In The Supreme Court of Florida

In re Amendments
to Standard Jury Instructions
in Criminal Cases-Instruction 7.7,
_____/ CASE NO. SC10-113

COMMENTS ON PROPOSED MANSLAUGHTER JURY INSTRUCTION

In *State v. Montgomery*, - So.3d -, 2010 WL 1372701, No. SC 09-332 (Fla. April 8, 2010), this Court held, that under Florida law, the crime of manslaughter by act does not require an intent to kill the victim. *Montgomery*, 2010 WL 1372701 at *2. This Court also issued a new standard jury instruction on manslaughter to reflect its holding in *Montgomery*. *In re Amendments to Standard Jury Instructions in Criminal Cases-Instruction 7.7*, - So.3d -, 2010 WL 1372703, 35 Fla. L. Weekly S209 (Fla., April 8, 2010)(No. SC10-113).

This Court via its new jury instruction has abolished the centuries old, common law, codified crime of manslaughter and create the previous unknown crime of an "unexcused act causing death" in its stead. And this Court has done so for no other reason than misunderstanding and confusion regarding the law of manslaughter. This Court simply does not understand the difference between voluntary and involuntary manslaughter and the concept of provocation.

The Law of Manslaughter

Florida's manslaughter by act statute is the codification of two different types of common law manslaughter - voluntary manslaughter and involuntary manslaughter. One type of manslaughter has an intent to kill but the other type does not. Voluntary manslaughter has an intent to kill but involuntary manslaughter does not. It is this dual aspect of the manslaughter by act statute that is confusing Florida's courts. *Taylor v. State*, 444 So.2d 931, 934 (Fla. 1983)(recognizing "the distinction found in common law between voluntary and involuntary manslaughter"); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, 652 (2nd ed. 1986)(explaining that common law manslaughter included both voluntary and involuntary manslaughter). *Fortner v. State*, 119 Fla. 150, 154, 161 So. 94, 96 (Fla. 1935)(defining voluntary manslaughter as "the intentional killing of another in a sudden heat of passion due to adequate provocation . . ."). The *Montgomery* Court misinterpreted the manslaughter by act statute. And the new proposed jury instructions based on *Montgomery* are incorrect statements of the law of manslaughter.

Florida's manslaughter statute, § 782.07(1), Florida Statutes (2007), provides:

> The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, is manslaughter, a felony of the second-degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.[1]

[1] The "act, procurement, or culpable negligence" language is not unique to

The general manslaughter statute, which was first enacted in 1868, codified the common law of homicide. *Bautista v. State*, 863 So.2d 1180, 1186 & n.5 (Fla. 2003). In 1892, the general manslaughter statute was amended. *Bautista*, 863 So.2d at n.6 citing § 2384, Fla.Rev.Stat. (1892). The *Bautista* Court explained that the 1892 amendment eliminated degrees of manslaughter 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. *Bautista*, 863 So.2d at n.6. The general manslaughter statute has remained unchanged since 1892. *Bautista*, 863 So.2d at 1186 (noting this statutory language "has remained unchanged since 1892."); See also *Rodriguez v. State*, 443 So.2d 286, n.8 (Fla. 3d DCA 1983)(explaining the legislative history of the manslaughter by act statute from the 1868 version which contained degrees of

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Florida's manslaughter statute. *See e.g.* Miss. Code Ann. § 97-3-29 ("The killing of a human being without malice, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration of any crime or misdemeanor not amounting to felony, or in the attempt to commit any crime or misdemeanor, where such killing would be murder at common law, shall be manslaughter."); Mo. Rev Stat. § 559.070 (1959)('Every killing of a human being by the act, procurement or culpable negligence of another ... shall be deemed manslaughter); Okla. Stat. Ann. tit. 21, § 716 ("Every killing of one human being by the act, procurement, or culpable negligence of another which, under the provisions of this chapter, is not murder, nor manslaughter in the first-degree, nor excusable nor justifiable homicide is manslaughter in the second-degree."); Oregon RS 163.040(3)(1953)("Every killing of a human being by the act, procurement or culpable negligence of another, when the killing is not murder in the first or second-degree, or is not justifiable or excusable or negligent homicide as provided in ORS 163.090 is manslaughter."). This statutory language seems to have been modeled on New York's manslaughter statute. Penal Law, § 1052, subd. 3 ; N.Y. Penal Law § 19, part IV, ch. 1, tit.

manslaughter which was amended in 1892 to create the manslaughter by act statute, which eliminated the degrees of manslaughter but the classic common-law manslaughters, such as misdemeanor manslaughter and heat of passion killings and killing through negligence, became subsumed within the general definition).

