnote of an opinion of the Third District Court of Appeal, *Rodriguez v. State*, 443 So. 2d 286, 290 n.8 (Fla. 3d DCA 1983).

Theoretically, "unlawful act" manslaughter can include felonious acts that fail, for whatever reason, to serve as the underlying offense for felony murder. See LaFave and Scott, *Criminal Law, §15.5*(a) p.531 (2d ed.) ("'Unlawful act' is a phrase, however, which also includes criminal acts other than misdemeanors. Thus a felony

which for some reason will not suffice for felony-murder may do for unlawful-act manslaughter."); but see *Boler v. State*, 678 So. 2d 319, 323 (Fla. 1996) ("The cases cited by Oats involved misdemeanor-manslaughter charges based upon unintended homicides that occurred during the commission of an unlawful act not amounting to a felony."). Nonetheless, "unlawful act" manslaughter contains a causation element that requires the State to prove that the defendant's intentional act caused the victim's death. See *Boler* at 323 ("The cited [misdemeanor-manslaughter] cases also focus on the causation element and the foreseeability that the defendant's actions could result in physical harm; in each instance the court concluded that legal causation had not been proven."); see also LaFave and Scott, *Criminal Law, §15.5*(b) p.533 (2d ed.) ("Assuming that, while the defendant is committing an 'unlawful act,' a death occurs near the defendant, still the defendant is not guilty of manslaughter unless the unlawful act causes the death.").

Although the Second District correctly recognized the existence of the crime of involuntary manslaughter by act in reaching its decision in *Hall*, that court, in a subsequent decision, recently repeated the Fifth District's erroneous suggestion that the common law crime of involuntary manslaughter is now codified exclusively as manslaughter by culpable negligence. See *Bolin v. State*, 8 So.3d 428, 420 (Fla. 2d DCA 2009) ("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.") (Emphases added). This erroneous interpretation of the law fails to account for the intentional act element inherent in the crime of involuntary manslaughter by act. Cf. LaFave and Scott, *Criminal Law, §15.5* p.530 (2d ed.):

> Centuries ago it was stated to be the law that an unintended homicide in the commission of an unlawful act constituted criminal homicide; and later, when criminal homicide was subdivided into the separate crimes of murder and manslaughter, this type of criminal homicide was assigned to the (involuntary) manslaughter category. As time passed it came to be considered too harsh a rule, and the courts began to place limitations upon it.
>
> The trend today is to abolish altogether this type of involuntary manslaughter, leaving the field of involuntary manslaughter occupied only by the criminal-negligence type already discussed.

Cf. also LaFave and Scott, *Criminal Law, §15.5*(e) p.541 (2d ed.):

> A modern tendency, however, is to go further and, by statute, to abandon the whole concept of involuntary manslaughter based upon unlawful conduct alone, leaving the field occupied solely by involuntary manslaughter based upon criminal negligence or recklessness (although of course the fact of the defendant's unlawful conduct may generally be looked to as evidence of criminal negligence).

In *Montgomery*, the First District declared express and direct conflict with *Barton* on the purported failure of the Fifth District to recognize the crime of involuntary manslaughter by act. See *Montgomery* at *12:

> In determining that there is no intent-to-kill element in manslaughter by act, we have come into conflict with the Fifth District. Although we reached our decision by a different route, we agree with the Second District

> regarding the elements of the crime of manslaughter by act. *We believe that the contrary holding espoused by the Fifth District in 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*. Because we are unable to reconcile our holding with the Fifth District's position, we certify conflict with Barton. (Emphasis added)

In essence, *Montgomery* expresses a concern that *Barton* fails to account for the common law crime of misdemeanor manslaughter (e.g. the single punch fist fight).

Despite its failure to recognize the crime of involuntary manslaughter by act, *Barton* correctly holds that voluntary manslaughter can only include manslaughter by act or procurement because voluntary manslaughter necessarily involves an intent to kill. See generally *State v. Sherouse*, 536 So. 2d 1194, 1195 (Fla. 5th DCA 1989) (Cobb, J., concurring specially) ("Therefore, consistent with our interpretation in *Barton*, an essential element of the crime of ***voluntary*** manslaughter is an intent to kill, although that intent lacks sufficient deliberation to elevate the homicide to first degree murder.") (Emphasis added). In contrast, involuntary manslaughter can include all three methods of manslaughter listed in the current statutory definition (act, procurement, and culpable negligence). In other words, all voluntary manslaughter must be by act or procurement (with an intent to kill), but all manslaughter by act or procurement need not be voluntary. The following tables illustrate this point:

Table 1

	Manslaughter by act?	Manslaughter by procurement?	Manslaughter by culpable negligence?
Voluntary manslaughter[1]	Yes.	Yes.	No.
Involuntary manslaughter[2]	Yes.	Yes.	Yes.

Table 2

	Voluntary manslaughter?	Involuntary manslaughter?
Manslaughter by act?	Yes.	Yes.
Manslaughter by procurement?	Yes.	Yes.
Manslaughter by culpable negligence?	No.	Yes.

The distinction between voluntary and involuntary manslaughter under the current statutory definition may appear academic at first glance. However, that distinction becomes paramount when a trial court must decide: (1) what form of manslaughter constitutes the appropriate lesser included offense in a murder prosecution; and, (2) what form of manslaughter supports an attempt instruction.

What form of Manslaughter Constitutes the Appropriate

[1]See *Fortner*, supra ("***Voluntary*** manslaughter was the intentional killing of another in a sudden heat of passion due to adequate provocation, and not with malice.") (Emphasis added).

[2]See *Fortner*, supra ("***Involuntary*** manslaughter consisted in the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act

Lesser Included Offense in a Murder Prosecution?

Recent decisions of the Second and Fifth Districts highlight the difficulties trial courts face when deciding which form of manslaughter constitutes the appropriate lesser included offense in a murder prosecution. See generally *Bolin* at 429:

> [T]he standard instruction for manslaughter requires the court to tailor the instruction to the case. As set forth in both the manslaughter statute, § 782.07, and in the standard jury instruction, the crime can be committed in three ways: by act, by procurement, or by culpable negligence.

In *Duncan v. State*, 703 So. 2d 1069 (Fla. 5th DCA 1997), the Fifth District faulted the trial court for instructing the jury on the lesser offense of voluntary manslaughter (by act) when the State only charged the defendant with second degree murder. See *Duncan* at 1070:

> The instruction for ***voluntary*** manslaughter should not have been given because Duncan was only charged with second degree murder. It is only when manslaughter is being defined as a lesser included offense of first degree premeditated murder that the instruction for ***voluntary*** manslaughter is to be given. (Emphases added)

Conversely, the Second District in *Bolin* faulted the trial court for instructing the jury on the lesser offense of involuntary manslaughter by culpable negligence when the State charged first degree murder. See *Bolin* at 430:

> Given both the allegations of the indictment and the proof at Bolin's trial, the court was required to instruct the jury on manslaughter by act. It did not. Instead, the court instructed the jury that it could find Bolin guilty of manslaughter if it determined, among other things, "that

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lawful in itself.") (Emphasis added).

