IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1458
L.T. CASE NO. 4D09-2159

AMOS AUGUSTUS WILLIAMS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Petitioner was the defendant and respondent was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County. On appeal to the Fourth District Court of Appeal, petitioner was the appellant and respondent was the appellee. In this brief, the parties will be referred to as they appear before this Court, except that respondent may also be referred to as "the state."

The following references, which were utilized by petitioner in his initial brief, will also be used in this brief:

> [R.] Record proper on appeal [consisting of three volumes, paginated 1 through 320, with the third volume "confidential"]
>
> [T.] Transcripts on appeal of jury trial and sentencing [consisting of three volumes, paginated 1 through 570]

STATEMENT OF THE CASE AND FACTS

This case is before the Court pursuant to two questions certified by the Fourth District Court of Appeal:

> 1. Does the standard jury instruction on attempted manslaughter constitute fundamental error?
>
> 2. Is attempted manslaughter a viable offense in light of *State v. Montgomery*, 39 So. 3d 252, 2010 WL 1372701 (Fla. Apr. 8, 2010)?

Williams v. State, 40 So. 3d 72, 76 (Fla. 2010).

In addition, the Fourth District Court certified conflict with Lamb v. State, 18 So. 3d 734 (Fla. 1st DCA 2009). Williams, 40 So. 3d at 76.

Petitioner was originally charged by information with aggravated assault with a deadly weapon (a hammer) on victim Yolanda Dent. [R.1] He entered into a plea agreement and received three years of probation, along with time served. [R.8-23]

Petitioner was shortly thereafter arrested on new charges. A violation of probation was filed, along with a new information charging him with: 1) attempted first degree murder (victim Samantha Lindsay, with a knife); 2) burglary of a dwelling with an assault or battery while armed (victim Samantha Lindsey); 3) child abuse by intentional infliction of mental or physical injury (stabbing child's mother in front of child); 4) false imprisonment with a weapon or firearm (victim Samantha Lindsey, with a

knife; 5) tampering with a witness. [R.2-3, 4-5, 24-33, 42-52, 75-79] The state later elected not to go forward with count five. [T.4, 6]

At the trial on the new charges, police officers testified as to arriving at a residence to hear a baby crying and seeing a man silhouetted in a window, though no one responded to knocks and announcements of police presence. [T.205-210, 252-253] After police backup arrived, a woman opened the door and staggered out, covered in blood. [T.211-214, 252] The woman said she had just been stabbed. [T.214, 252] Her intestines were protruding from her stomach. [T.222-223, 259]

A crying baby was located inside, crawling in blood. [T.215, 258] A blood-covered knife was on the kitchen floor and another knife was found outside the bedroom window. [T.235-236, 238-239] A black male was seen climbing out the bedroom window and running away. [T.239, 255, 270-272] Petitioner was located by a police dog while hiding under a tree. [T.281] His shorts appeared to have blood on them and he had blood on his fingers, around his nail beds. [T.283-284, 299-300] He later admitted that the blood belonged to the victim. [T.347]

Petitioner gave a statement to police, in which he said that he and the victim were arguing while she was cutting up chicken with a knife. [T.328] She was being a bully and trying to make him fight, and they began

wrestling. [T.329, 348] She was attacking him and wanting to cut him. [T.329-330, 333] She got cut when she dropped the knife and bent down to grab it; she fell on the knife and it went through her stomach. [T.340, 347-348, 357] He did not grab the knife and did not know how the victim's throat got cut. [T.348, 357] He did not handle the knife except to take it from her. [T.357-358] He mentioned evil spirits moving. [T.342-346]

Samantha Lindsey testified that petitioner, her ex-boyfriend at the time, let himself in the house that night while she was cooking; he stabbed her in the leg after she took her ten-month-old baby from him and told him to leave. [T.362, 365, 367-369] He then stabbed her in the neck. [T.371] She ran with the baby out of the house, but he chased her and continued stabbing, eventually dragging her back to the house. [T.372-378]

Inside, petitioner stabbed Ms. Lindsey each time she tried to leave. [T.379] This continued for several hours, until police arrived. [T.386-387] Petitioner told her to shut up or he would finish her off. [T.388] When he went toward the bedroom, Ms. Lindsey was able to slide herself toward the door and outside. [T.389-390] She tried to push her intestines back into her body because they were "dragging on the ground." [T.392]

Ms. Lindsey was hospitalized about a month. [T.405] The scar from the stabbing to her stomach was at least the length of her hand. [T.375] She

had stabbing scars on her side, chest, neck, and face. [T.375-378] The baby was traumatized and in counseling for aggressive behavior. [T.391, 405]

During the charge conference, petitioner requested the lesser-included offenses of attempted second degree murder, attempted voluntary manslaughter, and aggravated battery as to his charge of first degree murder. [T.414-415] The parties agreed to the standard instruction on attempted voluntary manslaughter. [T.445-446]

In closing, the defense argued that the case had a "bad set of facts" but petitioner did not have a premeditated intent to kill the victim (as to attempted first degree murder), and he did not intend to cause her death because he did not "inflict a life-threatening wound" (as to attempted second degree murder). [T.488, 491-492-496] Defense counsel did not specifically address attempted manslaughter. The defense admitted petitioner committed injuries that could be considered battery or aggravated battery. [T.500]