Voluntary manslaughter

The more common type of manslaughter is voluntary manslaughter. Voluntary manslaughter is a "heat of passion," provoked homicide. As this Court has explained, "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." *Fortner v. State*, 119 Fla. 150, 154, 161 So. 94, 96 (Fla. 1935).

The classic example of a heat of passion killing is a husband discovering his wife in bed with another man. *Febre v. State*, 158 Fla. 853, 30 So.2d 367 (1947)(reducing a conviction for first degree murder to manslaughter where the defendant killed a man he discovered in bed with his wife because the "act of the seducer or adulterer has always been treated as a general provocation" and "[s]exual intercourse with a female relative of another is calculated to arouse ungovernable passion, especially in the case of a wife."); Cf. *Paz v. State*, 777 So.2d 983 (Fla. 3rd DCA 2000)(referring to the case as "a classic case of manslaughter

based on adequate legal provocation" and reducing a second degree murder conviction to manslaughter and finding adequate provocation existed as a matter of law where the victim raped the defendant's wife and the defendant immediately stabbed the rapist.); Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law, 655-657 (2nd ed. 1986)(providing a list of provocations that have traditionally be viewed as adequate provocation including adultery and mutual combat).

Voluntary manslaughter, unlike involuntary manslaughter, does have an intent to kill. *Taylor v. State*, 444 So.2d 931, 933-934 (Fla. 1983)(explaining that "in Florida, the crime of manslaughter includes certain types of intentional killings" and recognizing "the distinction found in common law between voluntary and involuntary manslaughter" and noting that in voluntary manslaughter there is an intent to kill and finding an intent to kill where the defendant intentionally fired the shotgun at Clayton); *Fortner v. State*, 119 Fla. 150, 154, 161 So. 94, 96 (Fla. 1935)(defining voluntary manslaughter as "the intentional killing of another in a sudden heat of passion due to adequate provocation . . ."). As Professor Lafave explains, voluntary manslaughter is "an intentional homicide committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing" and "the usual type of voluntary manslaughter involves the intentional killing of another" while in the heat of passion and that except for this mental state, which causes a temporary loss of self-control, it would be murder. Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law, 653-654 (2nd ed. 1986). Several other treatise on the criminal law also note that voluntary manslaughter does

include an intent to kill. See W. Clark & W. Marshall, A Treatise on the Law of Crimes § 258, at 339 (5th ed. 1952) (observing that "[i]n all cases of voluntary manslaughter there is an actual intention to kill, or there is an intention to inflict great bodily harm, from which such an intent may be implied"); J. Dressler, Understanding Criminal Law 450 (1987) ("an intentional killing committed in 'sudden heat of passion' as the result of adequate provocation constitutes voluntary manslaughter");); 2 C. Torcia, Wharton's Criminal Law § 153, at 236-37 (14th ed. 1979) ("[v]oluntary manslaughter is an intentional killing in the heat of passion as the result of severe provocation and a killing, which would otherwise constitute murder, is mitigated to voluntary manslaughter"). It is provocation and its resulting heat of passion, not intent to kill, that distinguishes voluntary manslaughter from first degree murder. *Disney v. State*, 72 Fla. 492, 503, 73 So. 598, 601 (1916)(affirming a conviction for manslaughter and explaining that a killing in the heat of passion occurs when the defendant is intoxicated by his passion, is impelled by a blind and unreasoning fury and "[i]n that condition of mind, premeditation is supposed to be impossible, and depravity which characterizes murder in the second degree absent).

Furthermore, second degree murder requires a depraved mind, which has been interpreted as requiring "ill-will, hatred, spite or an evil intent" in Florida, whereas, voluntary manslaughter does not. *Disney v. State*, 72 Fla. 492, 503, 73 So. 598, 601 (1916)(explaining that a killing in the heat of passion that occurred when defendant acted in a condition of mind where "depravity which characterizes

murder in the second degree is absent."). The intent to kill is a given in voluntary manslaughter. Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law, 653 & n.3 (2nd ed. 1986)(noting that voluntary manslaughter "presupposes an intent to kill" and citing cases). Provocation is the critical concept in this type of manslaughter, not intent to kill.