> the death of Natalie Holley was caused by the culpable negligence of Oscar Ray Bolin." (Emphasis supplied.) The court then defined culpable negligence for the jurors.

Importantly, both *Duncan* and *Bolin* conclude that the level of intent, if any, alleged in the murder count necessarily dictates the appropriate form of manslaughter that constitutes the lesser included offense.

A simple rule of easy application, the mental state for the lesser form of manslaughter should match the mental state for the charged form of murder. Because first degree murder requires proof of an intent to kill, voluntary manslaughter by act (which also includes an intent to kill) constitutes the appropriate, lesser form of manslaughter. See *In re Standard Jury Instructions in Criminal Cases-Report No. 2007-10*, 997 So. 2d 403, 404 (Fla. 2008) ("Give only if 2(a) alleged and proved [(Defendant) intentionally caused the death of (victim)], ***and manslaughter is being defined as a lesser included offense of first degree premeditated murder***.") (Emphasis added); accord *Duncan*. Because second degree murder does not require proof of an intent to kill, involuntary manslaughter by culpable negligence constitutes the appropriate, lesser form of manslaughter. Finally, involuntary manslaughter by act provides the appropriate lesser form of manslaughter when the State charges a defendant with felony murder. See LaFave and Scott, *Criminal Law, §15.5(a)* p.531 (2d ed.):

> [T]he unlawful-act type of manslaughter is often referred to, somewhat loosely, as the "misdemeanor-manslaughter doctrine,"

> a sort of junior-grade counterpart of the "felony-murder doctrine." Although the misdemeanor involved is commonly a traffic offense (e.g., speeding, drunk driving), another common type of misdemeanor causing death is simple battery, as where the defendant hits the victim a light blow, intending to inflict only minor harm, but actually causing a quite unexpected death.

See e.g. *Tyus v. State,* 845 So. 2d 318, 319 (Fla. 1st DCA 2003):

> Appellant, Albert Tyus, appeals from his conviction for manslaughter. Appellant contends that his act of burglarizing an elderly woman's residence did not constitute the legal cause of the resident's death by fatal cardiac dysrhythmia and that the trial court therefore erred in denying his Motion for Judgment of Acquittal...
>
> After the State rested its case, appellant moved for a judgment of acquittal as to the felony murder and grand theft counts. Appellant also asserted that the State had not proven the elements of second-degree murder or manslaughter, two lesser included offenses of first-degree felony murder.

The following table illustrates the distinguishing requirements for various forms of homicide in the State of Florida:

	1st Degree Murder	2nd Degree Murder	Felony Murder	Voluntary Manslaughter by Act	Involuntary Manslaughter by Act	Involuntary Manslaughter by Culpable Negligence
Premeditation	***Yes***.	No.	No.	No.	No.	No.
Specific Intent (to kill)	***Yes***.	No.	No.	***Yes***.	No.	No.
Depraved Mind	No.	***Yes***.	No.	No.	No.	No.
General Intent (to commit a felony)	No.	No.	***Yes***.	No.	No.	No.
General Intent (to commit a misdemeanor)	No.	No.	No.	No.	***Yes***.	No.
Reckless Act	No.	No.	No.	No.	No.	***Yes***.

Although arguably oversimplified, the following equations correlate the particular form of murder with the appropriate form of manslaughter as a lesser offense:

First Degree Murder

First degree murder **=** premeditation **+** intent to kill **+** death

First degree murder **-** premeditation **=** voluntary manslaughter by act (intent to kill)

In other words, if you eliminate premeditation but keep the intent to kill (and do not add a depraved mind), the homicide moves straight from first degree murder to voluntary manslaughter by act (without a stopping at second degree murder).

Second Degree Murder

Second degree murder **=** depraved mind (i.e. “super” recklessness) **+** death

Second degree murder **-** depraved mind **+** culpable negligence = involuntary manslaughter by culpable negligence (recklessness)

In other words, if you reduce the state of mind from “super” reckless to just reckless, the homicide moves from second degree murder straight to involuntary manslaughter by culpable negligence (without stopping at manslaughter by act). See generally *Oliva v. McDonough*, Case No.8:05-CV-246-T-30EAJ *2 (M.D. Fla., Feb. 15, 2008):

> Petitioner asserts that he was charged by indictment with second degree murder, and the trial court instructed the jury on second degree murder and voluntary manslaughter. Petitioner's sole claim is that his trial counsel provided ineffective assistance by failing to object to the voluntary manslaughter jury instruction on the ground that it contained an intent element not alleged in the charging document. He argues that "intentional manslaughter with a firearm" was not an available lesser included offense of the second degree murder statute in his case because the information sworn to by the State did not allege that he had the intent to kill the victim, and therefore, his counsel was ineffective by failing to object to the manslaughter jury instruction.

But see *Oliva v. McDonough* at *3:

> Petitioner argues that voluntary manslaughter is a lesser included offense of first-degree murder, but not second-degree murder, and therefore, because he was

> charged with second-degree murder the voluntary manslaughter instruction was inappropriate. In support of his argument he cites to *Duncan v. State*, 703 So. 2d 1069 (Fla. 5th DCA 1997), and he maintains that his counsel was ineffective for failing to object to the voluntary manslaughter instruction and argue *Duncan* in support of the objection. However, in [*Rayl v. State*, 891 So. 2d 1052 (Fla. 2d DCA 2004)] the Second District Court of Appeal, the appellate court for the district in which the trial court in Petitioner's case is located, stated that "the dicta in *Duncan* suggesting that manslaughter is not a standard necessary lesser included offense of second-degree murder is an incorrect statement of law, which contradicts precedent from the Florida Supreme Court and this court." *Id.*, 891 So. 2d at 1055. If there is conflict between the district courts, the trial court is bound by the precedent in its own appellate district. See *Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992). "Counsel is not deficient for failing to raise an argument which runs contrary to the law or controlling precedent at trial or on appeal." *Coley v. Sec 'y of Dep't of Corr.*, 2007 U.S. Dist. LEXIS 26075 *13 (M.D. Fla. 2007) (citing *Jones v. Barnes*, 463 U.S. 745 (1983); *U.S. v. Winfield*, 960 F.2d 970, 974 (11th Cir. 1992) (finding an attorney was not ineffective for failing to argue a meritless issue)). Moreover, the dicta in *Duncan* "is without force as a judicial precedent[.]" See *Pooton v. Berutich*, 199 So. 2d 139, 142 (Fla. 2nd DCA 1967).