A judgment of acquittal was granted as to count three, child abuse, but otherwise denied. [T.433] As to count one, the jury returned a verdict of guilty of attempted second degree murder, a lesser included offense of attempted first degree murder. [T.535] It found petitioner guilty as charged as to counts two (armed burglary) and four (false imprisonment). [T.535-

536] After a hearing, petitioner was also found guilty of violating three conditions of his probation. [T.534]

Petitioner's probation was revoked and he was sentenced to five (5) years in the Department of Corrections for his violation of probation case. [T.566; R.265-270] In his attempted murder case, he was sentenced to life in prison for attempted second degree murder and for armed burglary of a dwelling, and to five (5) years in prison for false imprisonment. [T.566; R.261-264, 271-280]

On appeal to the Fourth District Court of Appeal, petitioner raised one issue, "fundamental error in the standard jury instruction on attempted voluntary manslaughter," and relied on State v. Montgomery, 39 So. 3d 252 (Fla. 2010). Williams, 40 So. 3d at 73.

The Fourth District affirmed, noting that it was applying the same fundamental error analysis as in Montgomery because petitioner did not object to the attempted manslaughter instruction. *Id*. at 74. It found that no fundamental error had resulted in the case, and that the instruction had not confused the jury *Id*. at 74, 75. While finding the case distinguishable from Montgomery, the Fourth District certified its two questions and conflict with Lamb. *Id*. at 75-76. This Court accepted jurisdiction after reviewing the jurisdictional briefs.

SUMMARY OF THE ARGUMENT

A critical debate has arisen in two jury instruction cases pending before this Court, the resolution of which controls the resolution of this case. At issue is this Court's interpretation of Florida's manslaughter statute, with its general definition of manslaughter that has remained virtually unchanged since its original enactment in the 1800s. If the debate is resolved in favor of interpreting the statue in light of the common law concepts of manslaughter, then the jury instruction at issue here was correct and there was no error, much less fundamental error. If the debate is resolved in favor of giving the statute its strict and literal interpretation, thereby ignoring any common law concepts of manslaughter, then the instruction here still did not amount to fundamental error.

ARGUMENT

THE TRIAL COURT DID NOT FUNDAMENTALLY ERR WHEN INSTRUCTING THE JURY AS TO ATTEMPTED VOLUNTARY MANSLAUGHTER BY ACT. [Restated]

I. Introduction.

As this Court is well aware, a great debate has taken shape within two jury instruction cases pending before this Court. Those two cases involve the jury instructions for manslaughter and attempted voluntary manslaughter, and implicate this Court's decision in State v. Montgomery, 39 So. 3d 252 (Fla. 2010). *See* this Court's cases, In re Standard Jury Instructions in Criminal Cases, SC10-113 (Instruction 7.7, manslaughter); In re Standard Jury Instructions in Criminal Cases, SC11-1010 (Instruction 6.6, attempted voluntary manslaughter).[1]

The resolution of this debate is critical to the resolution of this case. Essentially, the debate is: Has this Court correctly interpreted Florida law regarding manslaughter?

Because of this vigorous and unresolved debate, respondent will address the case at bar through two different arguments: 1) based on interpreting the applicable statute in light of the common law, the standard

[1] This Court has long held that it may take judicial notice of its own records. *See, e.g.*, Collingsworth v. Mayo, 37 So. 2d 696, 697 (Fla. 1948).

jury instruction on attempted voluntary manslaughter (by act) was correct; 2) even by giving the applicable statute only its strict and literal interpretation, as was done in Montgomery, the jury instruction in this case did not rise to the level of fundamental error.

II. Standard of Review.

The standard of review is de novo, as the questions in this case turn on the interpretation of a statute. *See* McDonald v. State, 957 So. 2d 605, 610 (Fla. 2007) (review involving statutory interpretation issue is *de novo*).

III. Based on interpreting the applicable statute in light of the common law, the standard jury instruction on attempted voluntary manslaughter (by act) was correct.

This Court is currently considering changes to the standard jury instructions regarding manslaughter and attempted voluntary manslaughter. The argument raised by the state and one committee member in those jury instruction cases directly impacts this case. Should this Court agree with that argument, then the standard jury instruction in this case was correct.

In 2008, after the Montgomery trial but before the district court's opinion issued in the direct appeal, this Court modified the standard jury instruction on manslaughter. In re Standard Jury Instructions in Criminal Cases – Report No. 2007-10, 997 So. 2d 403 (Fla. 2008). However, when this Court later issued its opinion in the Montgomery case, finding the

original manslaughter instruction to be erroneous, it amended the modified instruction—on its own motion—by issuing an "interim" instruction and requesting further comments. In re Amendments to Standard Jury Instructions in Criminal Cases – Instruction 7.7, 41 So. 3d 853 (Fla. 2010). While comments have been submitted and oral argument held, this Court has not yet finalized a manslaughter instruction. *See* this Court's case, In re Standard Jury Instructions in Criminal Cases, SC10-113 (Instruction 7.7, manslaughter). The jury instructions committee has also proposed amending the jury instruction on attempted voluntary manslaughter; comments have been received but there has been no resolution. *See* this Court's case, In re Standard Jury Instructions in Criminal Cases, SC11-1010 (Instruction 6.6, attempted voluntary manslaughter) (severed from SC10-2434).