Provocation

The concept of provocation resulting in a heat of passion is absolutely critical to understanding the crime of voluntary manslaughter. As this Court explained long ago,

the common "law reduces the killing of a person in the heat of passion from murder to manslaughter out of a recognition of the frailty of human nature, of the temporary suspension or overthrow of the reason or judgment of the defendant by the sudden access of passion and because in such case there is an absence of malice. *Collins v. State*, 88 Fla. 578, 584-585, 102 So. 880, 882 (Fla. 1925)(citing 1 Michie on Homicide, § 38). Such killing does not "proceed from a bad or corrupt heart, but rather from the infirmity of passion to which even good men are subject. Passion is the state of mind when it is powerfully acted on and influenced by something external to itself. It is one of the emotions of the mind known as anger, rage, sudden resentment, or terror. But for passion to constitute a mitigation of the crime from murder to manslaughter, it must arise from legal provocation." *Collins v. State*, 88 Fla. 578, 584-585, 102 So. 880, 882 (Fla. 1925)(citing 1 Michie on Homicide, § 38); see also *Rivers v. State*, 75 Fla. 401, 78 So. 343, 345 (1918)(defining adequate

provocation as that provocation that would "obscure the reason or dominate the volition of an ordinary reasonable man" and explaining that there must be an adequate or sufficient provocation to excite the anger or arouse the sudden impulse to kill in order to exclude premeditation); see also Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law, 654-664 (2nd ed. 1986)(discussing the concept of provocation and its requirements at length). While the involuntary manslaughter wing of the manslaughter by act statute, does not include an intent to kill, voluntary manslaughter does include an intent to kill.

The *Montgomery* Court perceived as an anomaly the fact that voluntary manslaughter, which is a lesser offense than second-degree murder, has an intent to kill; whereas, second-degree murder does not have an intent to kill. So, the lesser offense of voluntary manslaughter seems to have a higher mental state than the greater offense of second-degree murder. This is not an anomaly. The perceived anomaly only exists because this Court has overlooked the critical concept of provocation. Understanding provocation makes the perceived anomaly disappear. The critical difference between second-degree murder and voluntary manslaughter is not intent to kill; it is provocation. Provocation and its resulting heat-of-passion is the raison d'être of voluntary manslaughter. Voluntary manslaughter simply cannot be understood, explained, or reconciled with any other degree of murder without the concept of provocation.

Provocation, not only negates premeditation as a matter of law, it lessens the moral culpability of a defendant who intends to kill but was provoked into doing so.

Compare a drug dealer who engages in a drive-by shooting of a rival's house and unintentionally, unknowingly kills a child inside the house, thereby committing second degree murder with a husband who comes home, sees his wife in bed with another man and shots the other man, thereby committing voluntary manslaughter. The drug dealer did not intend to kill the child; whereas, the husband did intend to kill the adulterer. But the husband was provoked and the drug dealer was not. Under Florida law and centuries of manslaughter law, the husband is less morally culpable than the drug dealer. There is no anomaly.

Involuntary manslaughter

The involuntary manslaughter wing of the manslaughter by act statute, commonly referred to as misdemeanor/manslaughter, does not involve an intent to kill. Indeed, involuntary manslaughter does not even require an intent to harm. Like its equivalent, the felony/murder rule, misdemeanor/manslaughter only requires an intent to commit the underlying crime. The classic case of misdemeanor/manslaughter is a single punch resulting in the death of the victim. In such cases, the defendant does not intend to kill the victim, he only intends to commit the underlying misdemeanor of simple battery. However, under the misdemeanor/manslaughter rule, he is guilty of involuntary manslaughter. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, 675-682 (2nd ed. 1986)(explaining the common law classifying involuntary manslaughter as "an unintended homicide in the commission of an unlawful act.").

In *Hall v. State*, 951 So.2d 91 (Fla. 2d DCA 2007) (en banc), the Second District held that a conviction for manslaughter by act does not require an intent to kill but only an intent to do the act that resulted in the death of the victim. The case was, in the Second District word's, "another tragic instance of manslaughter by single punch to the head." The victim threw a rock at a third person. Hall chased the victim down and punched the victim a single time in the jaw but that single blow severed a vertebral artery and caused a fatal brain hemorrhage. The victim died from a single blow. The "very unusual occurrence" of the victim dying, "resulted more from the placement of the blow than the amount of force used." On appeal, Hall argued the State did not prove manslaughter by act because there was no evidence he intended to kill the victim. Hall asserted that he punched the victim "in the heat of passion" and "upon a sudden combat." *Hall*, 951 So.2d at 94. The Second District found the evidence supported a manslaughter by act conviction and affirmed. See also *Acosta v. State*, 884 So.2d 112 (Fla. 2d DCA 2004)(another single punch resulting in death case).

