IN THE SUPREME COURT OF FLORIDA

AMOS AUGUSTUS WILLIAMS, Petitioner -Appellant, STATE OF FLORIDA, Respondent -Appellee.	)	CASE NO. SC10-1458

INITIAL BRIEF ON THE MERITS

On Certiorari Review from the Fourth District Court of Appeal

CAREY HAUGHWOUT
Public Defender
Fifteenth Judicial Circuit of Florida

DEA ABRAMSCHMITT
Assistant Public Defender
Florida Bar No. 084506

JOHN M. CONWAY
Assistant Public Defender
Florida Bar No. 0267724

The Criminal Justice Building
421 3rd Street - Sixth Floor
West Palm Beach, Florida 33401-4203
(561) 355-7600
appeals@pd15.org

Attorneys for Amos Augustus Williams

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PRELIMINARY STATEMENT

Petitioner, Amos Augustus Williams, was the Appellant and Respondent, the State of Florida, was the Appellee in the Fourth District Court of Appeal. Petitioner was the defendant and the State was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida. The decision of the Fourth District Court of Appeal is reported as *Williams v. State*, 40 So.3d 72 (Fla. 4th DCA 2010). In this brief, the parties will be referred to as Petitioner or Williams and State, respectively.

The following symbols will be used in the brief:

"R" The Record on Appeal proper.

Volume 1 (pages R1 – 151)
Volume 2 (pages R152 - 292)
Volume 3 (pages R293 - 320) *****Confidential*****

"T" Transcript of Petitioner's jury trial and sentencing.

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STATEMENT OF THE CASE AND FACTS

This case involves two questions of law certified to this Court as being of great public importance by the lower court. The questions relate to Petitioner's conviction for attempted second degree murder. Petitioner was charged with, among other things, attempted first degree murder (R2-3). When the court instructed the jury on the attempted first degree murder charge, the jury was also instructed on the lesser offenses of attempted second degree murder, attempted voluntary manslaughter and aggravated battery (R230). The court gave the jury the following attempted voluntary manslaughter instruction:

> [The] State must prove the following 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. Lindsay or he failed to do so . . .

[Emphasis supplied] (T473). The prosecution argued this instruction in closing argument:

> STATE: That brings us to the three levels, as you will, of the attempted murder, but first one is attempted voluntary manslaughter. The judge read to you the definitions of each of the levels of attempted homicide and in order for it to be attempted voluntary manslaughter, all the State has to prove is that the Defendant ***committed an act which was intended to cause the death*** of Samantha Lindsay. . .

[Emphasis supplied] (T485-86). On the attempted murder charge, the jury convicted Williams of attempted second degree murder (R230-31).

On appeal to the Fourth District, Petitioner argued that the jury instruction for attempted voluntary manslaughter was defective and required reversal on the authority of *State v. Montgomery*, 39 So. 3d 252 (Fla. 2009). The Fourth District rejected this argument stating that:

> "To prove the crime of attempted voluntary manslaughter, the State must prove ... Mr. Williams committed an act which was intended to cause the death of Ms. Lindsay ...." The error that occurs by instructing the jury that "an intent to kill" is an element of manslaughter does not exist when instructing the jury that the defendant committed an act which was intended to cause the death of the victim. As the Second District explained, you cannot attempt to commit an unintentional act. *Hall*, 951 So.2d at 96. This may explain why the Supreme Court has not amended the attempted manslaughter instruction, even though it has twice amended the manslaughter instruction within the last two years.

Williams v. State, 40 So. 3d 72, 75 (Fla. 4th DCA 2010). The District Court certified conflict with *Lamb v. State*, 18 So. 3d 734 (Fla. 1st DCA 2009), and also certified the following questions of great public importance:

(1) Does the standard jury instruction on attempted manslaughter constitute fundamental error?

(2) Is attempted manslaughter a viable offense in light of *Montgomery v. State*, 2010 WL 1372701 (Fla. Apr. 8, 2010)?