A review of this Court's files in those cases, along with the oral argument in the manslaughter instruction case, shows the complexity of the debate. The position of the state and one jury instruction committee member in those cases presents the view that this Court, in Montgomery, has erroneously strictly interpreted the manslaughter statute, rather than reading it in concert with the common law. This has resulted in great confusion. *See* Charmaine Millsaps, Comments on Proposed Attempted Voluntary Manslaughter Jury Instruction, SC11-1010, Mar. 16, 2011; Michael

Terrance Kennett, Comments, SC11-1010, Mar. 14, 2011; Bart Schneider, Comments, SC10-113, May 17, 2010; Charmaine Millsaps, Comments on Proposed Manslaughter Jury Instruction, SC10-113, June 7, 2010; Michael Terrance Kennett, Comments, SC10-113, June 7, 2010.

Because this Court has already been thoroughly apprised of the argument through the various submitted comments, respondent will condense this argument into its most salient points for purposes of this brief.

The crime of manslaughter is set forth in section 782.07(1), Florida Statutes:

> 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.

Manslaughter is a "residual offense," defined by "what it is not" rather than by what it is, and encompasses killings that are reprehensible but "not bad enough to be murder." Stockton v. State, 544 So. 2d 1006, 1007-1008 (Fla. 1989).

The manslaughter statute was enacted in 1868, codifying the common law; the original general definition of manslaughter was almost identical to the present statute's language. *See, e.g.* Bautista v. State, 863 So. 2d 1180,

1186 & nn.5-7 (Fla. 2003) (explaining 1868 codification of common law in homicide statutes); Rodriguez v. State, 443 So. 2d 286, 289-290 & n.8 (Fla. 3d DCA 1983) (giving detailed explanation of statute's development). In addition to the general definition, the 1868 statute set forth certain other acts, "some common law manslaughter killings, others not, and assigning to them degrees of manslaughter." Rodriguez, 443 So. 2d at 290 n.8.

The statute was revised in 1892, at which time the degrees of manslaughter were eliminated, certain killings were specifically listed, and other "classic common-law manslaughters," such as heat of passion killings and misdemeanor manslaughter, "were no longer specifically listed but became subsumed within the general definition." Rodriguez, 443 So. 2d at 290 n.8; *see also* Bautista, 863 So. 2d at 1186 n.5 (noting that 1892 revision subsumed certain common law manslaughters, such as heat of passion, within the general definition). However, the general definition section "has remained unchanged since 1892." Bautista, 863 So. 2d at 1186.

The confusion today in manslaughter law appears to stem from this long-ago subsuming of the classic common law types of manslaughter into the general definition section of the statute. While a number of cases recognize that both voluntary and involuntary manslaughter exist (as they did at common law), there has been great confusion as to the criminal intents

involved. This appears to be due to the statute's incorporation of the common law but lack of express language as to voluntary and involuntary (i.e., intent), and its listing of three ways in which manslaughter may be committed: by act, by procurement, or by culpable negligence. Thus, while the statute speaks to the *actus reus*, or ways to commit manslaughter, it is silent as to the *mens rea*, or criminal intent required for manslaughter.

At common law, manslaughter was "the unlawful killing of another without malice either express or implied." Fortner v. State, 119 Fla. 150, 153, 161 So. 94, 96 (Fla. 1935) (Brown, J., concurring). There were two distinct categories: voluntary and involuntary. *Id*. Voluntary manslaughter was understood to be "the intentional killing of another in a sudden heat of passion due to adequate provocation, and not with malice." *Id*. Involuntary manslaughter was "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." *Id*. Thus, involuntary manslaughter actually encompassed two forms—by unlawful act (or misdemeanor manslaughter) and by lawful act (or culpable negligence).

In common law voluntary manslaughter, there was the clear understanding of an intent to kill. *See, e.g.*, Olds v. State, 44 Fla. 452, 460-

461, 33 So. 296, 299 (Fla. 1902) ("Voluntary manslaughter at common law was an intentional killing in the heat of sudden passion, caused by sufficient provocation."); Fortner, 161 So. at 96 ("On the other hand, there is a class of cases where the intent to kill *is* an element of the crime of manslaughter." (emphasis supplied) (Brown, J., concurring)).

Requiring an intent to kill, "[a]mong the intentional killings recognized at common law as voluntary manslaughter were those committed (1) in the heat of passion, . . . (2) in mutual combat, . . . (3) by the use of excessive force to defend oneself, . . . (4) by the use of excessive force to resist an unlawful arrest, . . . and (5) with neither premeditation nor depravity." Rodriguez, 443 So. 2d at 287. This intent to kill was distinguishable from the intents to commit first and second degree murder because, in a situation such as heat of passion, the defendant was presumed to be "intoxicated by his passion . . . impelled by a blind and unreasoning fury to redress his real or imagined injury," to the point that "premeditation is supposed to be impossible, and depravity which characterizes murder in the second degree absent." Disney v. State, 72 Fla. 492, 502, 73 So. 598, 601 (Fla. 1916).