Hall is correctly decided because it was an involuntary manslaughter case. *Hall* and the other single blow cases are the perfect textbook example of the old common law crime of misdemeanor/manslaughter which was a form of involuntary manslaughter. Basically, in these cases, the defendant commits a simple battery that results in death. No intent to kill is required. The only intent that is required is the intent to commit the underlying misdemeanor of simple battery. Hall only had to intend the battery, not the result. If a court is dealing with an involuntary

manslaughter, *i.e.*, a misdemeanor/manslaughter case, as the Second District was in the *Hall* case, then no intent to kill is required. Indeed, including a intent to kill element in a misdemeanor/manslaughter case negates the entire basis for the criminal liability in such cases.

Misdemeanor/manslaughter does not require an intent to harm. The equivalent is the felony/murder rule. As with the felony murder rule, no intent to harm is required. For example, a burglar breaks into a home and the homeowner dies of fright from a heart attack. The burglar had no intent to harm the homeowner. Indeed, the burglar never touched the homeowner. He is still guilty of felony murder under the felony/murder rule. All that is required is that the burglar commit the underlying felony of burglary. This is equally true of the misdemeanor/manslaughter rule. The defendant need only have intentionally committed the underlying misdemeanor, not to intentionally harm the victim. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, 676 (2nd ed. 1986)(referring misdemeanor-manslaughter as "a sort of junior grade counterpart of the felony-murder doctrine.").

Misdemeanor/manslaughter does, however, require an underlying unlawful act just like felony/murder rule requires an underlying felony. Indeed, as the common label of misdemeanor/manslaughter implies, it requires the defendant commit a misdemeanor. The underlying act must be misdemeanor or, at least, a violation of a public safety ordinance. The classic example of a violation of an ordinance amounting to involuntary manslaughter would be a person allowing their

dog to roam freely, in violation of the local leash ordinance, and then the dogs kills a person. The dog's owner did not intend to harm the person but he did intentionally violate the ordinance. *State v. Powell*, 426 S.E.2d 91 (N.C. App. Ct. 1993)(affirming a conviction for involuntary manslaughter based of a violation of a city ordinance requiring dogs to be "restricted to the owner's property by a tether, rope, chain, fence or other device" where two Rottweilers dug out and killed a jogger because the ordinance was a safety ordinance, not merely a nuisance law and explaining that all the State must prove for an involuntary manslaughter conviction is that the defendant intentionally violated the ordinance).

Another example would be a person who carries a concealed firearm which drops and goes off, killing another person. Assuming that in the jurisdiction, carrying was a misdemeanor, that person is guilty of involuntary manslaughter. In *United States v. Walker,* 380 A.2d 1388 (D.C.1977), that District of Columbia court of appeal held that misdemeanor violation of carrying an unlicensed firearm was sufficient, without a showing of recklessness or negligence, for an involuntary manslaughter conviction. Walker, while carrying a pistol without a license, dropped it in the stairwell of an apartment building, and that the gun went off, fatally wounding a bystander. There was no statutory definition of manslaughter in the district, so the common-law controlled. The Court explained that involuntary manslaughter is an unlawful killing which is unintentionally committed which means there was no intent to kill or to do bodily injury. *Walker*, 380 A.2d at 1388-1390. The crime occurs as the result of an unlawful act which is

a misdemeanor involving danger of injury. "The requisite intent in involuntary manslaughter is supplied by the intent to commit the misdemeanor." *Walker*, 380 A.2d at 1390. Carrying a pistol without a license outside the possessor's "dwelling house or place of business" was a misdemeanor. The Court held that a violation of the statute resulting in the death of another validly charges involuntary manslaughter. See also *Comber v. United States*, 584 A.2d 26 (D.C. App. 1990)(discussing at length, in single punch case, the difference between voluntary and involuntary manslaughter including *Walker*). If the defendant, however, was a convicted felon in possession of a firearm that dropped down the stairs killing another person, this would be third degree felony murder in Florida. § 782.04(4), Florida Statutes (2010); *Mahaun v. State*, 377 So.2d 1158, 1160 (Fla.1979)(explaining that third-degree murder is defined as an unlawful killing committed by a person engaged in the perpetration of any felony other than those identified as the underlying felony in second-degree murder when there is no premeditated design to effect the death of the victim).