Id. at 76. A timely Notice of Discretionary Jurisdiction was filed on July 23, 2010. After the submission of jurisdictional briefs, this Court accepted jurisdiction on June 7, 2010.

SUMMARY OF THE ARGUMENT

It was fundamental error for the trial court to instruct the jury that attempted manslaughter required proof that Petitioner committed an act which was intended to cause the death of the victim. The intent required by this instruction "would be naturally understood as requiring a finding that the defendant intended for the victim to die." *State v. Montgomery*, 39 So. 3d 252, 257 (Fla. 2009*), citing with approval Montgomery v. State,* 34 Fla. L. Weekly D360 (Fla. 1st DCA February 12, 2009). The instruction in the instant case suffers from the same infirmities as the erroneous instruction found to be fundamental error in Montgomery. There is no requirement that a defendant have an intent to kill for either manslaughter or attempted manslaughter. The required intent is to commit an act, not an intent to kill. Moreover, the erroneous instruction given in this case was on a pertinent and material element of the next lesser offense. The Fourth District's decision is an erroneous interpretation of the law. This Court should find that the attempted manslaughter instruction resulted in fundamental error. The second certified question has already been answered by this Court in *Taylor v. State*, 444 So.2d 931 (Fla. 1983), which held that there is a crime of attempted manslaughter by act and that the required intent is to commit an act, not an intent to kill. Petitioner's conviction should be reversed for a new trial.

ARGUMENT

THE TRIAL COURT FUNDAMENTALLY ERRED IN INSTRUCTING THE JURY THAT THE LESSER INCLUDED OFFENSE OF ATTEMPTED MANSLAUGHTER BY ACT INCLUDED AN INTENT TO KILL ELEMENT.

In this case, Petitioner was charged with attempted first degree murder. The trial court instructed the jury on attempted first degree murder, as well as the lesser offenses of attempted second degree murder, attempted manslaughter and aggravated battery. The jury convicted Petitioner of attempted second degree murder. At issue here is the standard jury instruction for attempted voluntary manslaughter. *See Fla. Std. Jury Instr. (Crim.)* 6.6. This instruction contains language which requires the State to prove that Petitioner "committed an act which was intended to cause the death of [the victim]." There was no objection made to the instruction.

Attempted manslaughter is one offense removed from attempted second degree murder, the offense for which Petitioner was convicted. The error in the attempted manslaughter instruction is *per se* fundamental error and requires reversal based on the authority of *State v. Montgomery*, 39 So. 3d 252 (Fla. 2009).

In *Montgomery*, this Court found that the standard jury instruction for manslaughter by act was fundamentally flawed. The jury instruction in that case

[Fla. Std. Jury Instr. (Crim.) 7.7 (2006)], like the one at issue here, required the State to prove that the defendant intentionally caused the death of the victim. *Montgomery*, 39 So. 3d at 256. The instruction "required the jury to find that the defendant intended to kill the victim in order to convict Montgomery of manslaughter." *Id.* This Court decided unequivocally that the jury instruction was fundamental error.

> Montgomery was entitled to an accurate instruction on the lesser included offense of manslaughter. The instruction in this case, requiring the jury to find that Montgomery intended to kill Ellis, erroneously explained Florida law on manslaughter by act. Moreover, it was "pertinent or material to what the jury must consider in order to convict."*State v. Delva*, 575 So.2d 643, 645 (Fla.1991) (*quoting Stewart v. State*, 420 So.2d 862, 863 (Fla.1982)). Thus, we conclude that fundamental error occurred in this case, where Montgomery was indicted and tried for first-degree murder and ultimately convicted of second-degree murder after the jury was erroneously instructed on the lesser included offense of manslaughter.

Id. at 259. Relying on *Pena v. State*, 901 So.2d 781, 787 (Fla. 2005), this Court concluded that the erroneous instruction was *per se* fundamental error because the defective manslaughter instruction was one-step removed from the second degree murder verdict actually returned by the jury.