A good example of heat of passion is found in the case of Paz v. State, 777 So. 2d 983, 984 (Fla. 3d DCA 2000), which relied on the 1916 Disney

case. There the court stated that "the undisputed record evidence reveals a classic case of manslaughter based on adequate legal provocation"—the defendant had killed the victim "*immediately* upon realizing that the victim had sexually assaulted his wife." Paz, 777 So. 2d at 984 (emphasis in original). The court explained, "As a matter of law, Paz's sudden act of stabbing the victim immediately after surmising that the victim had sexually assaulted his wife may not be deemed an act evincing a depraved mind regardless of human life, 'but rather from the infirmity of passion to which even good men are subject.'" *Id*. (emphasis in original) (citations omitted).

Conversely, involuntary manslaughter had no intent to kill, though there may have been an intent to do an act. "[U]nder our statute the crime of manslaughter may be committed where there is no intent to kill whatever, such as cases where the death of the person killed is caused by 'culpable negligence' of the accused." Fortner, 161 So. at 96 (Brown, J., concurring). The two forms of common law involuntary manslaughter were by lawful act (i.e., culpable negligence) and by unlawful act (misdemeanor manslaughter). Fortner, 161 So. at 96 (Brown, J., concurring) (noting that involuntary manslaughter was done without malice or intention, but by doing some unlawful act that was not a felony, or by negligently doing a lawful act).

These two forms of involuntary manslaughter had different intents. One form, involuntary manslaughter of the misdemeanor or unlawful act type, involved an intended unlawful act, but not an intent to kill—such as a single punch to the head that unintentionally resulted in death. The person did intend the act of punching, but did not intend the death. *See, e.g.*, Hall v. State, 951 So. 2d 91, 92 (Fla. 2d DCA 2007) ("This case is another tragic instance of manslaughter by single punch to the head."). The other form, involuntary manslaughter by lawful act, involved "negligently doing some act lawful in itself" that unintentionally caused the death. Fortner, 161 So. at 96 (Brown, J., concurring).

Cases have understood that though the manslaughter statute is silent as to voluntary and involuntary, these common law concepts are covered "in substance" within the statute. Fortner, 161 So. at 96 (Brown, J., concurring); *see also* Rodriguez, 443 So. 2d at 290 (noting that since 1892, statute "has been construed as embracing both voluntary and involuntary manslaughter").

Great confusion has resulted over the years by cases incorporating these common law concepts into the statue in an incomplete or uneven manner, or by strictly construing the statute to the exclusion of the common law concepts. However, because the statute is wholly silent as to the

criminal intent (*mens rea*) required for any of the statute's three ways to commit manslaughter (the *actus reus*—by act, procurement, or culpable negligence), it is essential to look to the common law to determine the requisite mental state. *See* §775.01, Fla. Stat. ("The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.").

A case that has caused great confusion is Taylor v. State, 444 So. 2d 931 (Fla. 1984). There this Court noted that, in arguing that attempted manslaughter was a logical impossibility, the appellant had made the "erroneous assumption . . . that manslaughter is necessarily an involuntary act." *Id*. at 933. This Court explained that "[t]his has never been the case in Florida," and "in Florida the crime of manslaughter includes certain types of intentional killings." *Id*. It noted cases stating that there may to be an intent to kill in some manslaughter cases, and that it "recognized the distinction found in common law between voluntary and involuntary manslaughter." *Id*. at 933-934. It looked at the evidence and stated that there was "sufficient proof that he [the appellant] intended to kill him [the victim]." *Id*. at 934. However, in holding "that there may be a crime of attempted manslaughter," the Court also stated that such a verdict required "proof that the defendant

had the requisite intent to commit an unlawful act." *Id*. Thus, while the Court found that attempted manslaughter did exist, it failed to distinguish the two different intents required for common law involuntary manslaughter by act (intent to do an unlawful act, which unexpectedly results in death) and voluntary manslaughter by act (intent to kill). Instead, it confusedly stated that there was sufficient proof of an intent to kill, and that proof of an intent to commit an unlawful act was essential. Petitioner acknowledges this confusion within Taylor in his Initial Brief on the Merits (at page 10).

In Barton v. State, 507 So. 2d 638, 641 (Fla. 5th DCA 1987), the district court correctly understood that "voluntary (i.e., intentional) manslaughter at common law" required an "intent to kill," and that the statute reflected this. It interpreted Taylor as requiring an intent to kill as to attempted manslaughter. *Id*. However, the court erroneously limited manslaughter by act (and procurement) solely to voluntary manslaughter situations, reasoning that "[t]he words 'act' and 'procurement' obviously refer to acts evidencing an intent to kill, as required at common law for voluntary manslaughter." *Id*. By doing this the court overlooked that, at common law, *involuntary* manslaughter also involved an act, i.e., an intentional, unlawful act that unintentionally caused death. The opinion also erroneously suggested—contrary to the common law—that *involuntary*

manslaughter was exclusively limited to culpable negligence. *Id*. Involuntary manslaughter by unlawful act was again overlooked.