See also generally *Rayl v. State*, 891 So. 2d 1052, 1054 (Fla. 2d DCA 2004):

> Rayl claimed in his habeas petition that his appellate counsel should have sought rehearing from this court's decision on direct appeal because manslaughter with a firearm was not an available lesser included offense to the second-degree murder charge. Rayl asserted that of the three different ways to commit manslaughter, two were not supported by the evidence because there was no evidence of culpable negligence or procurement. The remaining way, manslaughter by act or voluntary manslaughter, was not a necessary lesser because that crime contained an intent-to-kill element, which was not contained within the information for second-degree murder. Rayl asserted that pursuant to Duncan, voluntary manslaughter is a lesser included offense of first-degree murder, but not second-degree murder and, thus, by failing to raise this issue in a motion for rehearing, appellate counsel was

ineffective.

But see *Rayl* at 1055:

> The "Note to Judge" does not prohibit giving an instruction on voluntary manslaughter as a lesser included offense of second-degree murder. In fact, as the trial court observed, manslaughter in all its forms is listed in the jury instructions as a category 1 offense that is necessarily included in the charge of second-degree murder.

Felony Murder

Felony murder **=** felony intent **+** death

Felony murder **-** felony intent **+** misdemeanor intent **=** involuntary manslaughter by act

In other words, if you reduce the general intent from that of a felony to a misdemeanor, the homicide moves from felony murder to involuntary manslaughter by act (without stopping at second degree murder or voluntary manslaughter by act).

Admittedly, defendants facing first degree murder charges often dispute the existence of an intent to kill. With intent to kill a factual question for the jury to resolve, most murder prosecutions would support an instruction on both first and second degree murder. Indeed, most individuals who possess an intent to kill also manifest a depraved mind. However, not everyone who intends to kill necessarily disregards the value of human life. The classic case of imperfect/excessive self-defense provides the best example. Compare *Hopson v. State*, 168 So. 810 (Fla. 1936):

> Self-defense is a plea in the nature of a confession and avoidance. In such cases the defendant confesses doing

> the act charged, but seeks to justify that act upon the claim that it was necessary to commit the act to save himself from death or great bodily harm.

with *Hill v. State*, 979 So. 2d 1134, 1134-35 (Fla. 3d DCA 2008):

> The defendant also requested an instruction on imperfect self-defense. Imperfect self-defense is "[t]he use of force by one who makes an honest but unreasonable mistake that force is necessary to repel an attack." *Black's Law Dictionary* 1390 (8th ed. 2004).
>
> The defendant relied on a California jury instruction regarding imperfect self-defense. Under California law, "Where that fear [of imminent peril] is unreasonable (but nevertheless genuine), ***it reduces the crime from murder to voluntary manslaughter***-a doctrine known as 'imperfect self-defense.'" *Middleton v. McNeil*, 541 U.S. 433, 434 (2004). The defendant asked the trial court to give the California instruction quoted in *Middleton*.
>
> We conclude that the requested instruction is contrary to the Florida statute, which requires a reasonable belief in the necessity to use deadly force. The Florida statute does not contain a provision on imperfect self-defense. The trial court correctly rejected the defense request. (Emphasis added)

Under Florida law, a defendant facing a first degree murder charge could stipulate imperfect self-defense and argue as follows:

- I shot the victim because I unreasonably believed that he was about to use deadly force upon me.
- Although I admittedly possessed an intent to kill, I did not possess any level of premeditation. Therefore, I cannot be guilty of first degree murder.
- Although unreasonable, my actions do not evince a "depraved mind regardless of human life." Therefore, I cannot be guilty of second degree murder.

- Because I possessed an intent to kill but did not possess premeditation or a depraved mind, the highest crime of which I can be found guilty is voluntary manslaughter by act.

Under the stipulated facts of this hypothetical, the crime of voluntary manslaughter by act constitutes the appropriate form of manslaughter upon which the trial court should instruct the jury.[3] Therefore, the trial court should instruct the jury on voluntary manslaughter by act to the exclusion of involuntary manslaughter by act and also to the exclusion of involuntary manslaughter by culpable negligence. See *Duncan v. State*, 703 So. 2d 1069 (Fla. 5th DCA 1997):

> We agree with Duncan that the trial court erred by merging the instructions for ***voluntary*** and ***involuntary*** manslaughter. The instruction for ***voluntary*** manslaughter should not have been given because Duncan was only charged with second degree murder. It is only when manslaughter is being defined as a lesser included offense of first degree premeditated murder that the instruction for ***voluntary*** manslaughter is to be given. *Standard Jury Instructions in Criminal Cases (93-1)*, 636 So. 2d 502, 503-504 (Fla. 1994).

But see *Roberts v. State*, 694 So. 2d 825, 826 (Fla. 2d DCA 1997), citing *Hayes v. State*, 564 So. 2d 161 (Fla. 2d DCA 1990) ("The trial court must instruct a jury completely on all necessarily included offenses,

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[3]In such a factual scenario, an instruction on second degree murder could improperly allow the jury to convict the defendant of a crime unsupported by the evidence. However, if the trial court declined to give an instruction on second degree murder and the jury convicted the defendant of first degree murder (presuming the defendant did not invite/waive the error by requesting no instruction on second degree murder), this Court would likely find *per se* reversible error under *State v. Abreau*, 363 So. 2d 1063 (Fla. 1978) (if preserved) or fundamental error under *State v. Lucas*, 645 So. 2d 425 (Fla. 1994) (if unpreserved).

regardless of whether the facts of the case support the instruction."). Thus, a trial court can instruct the jury on the appropriate form of manslaughter as a lesser included offense in a murder prosecution only if the trial court correctly distinguishes voluntary manslaughter from involuntary manslaughter.

The Previous Instruction Correctly Defined

the Crime of Voluntary Manslaughter by Act

Under the previous version of the standard instruction, a jury received a correct definition of the crime of voluntary manslaughter by act, a crime that constitutes the appropriate lesser included offense of first degree murder. A salient fact, both the previous and the revised versions of the standard instruction, in accordance with the common law, list voluntary manslaughter (which can only be accomplished by act) as the lesser included offense of premeditated murder. Compare *In re Standard Jury Instructions In Criminal Cases--No. 2006-1*, 946 So. 2d at 1062 ("Give only if 2(a) alleged and proved, ***and manslaughter is being defined as a lesser included offense of first degree premeditated murder***.") (Emphasis added) with *In re Standard Jury Instructions in Criminal Cases-Report No. 2007-10*, 997 So. 2d at 404 ("Give only if 2(a) alleged and proved, ***and manslaughter is being defined as a lesser included offense of first degree premeditated murder***.") (Emphasis added). The reference in the both instructions to the intentional form of manslaughter as the appropriate lesser included offense of first degree premeditated

murder explains the previous instruction's explanation that the intent to kill need not be premeditated. See generally *Rayl* at 1055:

> The "Note to Judge" explains that this additional instruction is to be given "only if 2(a) [the voluntary manslaughter element] is alleged and proved, and manslaughter is being defined as a lesser included offense of first-degree premeditated murder." Thus, in those cases where the primary offense charged is first-degree murder and manslaughter by intentional act is being submitted to the jury as a lesser included offense, the additional instruction must be given to assist the jury in distinguishing between the elements of first-degree murder and manslaughter.