The instruction given in the instant case contained the same erroneous instruction that attempted manslaughter required an act which was ***intended to***

***cause the death*.** The intent required in the instruction modifies the words, "to cause death" rather than intent "to commit an act." The instruction clearly requires a finding that the defendant intended for the victim to die. The instruction was a misstatement of the law and the error was pertinent and material to the jury's consideration for a conviction.

This Court's holding in *Montgomery* was not a radical departure from established Florida decisional law. Florida courts have long held that due process requires the jury to be intelligently and correctly instructed on the law:

> It is an inherent and indispensable requisite of a fair and impartial trial under the protective powers of our Federal and State Constitutions as contained in the due process of law clauses that a defendant be accorded the right to have a Court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence. Such protection afforded an accused cannot be treated with impunity under the guise of 'harmless error.'

[Citations omitted].*Gerds v. State*, 64 So. 2d 915, 916 (Fla. 1953).

Montgomery is also consistent with this Court's decision in *Gentry v. State*, 437 So.2d 1097 (Fla. 1983). In that case, this Court was called upon to determine the level of intent required for the crime of attempt as it relates to the intent required for the same crime if it had been completed. The *Gentry* court held that, where the completed offense would have been a general intent crime, the attempt

to commit such an offense also only requires general rather than specific intent. *Id.* at 1098-1099. *See also Montgomery*, 34 Fla. L. Weekly at D360; *approved*, 39 So.3d 252 (Fla. 2010).

> 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.

[Emphasis supplied] *Gentry*, 437 So. 2d at 1098-1099. An attempt to commit manslaughter falls into this category. Manslaughter does not require a specific intent to kill and therefore, neither does the attempt to commit manslaughter.

These principles have been directly applied by this Court in *Taylor v. State*, 444 So.2d 931 (Fla. 1983). In *Taylor*, this Court dealt specifically with the crime of attempted manslaughter. Taylor was convicted of attempted manslaughter. He argued on appeal that there is no such crime, based on the logic that culpable negligence is an element of manslaughter and it is illogical to say that one can intend to commit an act by culpable negligence. The First District agreed with his premise, but still upheld the conviction, saying attempted manslaughter was analogous to the earlier crime of assault with intent to commit manslaughter, which

required an intent to kill. *Taylor*, 444 So.2d at 932-33 (discussing lower court's ruling). This Court affirmed on somewhat different grounds.

First, it said culpable negligence is not an element of voluntary manslaughter. Hence, it is also not an element of attempted voluntary manslaughter, so that "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." *Id.* at 934.

Next, and confusingly, it wrote that the State proved an attempted manslaughter by evidence that Taylor fired a shotgun at the victim, so that there was "sufficient proof that he intended to kill him." *Id*. But this Court then ***held*** that attempted manslaughter requires only an intent to commit an illegal act:

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

[Emphasis supplied] *Id*.

However, any confusion resulting from the wording in Taylor was resolved by this Court a year later in *Brown v. State*, 455 So.2d 382 (Fla. 1984). In *Brown*, this Court stressed that the basis of *Taylor* is that the intent element of attempted manslaughter is an intent to commit an illegal act:

> This is a petition to review *Brown v. State*, 431 So.2d 247 (Fla. 1st DCA 1983), in which the district court of appeal certified the following question to be of great public importance:
>
> > IS THERE A CRIME OF ATTEMPTED MANSLAUGHTER UNDER THE STATUTES OF THE STATE OF FLORIDA?
>
> *Id*. at 249. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. Subsequent to the filing of this petition, we answered the same question in the affirmative in our recent decision in *Taylor v. State*, 444 So.2d 931 (Fla. 1983). In *Taylor* we held that
>
> > there may be a crime of attempted manslaughter … . [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. 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***.
>
> 444 So.2d at 934 (emphasis added).

Brown, 455 So.2d at 382.

After *Brown*, this Court again emphasized that the requisite intent is to commit a criminal act. In *Murray v State*, 491 So.2d 1120 (Fla. 1986), the defendant kidnapped, robbed, raped and shot the victim. He claimed he could not be convicted of attempted manslaughter because he did not intend to shoot the victim. This Court ruled that, under *Brown*, the record supported the conviction of attempted manslaughter because there was "sufficient evidence of an ***intention to commit the criminal act in question***."[Emphasis supplied]. *Id.* at 1122.