Years later, the First District, in the original Montgomery decision, recognized that Barton left "a gap in the law" because it did not allow for a conviction where the unintentional death was the result of an intentional unlawful act, e.g., the classic single blow to the head case. Montgomery v. State, --- So. 3d ---, 2009 WL 350624, *5 (Fla. 1st DCA 2009). However, while the Montgomery court correctly recognized that there exists a crime of manslaughter by act that does not have an intent to kill element—but only an intent to do an act, i.e., *involuntary* manslaughter by act—it erroneously stated that all "manslaughter by act" had "no intent-to-kill element." *Id*. Thus, while successfully recognizing the common law offense overlooked by Barton, the Montgomery reasoning failed to account for the *voluntary* manslaughter by act category of manslaughter, e.g., heat of passion.

The appellate court in Bolin v. State, 8 So. 3d 428, 420 (Fla. 2d DCA 2009), like Barton, also failed to recognize the existence of the common law crime of *involuntary* manslaughter by unlawful act (e.g., single blow to the head circumstances), by stating that "Florida law distinguishes between *voluntary* manslaughter, which is committed by act or procurement, and *involuntary* manslaughter, committed by culpable negligence." (Emphasis

supplied.) Thus, the court incorrectly restricted involuntary manslaughter to culpable negligence, and placed all manslaughter by act into the *voluntary* manslaughter category.

It is essential to understand that the three ways set forth in the statute for committing manslaughter—act, procurement, and culpable negligence—do not fit neatly into only one common law category—either voluntary or involuntary. Yet cases attempt to do exactly that. However, manslaughter by act can be voluntary and it can be involuntary—voluntary by an intent to kill (heat of passion) or involuntary by an intent to do an unlawful act that results in death (single blow to the head).[2]

A great problem has resulted because cases have incorrectly viewed involuntary manslaughter by act as being the same as voluntary manslaughter by act, but the intents are not the same. A voluntary manslaughter heat of passion crime involves the intent to kill; an involuntary manslaughter single blow to the head crime involves the intent to strike the blow, but not to kill.

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[2] Manslaughter by procurement will not be discussed here, though it may also be considered both voluntary and involuntary manslaughter, depending on the circumstances involved.

Because manslaughter by act—and thus attempted manslaughter by act—can be voluntary, with an intent to kill, the standard jury instruction at issue in this case was correct as it was given. That instruction was:

> To prove the crime of attempted **voluntary** manslaughter, the State must prove the flowing element beyond a reasonable doubt: That Mr. Williams committed an act which was **intended to cause the death** of Ms. Lindsay and would have resulted in the death of Ms. Lindsay except that someone prevented from [sic] Mr. Williams from killing Ms. Lindsey or he failed to do so, however, the Defendant cannot be guilty of attempted voluntary manslaughter if the attempted killing was either excusable or justifiable as I have previously explained those terms.

[T.473 (emphasis supplied)]

This instruction set forth the elements necessary for attempted *voluntary* manslaughter by act, which was the only possible type of manslaughter available to appellant. Petitioner certainly evidenced a desire to kill the victim. He repeatedly stabbed her with a knife, over a period of hours. He viciously sliced open her stomach, to the point that her intestines spilled out. He told her that if she did not shut up, he would finish her off.

Moreover, petitioner's explanation in his police statement, which was viewed by the jury, was that he was wrestling with the victim and defending himself as she was attacking him with a knife. The jury instruction correctly set forth that that petitioner was not guilty of attempted manslaughter if the attempted killing was either excusable or justifiable; these included in the

"heat of passion" and by "sudden combat." [T.467-468, 473] *See* Rodriguez, 443 So. 2d at 287 ("Among the intentional killings recognized at common law as voluntary manslaughter were those committed . . . (1) in the heat of passion, . . . (2) in mutual combat, . . . (3) by the use of excessive force to defend oneself, . . . (4) by the use of excessive force to resist an unlawful arrest, . . . and (5) with neither premeditation or depravity.").

Petitioner concedes that the crime of attempted manslaughter does exist. However, he does not differentiate between attempted voluntary and attempted involuntary manslaughter by act. Within the jury instruction cases, it is being debated whether the crime of attempted *involuntary* manslaughter by act should exist, particularly considering there can be no crime of attempted involuntary manslaughter by culpable negligence.[3]

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[3] The state has argued in the jury instruction cases that though the crime of attempted *voluntary* manslaughter exists, the crime of attempted *involuntary* manslaughter should not. *See* Michael Terrance Kennett, Comments, SC10-113, June 7, 2010, p.35-46. This is based on there being no crime of attempted involuntary manslaughter by culpable negligence, pursuant to Taylor v. State, 444 So. 2d 931, 934 (Fla. 1983) (holding that there "may be a crime of attempted manslaughter," but "there can be no corresponding attempt crime" for manslaughter by culpable negligence because "there can be no intent to commit an unlawful act when the underlying conduct constitutes culpable negligence.").

The dissent in Brown v. State, 790 So. 2d 389, 390 (Fla. 2000) (Harding, J., dissenting), struggled with the illogic involved in attempt crimes that have no specific intent—attempted second degree murder in that case. One "absurd result" is that the state can prove the attempt crime "without ever establishing that the defendant intended to commit the

If Montgomery remains good law, it appears that by eliminating an intent to kill, it eliminated the common law offense of voluntary manslaughter by act (e.g., heat of passion, with an intent to kill)—which would also eliminate the corresponding attempt crime of attempted voluntary manslaughter by act. Apart from manslaughter by culpable negligence, which has no attempt offense, this leaves only the offense of involuntary manslaughter by act, with its corresponding attempted involuntary manslaughter by act.