While the previous instruction correctly defined the offense of voluntary manslaughter by act, it failed to explain the crime of involuntary manslaughter by act. That failure, and that failure alone, constitutes its only error with regard to the crime of manslaughter by act. By adding the phrase "only an intent to commit an act which caused death" at the end of the explanatory paragraph on intent in the revised instruction, however, this Court placed an apple (involuntary manslaughter by act) at the end of a sentencing discussing oranges (voluntary manslaughter by act). In doing so, this Court replaced an instruction that remained correct part of the time (voluntary manslaughter scenarios) with an instruction that remains incorrect all of the time. In other words, the revised instruction represents a "one size fits all" approach that ends up fitting nothing. Ultimately, this Court needlessly adulterated an instruction that previously provided a correct definition of a separate and distinct form of manslaughter.

Hall, *Montgomery*, and the Revised Instruction

If the standard jury instruction fails to distinguish between voluntary and involuntary manslaughter by act, appellate courts may find fundamental error when no error actually occurred. Yet, the First District's decision in *Montgomery*, the Second District's decision in *Hall*, and this Court's revised instruction all fail to address the important distinction between the common law crimes of voluntary and involuntary manslaughter.

In *Montgomery*, the First District held that the standard jury instruction on manslaughter by act imposes an intent to kill element. See *Montgomery* at *2:

> [Appellant] contends the trial court fundamentally erred in giving the standard jury instruction for manslaughter by act, as it erroneously suggests that intent to kill is an element of that crime. We agree with Appellant because the standard instruction imposed an additional element on the crime of manslaughter by act...

See also *ibid* at *11 ("[W]e hold that the instructions, as given, improperly imposed an additional element on the lesser-included offense of manslaughter."). While correct in interpreting the instruction as requiring an intent to kill, the First District failed to recognize that the instruction correctly defined the offense of voluntary manslaughter by act. Apparently concerned that the instruction failed to address the crime of involuntary manslaughter by act, the First District found the instruction was fundamentally erroneous and reversed the defendant's conviction. *Ibid* at *3-4

("[W]e hold that intent to kill is not an element of manslaughter by act and that the trial court fundamentally erred in giving instructions that suggested the State was required to prove intent to kill to prove the crime of manslaughter."). In doing so, the First District endorsed a revised instruction that merged voluntary and involuntary manslaughter by act into a single, incomprehensible instruction. See *ibid* at *12 ("[T]he supreme court recently approved a modification to the standard jury instructions for manslaughter by act that is consistent with our holding.").

In *Hall*, the Second District held that the standard jury instruction on manslaughter by act does not impose an intent to kill element. See *Hall* at 96 ("[W]e hold that a conviction for manslaughter by act does not require an intent to kill but only an intentional act that causes the death of the victim."). While correct in recognizing that the crime of involuntary manslaughter by act does not require an intent to kill, the Second District failed to recognize that the standard instruction correctly defined the crime of voluntary manslaughter by act. Hence, by concluding that the standard instruction did not impose an intent to kill requirement, the Second District erred. See *ibid*:

> We are also aware that the standard jury instruction for manslaughter by act requires a finding that the defendant "intentionally caused the death of" the victim. Fla. Std. Jury Instr. (Crim.) 7.7. We do not read this instruction to require an intent to kill, however. We read this instruction to require an intentional act that "caused the death of" the victim...

Assuming *arguendo* that the First District is correct (and the Second District is wrong) regarding the imposition of an intent to kill requirement, the previous instruction would not constitute error, let alone fundamental error, if the defense presented a theory of imperfect self defense. When claiming imperfect self-defense, a defendant (in order to avoid a conviction for second degree murder) ***needs*** the jury to believe that voluntary manslaughter by act does require an intent to kill. In other words, in order to successfully argue imperfect self-defense, a defendant must convince a jury that, although he possessed an intent to kill, he lacked not only the premeditation required for first degree murder, but also the depraved mind required for second degree murder. In such a scenario, the previous standard instruction would correctly define the appropriate lesser included offense of **voluntary** manslaughter by act. See *Barton v. State*, 507 So. 2d 638, 641 (Fla. 5th DCA 1987):

> ***Voluntary*** manslaughter at common law (as to which there can be an attempt) has been statutorily enacted in Florida as "the killing of a human being by the act (or) procurement ... of another, without lawful justification." § 782.07, Fla.Stat. (1985). The words "act" and "procurement" obviously refer to acts evidencing an intent to kill, as required at common law for ***voluntary*** manslaughter. (Emphases added)

See also *State v. Sherouse*, 536 So. 2d 1194, 1195 (Fla. 5th DCA 1989) (Cobb, J., concurring) ("Therefore, consistent with our interpretation in *Barton*, an essential element of the crime of ***voluntary*** manslaughter is an intent to kill, although that intent

lacks sufficient deliberation to elevate the homicide to first degree murder.") (Emphasis added). However, by failing to recognize that the common law crime of voluntary manslaughter, as codified by *Section 782.07(1), Florida Statutes*, requires an intent to kill, whereas the common law crime of involuntary manslaughter (also codified by *Section 782.07(1)*) does not, the First District's decision in *Montgomery* requires a reviewing court to find fundamental error even if a defendant concedes (and therefore does not dispute) the intentional nature of the killing at issue. Hence, *Montgomery* finds fundamental error in an instruction that correctly defines voluntary manslaughter by act even in cases wherein that particular crime constitutes the appropriate lesser included offense of first degree murder.

Finding *per se* fundamental error in such a case turns the *sine qua non* aspect of fundamental error analysis on its head. See *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003), quoting *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960):

> We have stated that "in order to be of such fundamental nature as to justify a reversal in the absence of timely objection 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."

Normally, a defendant claiming fundamental error argues that the State could not have obtained the conviction without the assistance of the purported error. However, under the stated rationale of

Montgomery (the standard jury instruction improperly suggests that manslaughter by act requires an intent to kill), any fundamental error claim should fail because the purported error actually benefits the defendant. In other words, the defendant could not obtain the conviction he seeks (manslaughter as opposed to murder) ***unless*** the jury believes that manslaughter by act encompasses intentional killings whereas second degree murder does not. Thus, *Montgomery* improperly requires a finding of *per se* fundamental error even if the purported error benefitted the defendant.