The misdemeanor/manslaughter rule, however, definitely requires the underlying act be an unlawful act. If someone gave a person a peanut, who had a peanut allergy, and the person died as a result, this would not be involuntary manslaughter. Giving a person a peanut is not a misdemeanor or a violation of a public safety ordinance. And therefore, it is not involuntary manslaughter. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, 675-676 (2nd ed. 1986)(explaining that the underlying act must be unlawful).

This Court in *Taylor* held that the crime of attempted voluntary manslaughter existed because voluntary manslaughter included an intent to kill. *Taylor v. State*, 444 So.2d 931, 934 (Fla. 1983)(explaining that "in Florida, the crime of manslaughter includes certain types of intentional killings" and recognizing "the distinction found in common law between voluntary and involuntary manslaughter" and noting that in voluntary manslaughter there is an intent to kill and finding an intent to kill where the defendant intentionally fired the shotgun at Clayton). That there was an intent to kill element to voluntary manslaughter was absolutely critical to the *Taylor* Court's analysis. *Taylor*, 444 So.2d at 934 (citing *Anthony v. State*, 409 N.E.2d 632, 636 (Ind. 1980)(explaining that because manslaughter can be proved by evidence of the intentional killing of another human being, ... the crime of attempted manslaughter does exist)). This Court has abolished the crime of attempted manslaughter by its decision in *Montgomery*.

The Florida Supreme Court's decision in *Taylor* was later relied on by another State Supreme Court in interpreting its manslaughter statute. See *Cox v. State*, 534 A.2d 1333, 1335-1336 (Md. 1988)(interpreting that same statutory language of act, procurement or culpable negligence manslaughter and holding that the crime of attempted voluntary manslaughter exists under the common law of Maryland, quoting and relying on this Court's decision in *Taylor v. State*, 444 So.2d 931 (Fla. 1983)). They have been making the claim that voluntary manslaughter does not include an intent to kill since before most members of this Court were

born. *State v. Harper*, 17 So.2d 260, 260-261 (La. 1944)(stating that the defendant's "contention that the element of intent is lacking in the crime of manslaughter is equally without merit" because "in all cases of voluntary manslaughter there is an actual intention to kill, or there is an intention to inflict great bodily harm, from which such an intent may be implied" and explaining that it is manslaughter, and not murder, because there is no malice aforethought, not because of any lack of an intent to kill and therefore, the crime of attempted manslaughter exists). And the reason that these numerous State Supreme Courts, including this one, have found that the crime of attempted manslaughter exists is because voluntary manslaughter includes an intent to kill.

The *Montgomery* Court overruled nearly a century of precedent regarding the law of manslaughter. *Fortner v. State*, 119 Fla. 150, 154, 161 So. 94, 96 (Fla. 1935)(defining voluntary manslaughter as "the intentional killing of another in a sudden heat of passion due to adequate provocation . . ."); *Taylor v. State*, 444 So.2d 931, 934 (Fla. 1983). The *Montgomery* Court has overruled these prior decisions *sub silentio*. This Court by holding that there is no intent to kill in a voluntary manslaughter situation, has overruled *Fortner* and *Taylor*. And for no reason. The *Montgomery* Court does not even acknowledge these numerous prior Florida Supreme Court decisions or the decision from other state Supreme Courts concluding that voluntary manslaughters are intentional killings. Nor does the Court discuss the common law which also viewed voluntary manslaughters as intentional killings. Rather, this entire controversy basically stems from a

misunderstanding of the law of manslaughter. A misunderstanding is not a proper basis to recede from precedent. This Court receding from *Taylor* does not advance the law; it merely adds to the confusion.

The *Montgomery* Court stated that the State agreed that manslaughter by act does not require proof of intent to kill. The brief only addressed the fundamental error aspect of this case; however, at oral argument, counsel for the State confused and conflated involuntary and voluntary manslaughter. The State, however, attempted to correct this mistake. The State submitted a brief shortly after the oral argument in *State v. Thomas,* SC09-1984 correctly explaining the law of manslaughter which this Court struck tagging the case to Montgomery despite the State's objection. Additionally, the State in *State v. Leo,* SC09-1991 filed a motion to allow briefing explaining that briefing was necessary to correctly explain the law of manslaughter which this Court denied.