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underlying offense." *Id*. at 391. Noting that an attempt crime, being inchoate, has "no completed offense," and that "the State is punishing a defendant for conduct preparatory to the offense *coupled with the intent to commit such an offense*," the dissent opined that "[u]nlike the completed offense, mere preparatory conduct without any intent should not be enough to establish an attempt." *Id*. at 394 (emphasis in original). Another logical problem is that if an attempt crime with a general intent "'is caused by happenstance,'" then "'[h]ow does one attempt happenstance?'" *Id*. at 395 n.2 (citations omitted).

The Brown dissent recognized the question posed in the dissent of another case involving attempted second degree murder: "'So how do you "attempt" second degree murder? If intent to cause the death of another is not an element of second degree murder, what must the defendant have attempted (intended) to do which failed?'" *Id*. at 395 n.2 (citations omitted). If the "attempt" in that case was the shooting at or near the victim, then "'this act was not attempted—it was spectacularly achieved. If you complete the act prohibited by the statute, what have you attempted? More importantly, what crime have you committed?'" *Id*. (citations omitted).

The case at bar presents the same interesting questions. How do you "attempt" manslaughter where a death is not intended? If the intent pursuant to Montgomery is to do an act—and it is not an intent to kill—then what must petitioner have attempted (intended) to do that failed? If the "attempt" was not to kill, but was to stab the victim, this "was spectacularly achieved." So, if appellant completed the prohibited act, what did he attempt?

Even if the crime of attempted involuntary manslaughter by act should exist, the facts in this case would not at all support it. Petitioner admitted in his closing argument that he had definitely inflicted serious injuries—to the extent that this probably constituted aggravated battery. Involuntary manslaughter by act requires that petitioner did "some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm . . . ." Fortner, 119 Fla. at 153, 161 So. at 96 (Brown, J., concurring). The corresponding attempt offense would necessarily require the attempt to do the same, non-felony act not tending to cause death or great bodily harm, but that cannot be said here. Petitioner's repeated, severe stabbing of the victim over several hours certainly amounted to a felony and, without question, would naturally tend to cause death or great bodily harm.

Interpreting the manslaughter statute in light of the common law shows that the jury instruction on attempted voluntary manslaughter by act was correct. The first certified question to this Court is then answered in the negative: the standard jury instruction does not constitute fundamental error.

As to the second question of whether attempted manslaughter is still a viable offense in light of Montgomery, it appears that Montgomery—possibly inadvertently—entirely eliminated the common law offense of voluntary manslaughter by act (such as heat of passion and sudden combat,

with an intent to kill). This necessarily also eliminated the corresponding attempted voluntary manslaughter by act. Interestingly, this leaves only the offense of involuntary manslaughter by act, with its corresponding attempted involuntary manslaughter by act—if such an attempt crime can actual exist. The Montgomery decision should be re-visited.

IV. Even by giving the applicable statute only its strict and literal interpretation, as was done in Montgomery, the jury instruction in this case did not rise to the level of fundamental error.

Petitioner's argument is based wholly on a strict and literal reading of the manslaughter statute, and without due consideration of the common law. As just explained, it is impossible to read this statute in such a manner, and doing so perpetuates the confusion rampant within opinions discussing manslaughter. However, even if the statute is so interpreted, and the unobjected-to standard jury instruction utilized here deemed erroneous pursuant to Montgomery, any error did not rise to the high level of fundamental error. This Court has long-defined fundamental error as "error that reaches 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." Anderson v. State, 841 So. 2d 390, 403 (Fla. 2003).

Petitioner was charged with attempted first degree murder and found guilty of attempted second degree murder. Montgomery, 39 So. 3d at 259,

states that manslaughter is a category one, necessarily lesser included offense of first degree murder. As such, it "'is always included in the major offense.'" *Id*. (citations omitted). Second degree murder is also a necessarily lesser included offense of first degree murder. *Id*. However, where second degree murder is one step removed from first degree murder, "manslaughter as a lesser included offense is two steps removed from first-degree murder." *Id*.

Petitioner argues that because attempted manslaughter, which received the erroneous instruction, is one step removed from attempted second degree murder, the crime of conviction, the error was "*per se* fundamental error" that requires reversal pursuant to Montgomery. However, respondent believes this reasoning is incorrect. While Montgomery stated that it was applying a fundamental error analysis because the issue had not been preserved, it also utilized the words "per se reversible" in a confusing manner, along with "harmless error." 39 So. 3d at 258-259. Montgomery does not require per se reversal, and there was no fundamental error here.[4]

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[4] For the sake of this argument, and because the instruction was given, respondent has assumed that attempted voluntary manslaughter was a necessarily lesser included offense of attempted first degree murder. However, it must be pointed out that, in the jury instruction cases, the argument is before this Court that under Montgomery and this Court's recent

In State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978), this Court examined cases where the trial courts failed to instruct on lesser-included offenses that were one and two steps removed from the charged offenses, and where those issues had been preserved. This Court reasoned that the distinction in steps was "more than merely a matter of number or degree" because the situation implicated the jury's "fair opportunity to exercise its inherent 'pardon' power by returning a verdict of guilty as to the next lower crime." *Id*. The result: "Only the failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible. When the omitted instruction relates to an offense two or more steps removed . . . reviewing courts may properly find such error to be harmless." *Id*. Abreau was decided as to preserved issues, and so utilized a harmless error and per se reversible error analysis.