Unrecognized by the First District, the defendant in *Montgomery* essentially complained that he did not receive an instruction on the crime of involuntary manslaughter by act. Yet, the evidence adduced at trial could support an instruction on involuntary manslaughter by act only if the facts established a scenario involving an intentional act that unintentionally resulted in death. See e.g. *Hall* at 92 ("This case is another tragic instance of manslaughter by single punch to the head."); see also *Acosta v. State*, 884 So. 2d 112, 113 (Fla. 2d DCA 2004):

> Although the evidence suggests that John Acosta killed his victim with the first punch during an after-school fight among high school students, in light of all the circumstances, we conclude that the evidence permitted the jury to convict him of manslaughter.

Yet, the failure to instruct the jury on the crime of involuntary manslaughter by act does not constitute error when the defendant relies on a claim of imperfect self-defense. Furthermore, if such

a defendant did not request a specific instruction on the crime of involuntary manslaughter by act, the ***failure*** of the trial court to instruct on that lesser offense ***cannot*** constitute fundamental error. See *Morris v. State*, 658 So. 2d 155, 156 (Fla. 1st DCA 1995), citing *Jones v. State*, 484 So. 2d 577 (Fla. 1986) ("In non-capital cases, failure to instruct as to necessarily lesser-included offenses is not fundamental error.").

Ultimately, the First District's failure to recognize that the standard jury instruction correctly defined the crime of voluntary manslaughter by act resulted in an unnecessary finding of *per se* fundamental error. Thus, *Montgomery* highlights the need for trial courts to instruct juries on the appropriate form of manslaughter as a lesser included offense of murder.

***Jackson v. State*, Case No. 1D09-2981**

The case of *Jackson v. State* is currently pending in the First District Court of Appeal. In that case, the defendant expressly argued to the jury that voluntary manslaughter by act constituted the highest crime purportedly proven by the State. See IV-69:

> If you don't think he acted reasonably, it you don't think that he acted like a reasonable and prudent person, if you don't think that the facts justified him thinking that his life was in danger or that or some great bodily harm might befall him, then it's not self-defense because it's not reasonable, but by the same token that doesn't make it murder either.
>
> ***Manslaughter is what's left over***. When you look at a set of facts and you say, well it really doesn't fit murder, it really doesn't fit a justifiable killing or an excusable killing, but nevertheless, it's a wrongful killing. It's

> something that shouldn't have happened and wasn't reasonable, the person should not have resorted to deadly force under those circumstances as you judge them. ***Then by definition a killing is manslaughter***. (Emphases added)

See also IV-80-81:

> So what we're left with looking at is this manslaughter or attempted manslaughter, or is this justifiable homicide? I think the evidence excludes the proof that is necessary to prove beyond a reasonable doubt that he had either a premeditated state-of-mind or that he had that depraved state-of-mind that's required for second degree. Remember the operative terms in a depraved state-of-mind are ill-will, hatred, spite, or evil intent.
>
> Certainly with Lonnie Baxter none of that existed... So, ***the best case for the prosecution is they have proved a manslaughter case*** and they have proven an attempted manslaughter case. That's what the evidence supports. (Emphasis added)

In arguing imperfect/excessive self-defense, the defendant in *Jackson* conceded that he intentionally used deadly force. See IV-69 ("It's something that shouldn't have happened and wasn't reasonable, ***the person should not have resorted to deadly force*** under those circumstances as you judge them.") (Emphasis added). In arguing as he did, the appellant conceded that he possessed an intent to kill. See *Martinez v. State*, 981 So. 2d 449, 453 (Fla. 2008) ("[W]hen a defendant asserts a claim of self-defense, he admits the commission of the criminal act with which he was charged but contends that the act was justifiable."). Given that concession, it strains credulity to assert that the jury could have found that he lacked an intent to kill. Cf. *Montgomery* at *12:

> ***Because the jury in the instant case found that Appellant did not intend to kill the victim***, we are constrained, under

> the authority of [*Hankerson v. State*, 831 So. 2d 235 (Fla. 1st DCA 2002)], to reverse Appellant's conviction for second-degree murder and remand the case for a new trial consistent with this opinion. (Emphasis added)

In other words, the defendant's imperfect/excessive self-defense argument eliminated any dispute as to whether or not he possessed an intent to kill. Consequently, even if the standard jury instruction erroneously suggested that all manslaughter by act requires an intent to kill, no fundamental error could occur. See *Zeigler v. State*, 18 So. 3d 1239, 1243 (Fla. 2d DCA 2009):

> Alleged errors in jury instructions, as with most other alleged errors at trial, must be preserved in the trial court to be cognizable on appeal. "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. Delva*, 575 So. 2d 643, 644 (Fla. 1991). In the context of jury instructions, fundamental error arises only when the trial court fails to provide proper instructions on an issue that was disputed at trial. *Id.*; see also *Reed v. State*, 837 So. 2d 366, 369 (Fla. 2002). Further, an error is fundamental only when it "reach[es] 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." *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960). Thus, to constitute fundamental error, an erroneous jury instruction must both relate to a disputed issue at trial and be so erroneous as to affect the validity of the guilty verdict.

Additionally, by arguing imperfect/excessive self-defense ("that state-of-mind... one of fear and apprehension"), the defendant in *Jackson* claimed that he lacked any accompanying premeditation ("not the cold-blooded state-of-mind") or ill will, hatred, or spite ("not the mean state-of-mind"). II-22-23. In doing so, the defendant presented an argument for manslaughter strikingly similar to the

hypothetical posed earlier in these Comments. Compare II-25:

> I think in the final analysis, you will conclude that this isn't a case of first degree murder or attempted first degree murder, and it may not even be a case of second degree murder or attempted second degree murder. It's more of a borderline case between a manslaughter and a self-defense. Was he reasonable in what he did? Did he over react to the situation? ***In that case, the state's evidence will only support a verdict of manslaughter*** or attempted manslaughter. That is our version of the facts. (Emphasis added)

With Comments, p.22 ("Because I possessed an intent to kill but did not possess premeditation or a depraved mind, the highest crime of which I can be found guilty is voluntary manslaughter by act."). To succeed under this theory of defense, however, the defendant in *Jackson* ***needed*** the jury to believe that manslaughter by act encompassed intentional killings. Hence, a conviction for manslaughter (and an acquittal as to first and second degree murder – an outcome sought after by the appellant) could not have been obtained but for the assistance of the ***purported*** error identified by the First District in *Montgomery*. Stated somewhat differently, the speculative jury confusion of such concern to the First District in *Montgomery*, even if present, would have benefitted the defendant in *Jackson*. Therefore, no fundamental error could possibly occur. That argument aside, the First District's failure in *Montgomery* to recognize that the previous standard jury instruction correctly defined the crime of voluntary manslaughter by act may result in an unnecessary finding of *per se* fundamental error in *Jackson*.