Moreover, regardless of any improper concession by a party, this Court has a duty to correctly interpret the law. *Strickland v. State*, 437 So.2d 150, 151 (Fla. 1983)(receding from a prior decision in which the State had mistakenly conceded error but acknowledging the fault in not discovering the mistake "was decidedly ours."); *Salonko v. State*, 2010 WL 480844, 1 (Fla. 1st DCA 2010)(affirming despite concessions by the State in a *Montgomery* case because "this Court does not accept improper concessions of error by the State in criminal cases."); *United States v. Rodriguez*, 433 F.3d 411, 414 n. 6 (4th Cir. 2006)(observing of a concession of error made at oral argument "we are not at liberty to vacate and remand for resentencing

on the Government's concession of error alone."); *Orloff v. Willoughby*, 345 U.S. 83, 87, 73 S.Ct. 534, 97 L.Ed. 842 (1953)(observing that the "Court, of course, is not bound to accept the Government's concession that the courts below erred on a question of law."); *Young v. United States*, 315 U.S. 257, 258-259, 62 S.Ct. 510, 511, 86 L.Ed. 832 (1942)(explaining that a confession of error "does not relieve this Court of the performance of the judicial function" because "judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties.").

This Court's new standard jury instructions are a misreading of the manslaughter statute and an incorrect statement of the law of manslaughter. Actually, the populist online encyclopedia, Wikipedia, does a better job of explaining the law of manslaughter than the new proposed jury instructions. As Wikipedia notes, manslaughter is broken down into two distinct categories: voluntary manslaughter and involuntary manslaughter. Voluntary manslaughter occurs when the defendant kills with malice aforethought, that is with the intention to kill or cause serious harm, but there are mitigating circumstances, typically provocation, which reduce culpability. Provocation is an event which would cause a reasonable person to lose self-control. While not suggesting that the jury instruction should be drawn from Wikipedia, the Wikipedia entry at least includes an explanation that there are types of manslaughter - voluntary manslaughter and involuntary manslaughter and covers the concept of provocation which is more than can be said of this Court's new jury instruction.

Alternative standard jury instructions

This Court should rewrite the proposed manslaughter jury instruction modeled on the Eleventh Circuit's pattern jury instructions in criminal cases. This is a proposed instruction based on the Eleventh Circuit's instructions modified as appropriate such as deleting the federal jurisdictional elements.

Voluntary manslaughter

Florida's statute makes it a crime for anyone to commit voluntary manslaughter - that is, the unlawful and intentional killing of a human being without malice upon a sudden quarrel or heat of passion

The Defendant can be found guilty of voluntary manslaughter only if all of the following facts are proved beyond a reasonable doubt:

First: That the victim named in the indictment is dead;

Second: That the Defendant caused the death of the victim;

Third: That the Defendant so acted intentionally, but without malice and in the heat of passion caused by adequate provocation.

Manslaughter is an unlawful killing of a human being without malice, and it is voluntary when it occurs intentionally and upon a sudden quarrel or in the heat of passion. The phrase "in the heat of passion" means an emotional state that is generally provoked or induced by anger, fear, terror, or rage. In order for this

provocation to be an "adequate provocation," it must be of a kind that would naturally cause a reasonable person to temporarily lose self control and to commit the act upon impulse and without reflection but which did not justify the use of deadly force.

Involuntary manslaughter

Florida's statute makes it a crime for anyone to commit involuntary manslaughter - that is, the unlawful but unintentional killing of a human being during the commission of an unlawful act not amounting to a felony.

The Defendant can be found guilty of involuntary manslaughter only if all of the following facts are proved beyond a reasonable doubt:

First: That the victim named in the indictment is dead;

Second: That the Defendant caused the death of the victim, or inflicted injuries upon the victim from which the victim died;

Third: That the death of the victim occurred as a consequence of and while the Defendant was engaged in committing an unlawful act not amounting to a felony, namely [describe unlawful act, i.e., misdemeanor or public safety ordinance].