This Court has stated that "*Abreau* stands for the rule that a *refusal* to instruct on a lesser included offense two steps removed from the offense for which defendant is convicted is *harmless error*." Acensio v. State, 497 So.

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opinion in Coicou v. State, 39 So. 3d 237, 243 (Fla. 2010), the mental states of the two offenses are different if first degree murder requires an intent to kill and voluntary manslaughter requires only an intent to do an act. The result would be that while manslaughter might be a permissive lesser included offense, it would not be a necessarily lesser included. *See* Michael Terrance Kennett, Comments, SC11-1010, Mar. 14, 2011, pp. 51-67.

2d 640, 642 (Fla. 1986) (emphasis supplied) (harmless error analysis used with preserved issue). Abreau also applies in cases where a trial court fails to give an accurate jury instruction. *See, e.g.*, Rojas v. State, 552 So. 2d 914, 916 n.1 (Fla. 1989) (noting that it was not receding from Abreau, "which holds that the failure to give an accurate instruction on a lesser included offense which is two steps removed from the crime of which the defendant is convicted constitutes harmless error.").

Cases indicate that in order to be "per se" reversible, an Abreau jury instruction issue must be preserved. In Jones v. State, 484 So. 2d 577, 578 (Fla. 1986), this Court held that, in non-capital cases, a defendant does not have a constitutional right to have the jury instructed as to necessarily lesser included offenses. It noted that there were "long and unbroken lines of precedent conditioning a right to jury instructions on lesser included offenses upon a request for such instructions, . . . and requiring a contemporaneous objection as a predicate to proper appellate review." *Id*.

This Court recently explained the clear distinctions between harmless error, per se reversible error, and fundamental error. In Johnson v. State, 53 So. 3d 1003, 1007 (Fla. 2010), this Court explained, "When an error is preserved for appellate review by a proper objection, an appellate court applies either a harmless error test or a per se reversible error rule." Further,

"[b]oth per se reversible error and harmful error analysis apply only if the issue is properly preserved for appellate review." *Id*. at n.5. "This is in contrast to fundamental error, which applies when an issue is not preserved." *Id*. This Court looked to the case of Rodas v. State, 967 So. 2d 444 (Fla. 4th DCA 2007), in stating this. Johnson, 53 So. 3d at 1007 n.5.

In Rodas, the Fourth District explained:

> There is a difference between "per se reversible error" and "fundamental error." The general rule is that a reversal in a criminal case must be based on a prejudicial error that was preserved by a timely objection in the trial court. . . . A fundamental error is an exception to the contemporaneous objection rule. . . . A fundamental error reaches "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."
>
> A per se reversible error means that a reviewing court does not undertake a harmless error analysis to decide if a prejudicial error occurred. A per se reversible error is not necessarily a fundamental one. . . . If such an error must be preserved by an objection at trial it is not a fundamental error.

Rodas, 967 So. 2d at 446 (citations omitted).

The Johnson Court further explained that "'[l]ike the harmless error test, the per se reversible error rule is concerned with the right to a fair trial." 53 So. 3d at 1007. "'The test of whether a given *type* of error can be properly categorized as per se reversible is the harmless error test itself. . . . If application of the test to the type of error involved will always result in a

finding that the error is harmful, then it is proper to categorize the error as per se reversible.'" *Id*. (emphasis in original) (citations omitted). This Court then gave examples of where it had applied a per se reversible error rule because a harmless error analysis would have been "pure speculation." *Id*. at 1007-1008. Included in this was the situation where a jury was not instructed on a lesser included offense that was one step removed from the charged offense, such as in Abreau. *Id*. at 1008.

Applying Johnson, it is clear that any error in the instruction here would require a fundamental error analysis. There was no preservation, so a harmless error or per se reversible error analysis would not be accurate.

Moreover, per se reversible error applies to "a given *type* of error" that "will always result in a finding that the error is harmful." Johnson, 53 So. 3d at 1007 (emphasis in original). Montgomery did not find that this error was a type that will always result in harmful error, and it did not find that the error was per se reversible, i.e., applicable to every case. Montgomery clearly and repeatedly stated: the error "constituted fundamental error **in Montgomery's case**"; "we conclude that fundamental error occurred **in this case**; "fundamental error occurred **in his case**"; "**in this case** the use of the standard jury instruction on manslaughter constituted fundamental error"; and "we conclude that the use of the standard jury

instruction on manslaughter constituted fundamental, reversible error **in Montgomery's case** and requires that **Montgomer**y receive a new trial." Montgomery, 39 So. 3d at 254, 258-260 (emphasis supplied).

As astutely noted by the dissent in Rushing v. State, --- So. 3d ---, 2010 WL 2471903, *2 (Fla. 1st DCA 2010) (Clark, J. dissenting), "the *Montgomery* opinion did not prohibit, or even discourage, case-by-case analysis for fundamental error where convictions are challenged on the basis of an erroneous jury instruction for a lesser included offense. Fundamental error is a rare exception to the contemporaneous objection requirement for jury instructions."