What Form of Manslaughter Supports an Attempt Instruction?

When a trial court instructs the jury on the crime of *attempted* manslaughter, the distinction between voluntary and involuntary manslaughter remains paramount because the crime of attempted involuntary manslaughter ***should not*** exist. See *Sherouse* at 1195 (Cobb, J., concurring specially), citing *Taylor*; *Murray v. State*, 491 So. 2d 1120 (Fla. 1986); *Tillman v. State*, 471 So. 2d 32 (Fla. 1985); and *Brown v. State*, 455 So. 2d 382 (Fla. 1984) ("Florida recognizes the existence of the criminal offense of attempted ***voluntary*** manslaughter, but not the offense of attempted ***involuntary*** (culpable negligence) manslaughter.") (Emphases added)[4]; but see *Montgomery* at *6-7 ("We interpret [*Taylor*] as requiring the State to prove only an intent to commit an act that would have resulted in the death of the victim except that the defendant was prevented from killing the victim or failed to do so.").

In 1983 this Court addressed the following, certified question of great public importance:

> IS THERE A CRIME OF ATTEMPTED MANSLAUGHTER UNDER THE STATUTES OF THE STATE OF FLORIDA?

Taylor at 933. This Court answered the question in the affirmative, but limited the crime of attempted manslaughter to instances of manslaughter by act or by procurement. See *Taylor* at 934:

> We therefore hold that there may be a crime of attempted manslaughter. We reiterate, however, that a verdict for

[4]Judge Cobb's specially concurring opinion in *Sherouse* repeats the Fifth District's erroneous assertion that involuntary manslaughter only includes manslaughter by culpable negligence.

> attempted manslaughter can be rendered only if there is proof that the defendant had the requisite intent to commit an unlawful act. This holding necessitates that a distinction be made between the crimes of "manslaughter by act or procurement" and "manslaughter by culpable negligence." For the latter there can be no corresponding attempt crime. This conclusion is mandated by the fact that there can be no intent to commit an unlawful act when the underlying conduct constitutes culpable negligence. On the other hand, when the underlying conduct constitutes an act or procurement, such as an aggravated assault, there is an intent to commit the act and, thus, there exists the requisite intent to support attempted manslaughter.

While *Taylor* clearly articulates that the crime of attempted manslaughter by culpable negligence does not exist, the decision did not resolve whether the crime of attempted, involuntary manslaughter by act or procurement exists under Florida law. See *Cooper v. State*, 905 So. 2d 1063, 1064 (Fla. 4th DCA 2005), citing *State v. Brady*, 685 So. 2d 984 (Fla. 5th DCA 1977); *Taylor* ("Attempted manslaughter by culpable negligence is a nonexistent crime."); see generally LaFave and Scott, *Criminal Law, §6.2(c)(2)*, p.502 (2d ed.):

> The above analysis, it should be noted, cannot be applied when the completed crime consists of recklessly or negligently causing a certain result, for if there were an intent to cause such a result then the attempt would not be to commit that crime but rather the greater crime of intentionally causing such result. For example, so long as the crime of attempt is deemed to require an intent-type of mental state, there can be no such thing as an attempt to commit criminal-negligence involuntary manslaughter.

Noting both this Court's repeated references to an intent to kill and an inability to intend an unintentional death, the Second District interpreted *Taylor* as limiting the crime of attempted manslaughter to voluntary manslaughter by act scenarios. See *Hall* at 96:

> As we read the court's holding in *Taylor*, it was limited to determining that there was a crime of attempted manslaughter and determining the elements of that crime. The court's holding that an intent to kill is an element of attempted manslaughter does not require a determination that an intent to kill is an element of manslaughter by act. An intent to kill is required to commit an attempted manslaughter because no person can attempt to cause an unintentional death.

But see *In re Standard Jury Instructions in Criminal Cases-Report No. 2007-10*, 997 So. 2d 403, 404 (Fla. 2008):

> The Committee also proposed eliminating the intent element from instruction 6.6, Attempted Voluntary Manslaughter, consistent with its proposal to amend the manslaughter instruction. We do not approve the Committee's proposal for instruction 6.6 as well. See *Taylor v. State*, 444 So. 2d 931, 934 (Fla. 1983) ("[A] verdict for attempted manslaughter can be rendered only if there is proof that the defendant had the requisite intent to commit an unlawful act.").

The Fifth District interpreted *Taylor* as requiring an intent to kill for the crime of attempted manslaughter, but in doing so erroneously limited manslaughter by act or procurement solely to voluntary manslaughter scenarios. See *Barton* at 641:

> *Taylor v. State*, 444 So. 2d 931 (Fla. 1983), held that an intent to kill is a prerequisite for conviction of assault with intent to commit manslaughter pursuant to *Williams v. State*, 41 Fla. 295, 26 So. 184 (1899). Adopting the *Williams* rationale, *Taylor* held that the crime of attempted manslaughter exists in situations where, if death resulted from an act of the defendant, the defendant would be guilty of ***voluntary*** (i.e., intentional) manslaughter at common law. ***Voluntary*** manslaughter at common law (as to which there can be an attempt) has been statutorily enacted in Florida as "the killing of a human being by the act (or) procurement ... of another, without lawful justification." § 782.07, Fla.Stat. (1985). The words "act" and "procurement" obviously refer to acts evidencing an intent to kill, as required at common law for ***voluntary*** manslaughter. ***Involuntary*** (i.e., negligent) manslaughter at common law has been statutorily enacted in Florida as a

> killing caused by "culpable negligence" (see § 782.07, Fla.Stat. (1985))- and there is no such crime as "attempted manslaughter by culpable negligence." *Taylor* at 934. (Emphases added)

In a concurring opinion released six years after *Barton*, Judge Cobb attempted to clarify the Fifth District's interpretation of *Taylor* by focusing *Taylor's* repeated use of the phrase "intent to kill." See *Sherouse* at 1195 (Cobb, J., specially concurring):

> *Taylor*, in its discussion of ***voluntary*** manslaughter, repeatedly refers to the requisite of an intention to kill, not simply the intention to commit an unlawful act that results in homicide. In discussing the older case of *Williams v. State*, 41 Fla. 295, 26 So. 184 (1899), the *Taylor* opinion states: "The (*Williams*) Court made it clear, however, that for a conviction of assault with intent to commit manslaughter to be valid, there must be proof that the defendant did intend to kill." (Emphasis added). *Taylor* at 933. In discussing the facts of *Taylor*, Justice Boyd wrote: "[I]t is clear that appellant intentionally fired the shotgun at Clayton. This is sufficient proof that he intended to kill him. *Kelly v. State*, 78 Fla. 636, 83 So. 506 (1919)." (Emphasis added). *Taylor* at 934.
>
> Therefore, consistent with our interpretation in *Barton*, an essential element of the crime of ***voluntary*** manslaughter is an intent to kill, although that intent lacks sufficient deliberation to elevate the homicide to first degree murder. See *Williams*, 41 Fla. at 299-300, 26 So. at 186. (Emphases added)