Manslaughter is an unlawful killing of a human being without malice, and it is involuntary if it was not done intentionally, but occurs in the commission of an unlawful act not amounting to a felony. To establish the offense of involuntary manslaughter, the State need not prove that the Defendant specifically intended to

cause the death of the victim.[2]

This Court should rewrite the jury instruction using a court such as the Eleventh Circuit or the District of Columbia's jury instructions as a model.

[2] I deleted the manslaughter by culpable negligence aspect of the Eleventh Circuit involuntary manslaughter pattern jury instructions but we already have manslaughter by culpable negligence jury instruction that are separate and not at issue.

New jury instructions on manslaughter

In several pending cases in the First District, the Public Defender is making the claim that the standard manslaughter jury instruction incorrectly eliminates the meas rea requirement. See *Willie James Dennis v. State*, Case. No. 1D09-4775 Issue III IB at 32 (Fla. 1st DCA pending); *Immanuel Williams v. State*, 1D09-5075 Issue I IB at 36 (Fla. 1st DCA pending)[3] These briefs use an example about a golfer's errant golf ball striking and killing spectator. Under the standard jury instruction on manslaughter adopted in the wake of *Hall v. State*, 951 So. 2d 91, 96 (Fla. 2d DCA 2007)(en banc), the defendant need only intent to commit an act which caused death, not have a premeditated intent to cause death. So, the golfer, because he intentionally struck the golf ball, is guilty of manslaughter. This argument applies equally, if not with more force, to this Court's proposed instruction. This same argument can, and will be made, as an attack on this Court's new jury instruction. The Public Defenders are using the jury instruction committee and this Court to create error in the standard jury instruction.

But under a correct interpretation of Florida's manslaughter statute and correspondingly correct jury instructions, the golfer would be guilty of neither voluntary or involuntary manslaughter. The golfer would definitely would not be guilty of voluntary manslaughter because there are none of the hallmarks or elements of voluntary manslaughter in such a hypothetical. There is no

[3] The briefs in these cases are available online at eDCA to registered attorneys under the brief in other cases function.

provocation and no intent to kill. Nor is there any sudden combat. The golfer also would not be guilty of involuntary manslaughter under a correct jury instruction. Hitting a golf ball is not a misdemeanor. Nor is playing a round of golf a violation of a public safety ordinance. And hence, it is not misdemeanor/manslaughter, *i.e.*, involuntary manslaughter. This hypothetical, however, is the perfect evidence that this Court's new jury instruction is incorrect.

This Court has often stated that the trial court has a duty to accurately instruction the jury on the law regardless of the standard jury instruction but this Court also often states, contradictorily, that the standard jury instructions are "presumed correct and are preferred over special instructions." *Stephens v. State*, 787 So.2d 747, 755 (Fla. 2001). That rule applies when a committee writes a jury instruction, not when this Court writes the jury instructions itself. *State v. Hamilton*, 660 So.2d 1038, 10446 (Fla.1995)(noting that committees that draft standard instructions work hard in developing these restatements of Florida law in clear and straightforward language to assist the courts in carrying out their responsibility to explain the law to citizen jurors and confidence in the use of these instructions is undermined when their use is rejected without explanation but, on the other hand, trial judges perform an important service to the law when they detect some problem with a standard instruction or otherwise explain why its use is inappropriate in a particular case). This Court "owns" this new jury instruction. This Court may not mangled the law of manslaughter and then wash its hands of the consequences.

As one legal commentator has observed, this court's dual role as promulgator of rules and tribunal to hear claims of incorrect instructions produces odd statements such as "we express no opinion with respect to the correctness of the instruction" which in effect means "trial judges, use this instruction, but we might reverse you for error if you do." Crime and Consequences blog on October 30, 2009. And worse, under this Court's decision in *Montgomery*, the use of the standard jury instruction is fundamental error. A trial court will not even be given any warning by defense counsel's objection that the standard jury instruction could be flawed before being reversed by an appellate court.

Accordingly, this Court should rewrite the standard jury instruction with an instruction that distinguishes between voluntary manslaughter and involuntary manslaughter; explains that intent to kill is part of voluntary manslaughter but that no intent to kill is required in involuntary manslaughter; explains the concept of provocation and defines misdemeanor/manslaughter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing COMMENTS ON PROPOSED MANSLAUGHTER JURY INSTRUCTION has been furnished by U.S. Mail 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, this 7th day of June, 2010.

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Charmaine M. Millsaps