This Court has thus repeatedly held that the State only needs to prove intent to commit a criminal act as an element of attempted manslaughter. Contrary to these rulings, the Fourth District's decision in this case held the State must ***prove an act that was intended to kill***. Petitioner respectfully submits that the District Court erred by making a ruling contrary to *Brown*, *Murray*, and *Taylor*.

In the First District's decision in *Montgomery v. State*, 34 Fla. L. Weekly D360 (Fla. 1st DCA 2009) *approved*, 39 So.3d 252 (Fla. 2010), the First District gave a thoughtful analysis of the intent requirements for manslaughter and attempted manslaughter in light of *Taylor*. The Court found that:

> In addition to emphasizing that the crime of attempted manslaughter exists only where the completed offense would be manslaughter by act or procurement, this express holding identifies the intent element

> of attempted manslaughter. [*Taylor*, 444 So.2d at 934]. We interpret this language 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 [Footnotes omitted]. This interpretation of the *Taylor* holding results from our reading of its plain language, as well as Florida's general concept of the crime of attempt, which requires the jury to find that the defendant would have completed the relevant underlying offense except that he or she was either prevented from doing so or failed to do so.

Montgomery, 34 Fla. L. Weekly at D360.

The Fourth District based its decision, below, at least in part, on its interpretation of *Hall* v. State, 951 So.2d 91 (Fla. 2d DCA 2007). The Fourth District stated:

> The error that occurs by instructing the jury that "an intent to kill" is an element of manslaughter does not exist when instructing the jury that the defendant committed an act which was intended to cause the death of the victim. As the Second District explained, you cannot attempt to commit an unintentional act. *Hall*, 951 So.2d at 96.

Williams v. State, 40 So.3d 72, 75 (Fla. 4th DCA 2010).

The decision overlooks the ultimate holding in *Hall*, which was that manslaughter does not require an intent to kill but only an intent to commit an act that causes death. *Hall*, 951 So.2d at 96.

The decision also overlooks the fundamental flaw in the jury instruction for attempted manslaughter, the same flaw that was present in the instruction for manslaughter. In *Montgomery*, this Court agreed with the First District's decision in that case that the instruction erroneously requires the intent to cause death.

> We agree with the district court's observation in *Montgomery* that a reasonable jury would believe that in order to convict Montgomery of manslaughter by act, it had to find that he intended to kill Ellis. The district court stated:
>
> > The average juror would likely interpret the instruction as requiring an intent to kill, as there is no direct language regarding an intentional act. The word "intentionally" in the instruction modifies the word "caused." Thus, the instruction would be naturally understood as requiring a finding that the defendant intended for the victim to die. The likelihood of such an interpretation is illustrated by the fact that the phrase "intentionally caused the death of" is commonly associated with first-degree murder in charging documents.

Montgomery, 29 So. 3d at 257, *quoting Montgomery v. State*, 34 Fla. L. Weekly D360 (Fla. 1st DCA February 12, 2009). The same is true here. The intent required by the instruction is the intent to cause the death rather than the intent to commit an act. As in *Montgomery*, the instruction would be understood as requiring a finding that the defendant intended for the victim to die. It is clear that the instruction erroneously instructs the jury that attempted manslaughter requires an intent to kill.

The other basis for the Court's decision below, seems to be that this Court has not issued a new jury instruction for attempted manslaughter. Initially, this reasoning overlooks the standard language contained in amendments to criminal jury instructions. In the amendments, this Court includes cautionary language to the effect that, in approving the publication and use of the instructions:

> …we express no opinion with respect to the correctness of the instruction and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of the instruction."

See e.g. In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So.3d 17 (Fla. 2009). The fact that the standard instruction has not yet been changed is therefore not an indication that the instruction is without legal defects.

It is also important to note that this Court currently has a proposal before it to amend the jury instruction for attempted manslaughter to comport with *Montgomery* by making it clear that the required intent is to commit an act and not an intent to kill. *See in Re: Standard Jury Instructions in Criminal Cases - Report 2010-05* , Case No. SC10-2434.