In contrast with the Second and Fifth Districts, the First District interpreted *Taylor* as only requiring an intent to commit an unlawful act for the crime of attempted manslaughter. See *Montgomery* at *6-7 ("We interpret [*Taylor*] as requiring the State to prove only an intent to commit an act that would have resulted in the death of the victim except that the defendant was prevented from killing the victim or

failed to do so.”). The First District dismissed Judge Cobb’s concurring opinion in *Sherouse* as relying erroneously on dicta from the *Taylor* decision. *Ibid*:

> Although Judge Cobb correctly notes in his concurring opinion in *Sherouse* that the *Taylor* court referred to an intent to kill when discussing ***voluntary*** manslaughter (i.e., manslaughter by act or procurement), this language can only be construed as dicta when compared with the *Taylor* court's direct statement of its holding. (Emphasis added)

In reaching this conclusion, the First District noted the difficulty in envisioning a fact pattern that would support a conviction for attempted manslaughter when a defendant lacks the specific intent to kill. *Ibid*, n.2:

> We recognize that the concept of attempted manslaughter without an intent to kill is difficult to fathom. We can envision few scenarios from which it would be appropriate to charge attempted manslaughter, as opposed to attempted murder or aggravated battery. Nonetheless, we see no other way to give effect to the *Taylor* court's choice to omit any reference to an intent to kill in its express holding. Moreover, we note that many of the problems inherent in the recognition of attempted manslaughter without an intent to kill also inhere in the recognition of the crime of attempted second-degree murder without an intent to kill. Yet this state's highest court has decided that Florida will recognize the crimes of attempted manslaughter and attempted second-degree murder, and it has unequivocally stated that proof of attempted second-degree murder does not require proof of an intent to kill. *State v. Brady*, 745 So. 2d 954, 957 (Fla. 1999).

For support, the First District relied upon two decisions of the this Court which expressly hold that the crime of attempted second degree murder does not require the specific intent to kill. See *Gentry v. State*, 437 So. 2d 1097, 1098-99 (Fla. 1983):

> We now hold that there are offenses that may be successfully

> prosecuted as an attempt without proof of a specific intent to commit the relevant completed offense. The key to recognizing these crimes is to first determine whether the completed offense is a crime requiring specific intent or general intent. If the state is not required to show specific intent to successfully prosecute the completed crime, it will not be required to show specific intent to successfully prosecute an attempt to commit that crime. We believe there is logic in this approach and that it comports with legislative intent. Second-degree and third-degree murder under our statutes are crimes requiring only general intent.

See also *State v. Brady*, 745 So. 2d 954, 957-58 (Fla. 1999):

> Based on *Gentry* and the evidence presented at trial as outlined above, it would appear that a jury could reasonably conclude that Brady intentionally committed an act imminently dangerous to others, including Mack and Harrell, without regard for human life which would have resulted in death had the bullet fatally struck either Mack or Harrell. That is, by intentionally firing a deadly weapon in close proximity to both Mack and Harrell, the defendant intentionally committed an act that, had death resulted, would have constituted second-degree murder as to either Mack or Harrell. The attempt as to Mack appears clearer under evidence indicating that Mack was the intended target. However, because Harrell was in close proximity we also believe a jury could reasonably conclude, under the evidence, that the "act imminently dangerous to others" requirement of the second-degree murder statute would also be met by the proof submitted.

Flawed in its reasoning, *Montgomery* erroneously focuses on the intent to commit the underlying act, thereby failing to recognize the need for a perpetrator to enjoy the intent to accomplish the actual result of the act. Far from an academic point, the failure to require an intent to accomplish the result of the act causes significant problems in the context of attempted homicides. See generally LaFave and Scott, *Criminal Law, §6.2(c)(1)*, p. 500 (2d ed.):

> Some crimes, such as murder, are defined in terms of acts causing a particular result plus some mental state which

> need not be an intent to bring about that result. Thus, if *A*, *B*, *C*, and *D* have each taken the life of another, *A* acting with intent to kill, *B* with an intent to do serious bodily injury, *C* with a reckless disregard of human life, and *D* in the course of a dangerous felony, all three [sic] are guilty of murder because the crime of murder is defined in such a way that any one of these mental states will suffice. However, if the victims do not die from their injuries, then only *A* is guilty of attempted murder; on a charge of attempted murder it is not sufficient to show that the defendant intended to do serious bodily harm, that he acted in reckless disregard for human life, or that he was committing a dangerous felony. Again, *this is because intent is needed for the crime of attempt, so that attempted murder requires an intent to bring about that* ***result*** *described by the crime of murder (i.e., the death of another)*. (Emphasis added)

See also *State v. Gray*, 654 So. 2d 552, 553 (Fla. 1995), quoting *Amlotte v. State*, 456 So. 2d 448, 450 (Fla. 1984) (Overton, J., dissenting), but superceded by *Section 782.051(1), Florida Statutes*:

> Justice Overton maintained in a dissent that the crime of attempted felony murder is logically impossible. Id. at 450 (Overton, J., dissenting). He pointed out that a conviction for the offense of attempt requires proof of the specific intent to commit the underlying crime. Id.; see also § 777.04(1), Fla.Stat. (1991). He recognized that the crime of felony murder is based on a legal fiction that implies malice aforethought from the actor's intent to commit the underlying felony. *Amlotte*, 456 So. 2d at 450 (Overton, J., dissenting). This means that when a person is killed during the commission of certain felonies, the felon is said to have the intent to commit the death-even if the killing was unintended. Id. The felony murder doctrine also imputes intent for deaths caused by co-felons and police during the perpetration of certain felonies. Id. at 451. But, Justice Overton maintained, "Further extension of the felony murder doctrine so as to make intent irrelevant for purposes of the attempt crime is illogical and without basis in law." Id.
>
> We now believe that the application of the majority's holding in *Amlotte* has proven more troublesome than beneficial and that Justice Overton's view is the more logical and correct position.

Under the First District's interpretation of *Taylor*, the State can charge the crime of attempted (involuntary) manslaughter by act if a single-punch fist fight results in a "knock-out", not death. This defies the logic of the common law, as the alleged perpetrator would lack the intent to cause death. Yet, nothing in *Montgomery* would prevent such an illogical result.