It does appear that Montgomery has used wording that is confusing when contrasted to this Court's clear explanation in Johnson as to harmless error, per se reversible error, and fundamental error. Initially, Montgomery states that it approved the lower court's decision that the jury instruction "constituted fundamental error in Montgomery's case." 39 So. 3d at 254. Montgomery then speaks of the charges being one or two steps removed from each other in light of per se reversible and harmless error (i.e., Abreau). Montgomery, 39 So. 3d at 259. It then states that "fundamental error occurred" in Montgomery's situation "which was per se reversible." *Id*. It later states that use of the instruction was "fundamental error," and still later

that it was "fundamental, reversible error." *Id*. at 259-260. Thus, the applicable terms are utilized in an unclear manner, particularly by stating that is was "per se reversible" and "fundamental, reversible error" in a case where "fundamental error" was found as to the specific facts of the case—while clearly not holding that this was reversible error in every case with this type of error. This mixing of terms certainly might generate a good measure of confusion as to the proper analysis.

As recognized by the Fourth District, a fundamental error analysis here reveals that such error did not occur. The instruction at issue was not the same as that in Montgomery because it was as to attempted manslaughter, not manslaughter. Williams, 40 So. 3d at 74. The jury was instructed that for attempted voluntary manslaughter by act, the state had to prove that petitioner:

> committed an act which was intended to cause the death of Ms. Lindsay and would have resulted in the death of Ms. Lindsay except that someone prevented from [sic] Mr. Williams from killing Ms. Lindsay or he failed to do so, however, the Defendant cannot be guilty of attempted voluntary manslaughter if the attempted killing was either excusable or justifiable as I have previously explained those terms. . . . In order to convict of attempted voluntary manslaughter, it is not necessary for the State to prove that the Defendant had a premeditated intent to cause the death.

[T.473]

The Fourth District recognized that instructing a jury that a specific element of the crime was an "intent to kill," as was done Montgomery, was not exactly the same as instructing the jury that the state had to prove that the defendant committed an act that was intended to cause a death. Williams, 40 So. 3d at 75. The Montgomery instruction specifically stated "intent to kill," while the instruction here focused on the act itself.

Importantly, the Fourth District understood that the instruction did not confuse the jury, so this was not fundamental error that reached "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." Anderson, 841 So. 2d at 403.

As the Fourth District noted, by finding petitioner guilty of attempted second degree murder, the jury necessarily found that he "'intentionally committed an act' that would have resulted in the death of the victim **and** that the act was imminently dangerous to another and demonstrated a depraved mind, without regard for human life." Williams, 70 So. 3d at 75 (emphasis in original).

The required findings of "imminently dangerous to another" and "demonstrate[ing] a depraved mind, without regard for human life," were essential for the attempted second degree murder conviction—and the facts

in this case confirm the jury's findings. Petitioner viciously and repeatedly stabbed the victim—over a protracted period of time and sometimes while she held her ten-month-old baby girl. His acts were done in the presence of that baby, who was later found crawling in her mother's blood. Though the victim tried to flee numerous times, petitioner prevented her; he pulled her back into the house, secured the door, and stabbed her again whenever she tried to escape. After begin stabbed in the neck, face, chest, stomach, side, and leg, the victim's intestines were protruding from her body. Petitioner later explained to the police that evil spirits had moved on him.

Obviously, as recognized by the Fourth District, the jury was exercising its inherent "pardon" power by returning a lesser verdict. Williams, 40 So. 3d at 75. While seeking to convict on a lesser crime, the jury was faced with the uncontroverted evidence that petitioner's vicious acts were imminently dangerous; demonstrated a depraved mind; were without regard for human life; and were done with ill will, hatred, spite or an evil intent—all concisely set forth in the jury instruction for attempted second degree murder. [T.472] The jury instruction on attempted voluntary manslaughter contained none of these requisites, and the jury would have been hard-pressed to find such a crime.

This case is quite distinguishable from the facts in Montgomery, where this Court noted that the trial court itself expressed concerns over the sufficiency of the evidence as to first degree murder—which "further underscores the importance of the jury's accurate instruction on the lesser included offenses in this case." Montgomery, 39 So. 3d at 259 n.5. There was no such lack of evidence here.

Contrary to the high standard required for fundamental error, this verdict of attempted second degree murder was absolutely correct and any error in the attempted manslaughter instruction did not reach down into the validity of the trial. It cannot be said that this verdict could not have been reached without the assistance of an erroneous standard jury instruction.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities cited herein, respondent respectfully requests that this Court affirm the decision of the Fourth District Court of Appeal; find that, by interpreting the manslaughter statute in light of the common law, the standard jury instruction on attempted voluntary manslaughter by act did not constitute error; and reconsider its decision in Montgomery in order to affirmatively answer the certified question of whether attempted voluntary manslaughter by act is still a viable offense in Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been forwarded via courier to counsel for petitioner: DEA ABRAMSCHMITT, Assistant Public Defender, and JOHN M. CONWAY, Assistant Public Defender, The Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401 on August 22, 2011.

_____

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Times New Roman 14-point type and complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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