The following table highlights the positions adopted by the various courts of this State on the question presented (blank spaces indicate that the particular Court did not directly address the question):

Is the Intent to Kill an Element of the Offense?

	Taylor	2d DCA	5th DCA	1st DCA
Voluntary manslaughter	Yes.[5]		Yes. See *Barton* and *Sherouse*.	
Involuntary manslaughter	No.		No. See *Barton*.	
Manslaughter by act	??[6]	No. See *Hall*.	Yes. See *Barton*.[7]	No. See *Montgomery*.
Manslaughter by procurement			Yes. See *Barton*.	
Manslaughter by culpable negligence			No. See *Barton.*	
Attempted manslaughter	??[8]	Yes. See *Hall*.	Yes. See *Barton*.	No. See *Montgomery*.

If, as posited by the Fifth District in *Barton* and the Second District in *Hall*, this Court held in *Taylor* that Florida only recognizes the crime of attempted ***voluntary*** manslaughter by act, then

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[5]*Taylor* at 934 ("Thus this Court recognized the distinction found in common law between voluntary and involuntary manslaughter... [I]t is not a logical impossibility for the crime of attempted manslaughter to exist in situations where, if death had resulted, the defendant could have been found guilty of voluntary manslaughter.").

[6]See *Montgomery* at *4 ("The Fifth and Second Districts... disagree as to [*Taylor's*] significance as to [whether the intent to kill is an element of] manslaughter.").

[7]In *Barton*, the Fifth District erroneous asserts that involuntary manslaughter only includes manslaughter by culpable negligence.

[8]See *Montgomery* at *4 ("The Fifth and Second Districts seem to agree that the supreme court held [in *Taylor*] that intent to kill was an element of attempted manslaughter...").

the jury instruction on attempted manslaughter must include an intent to kill element. See *Taylor* at 934:

> Thus this Court recognized the distinction found in common law between ***voluntary*** and ***involuntary*** manslaughter. The crime of assault with intent to commit manslaughter was found to exist only in those cases where, if death had resulted, the manslaughter would have been ***voluntary*** and not ***involuntary***. By the same reasoning, it is not a logical impossibility for the crime of attempted manslaughter to exist in situations where, if death had resulted, the defendant could have been found guilty of ***voluntary*** manslaughter. (Emphases added)

See also *Barton* at 641:

> *Taylor v. State*, 444 So. 2d 931 (Fla. 1983), held that an intent to kill is a prerequisite for conviction of assault with intent to commit manslaughter pursuant to *Williams v. State*, 41 Fla. 295, 26 So. 184 (1899). Adopting the *Williams* rationale, *Taylor* held that the crime of attempted manslaughter exists in situations where, if death resulted from an act of the defendant, the defendant would be guilty of ***voluntary*** (i.e., intentional) manslaughter at common law. (Emphasis added)

See also *Hall* at 96:

> As we read the court's holding in *Taylor*, it was limited to determining that there was a crime of attempted manslaughter and determining the elements of that crime. The court's holding that an intent to kill is an element of attempted manslaughter does not require a determination that an intent to kill is an element of manslaughter by act. An intent to kill is required to commit an attempted manslaughter because no person can attempt to cause an unintentional death.

But see *Montgomery* at *7, citing *Taylor* at 934 ("If the *Taylor* court had intended to recognize an intent-to-kill element for the crime of attempted manslaughter by act, rather than an 'intent to commit an unlawful act,' it would have stated so in its direct holding."). If the Second and Fifth Districts are correct, then the First District's

concerns, as expressed in *Montgomery*, do not apply. Put simply, the standard jury instruction on attempted (voluntary) manslaughter could not erroneously suggest that the State was required to prove an intent to kill in order to establish the crime of attempted involuntary manslaughter by act because the crime of attempted involuntary manslaughter by act does not exist. See generally *Montgomery* at *2 ("[Appellant] contends the trial court fundamentally erred in giving the standard jury instruction for manslaughter by act, as it erroneously suggests that intent to kill is an element of that crime. We agree...").

Under the current, standard jury instruction on attempted manslaughter, the Second and Fifth Districts appear to have successfully interpreted this Court's decision in *Taylor*. Entitled "Attempted ***Voluntary*** Manslaughter", the standard instruction requires the State to prove that a defendant possessed an intent to kill. See Standard Jury Instructions in Criminal Cases (93-1), 636 So. 2d 502 (Fla. 1994):

> (Defendant) committed an act [or procured the commission of an act], which was intended to cause the death of (victim) and would have resulted in the death of (victim) except that someone prevented (defendant) from killing (victim) or [he] [she] failed to do so.

But see *In re Standard Jury Instructions in Criminal Cases-Report No. 2007-10*, 997 So. 2d 403, 404 (Fla. 2008):

> The Committee also proposed eliminating the intent element from instruction 6.6, Attempted Voluntary Manslaughter, consistent with its proposal to amend the manslaughter instruction. We do not approve the Committee's proposal

> for instruction 6.6 as well. See *Taylor v. State*, 444 So. 2d 931, 934 (Fla. 1983) ("[A] verdict for attempted manslaughter can be rendered only if there is proof that the defendant had the requisite intent to commit an unlawful act.").

CONCLUSION

To alleviate the confusion present in *Montgomery*, this Court should issue a standard jury instruction on manslaughter that separates the crime of manslaughter by act into two categories: (1) voluntary (which requires an intent to kill); and, (2) involuntary (which requires an intent to commit an unlawful act). Accordingly, a new instruction should provide the trial court with three possible forms of manslaughter on which it can instruct the jury: (1) voluntary manslaughter by act; (2) involuntary manslaughter by act; and, (3) involuntary manslaughter by culpable negligence.

Just as the previous instruction directed trial courts to instruct the jury on voluntary manslaughter by act only if manslaughter "is being defined as a lesser included offense of first degree premeditated murder", a new instruction should direct trial courts to ensure that the mental state of manslaughter matches the mental state of murder if manslaughter is defined a lesser included offense. Hence, voluntary manslaughter by act should constitute the appropriate form of manslaughter as a lesser included offense of first degree murder. Likewise, involuntary manslaughter by culpable negligence should constitute the appropriate form of manslaughter as a lesser included offense of second degree murder. Finally,

involuntary manslaughter by act should constitute the appropriate form of manslaughter as a lesser included offense of felony murder.

Although not expressly at issue in this case, a new instruction on manslaughter should also clarify that only the offense of voluntary manslaughter by act can support an attempt instruction.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the Honorable Lisa T. Munyon, 425 N. Orange Ave., Suite 1130, Orlando, Florida 32801-1515, c/o Les Garringer, Office of the General Counsel, 500 S. Duval Street, Tallahassee, Florida 32399-1925, by MAIL on June 7, 2010

Respectfully submitted and served,

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