Each of the other District Courts have found that the giving of this standard instruction for attempted manslaughter which states that a defendant "committed an act which was intended to cause the death of the victim" is fundamental error

and that *Montgomery* compels reversal for a new trial. In *Houston v. State*, 56 So.3d 908 (Fla. 2d DCA March 18, 2011), the Second District considered the attempted manslaughter instruction in light of both *Montgomery* and the Fourth District's decision, below. Like the Petitioner, Houston was charged with attempted first degree murder and the jury was instructed on attempted first-degree murder as well as attempted second-degree murder, and attempted manslaughter by act. *Id.* at 909. The jury was instructed using the same standard attempted manslaughter instruction at issue here. No objection was raised and Houston's jury returned a verdict of second degree murder.

The Second District found that the standard instruction's use of the phrase "committed an act which was intended to cause the death of" the victim impermissibly created an "intent to kill" element for the crime of attempted manslaughter:

> We agree with Houston that the phrase "committed an act which was intended to cause the death of" impermissibly creates an intent-to-kill element in the crime of attempted manslaughter.

Id. at 909. In reaching this conclusion, the Second District looked to the language of *Section* 782.07(1), *Florida Statutes*, which defines manslaughter, and the attempt statute which is found in *Section* 777.04(1), *Florida Statutes.* *Id.* The

Court concluded that there was no statutory requirement for an intent to kill.

> Nothing in this statutory scheme suggests that the crime of attempted manslaughter requires an intent to kill. *See Bass v. State*, 45 So.3d 970, 971 (Fla. 3d DCA 2010) (reviewing jury instruction on attempted voluntary manslaughter that included element that "defendant committed an act, which was intended to cause the death of [the victim]" and finding error, "based on *Montgomery*," in the giving of that instruction); *Lamb* v. State, 18 So.3d 734, 735 (Fla. 1st DCA 2009) ("[T]he standard jury instruction for attempted manslaughter by act ... adds the additional element that the defendant 'committed an act intended to cause the death' of the victim when attempted manslaughter by act requires only an intentional unlawful act."); *see also Gonzalez v. State*, 40 So.3d 60, 62 (Fla. 2d DCA 2010)

Id. at 909-910.

The *Houston* Court then addressed the Fourth District's decision in the instant case. The Court found that the Fourth District's reliance on its decision in *Hall*, 951, So. 2d at 91, *see also Hall*, 951, So. 2d at 91, was misplaced. In reaching this conclusion, the Court examined the specific language of *Hall* relied on by the Fourth District and concluded that the ultimate holding in *Hall* was that manslaughter by act does not require an intent to kill but only an intent to commit an act that causes death, and any discussion of attempted manslaughter was simply dicta. The Court also noted that the *Hall* opinion apparently misstates this Court's

holding in *Taylor* by holding that the necessary intent was an intent to kill. The *Houston* Court noted that the specific language in *Taylor* was that:

> "[T]here may be a crime of attempted manslaughter. We reiterate, however, that 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.***" 444 So. 2d at 934.. (emphasis added).

Id. at 910. The Second District found that the Fourth District's rationale in the instant case was unpersuasive and contrary to *Montgomery.*

Houston is by no means the only District Court decision at odds with the Fourth District's opinion, below. Each of the other District Courts have issued opinions which are in conflict with the instant case. In addition to the cases mentioned in *Houston* that have found the attempted manslaughter instruction in fundamental error under *Montgomery* [*Bass*, 45 So.3d at 970; *Lamb* 18 So.3d at 734; and *Gonzalez*, 40 So.3d at 60], numerous other decisions have reached the same conclusion. The First District has found the same instruction to be error in *Minnich v. State*, 36 Fla. L. Weekly D216 (Fla 1st DCA January 28, 2011) (finding ineffective assistance of appellate counsel, granting writ of *habeas corpus* and noting Fourth District's contrary decision in the instant case). *See also Herring v. State*, 43 So.3d 823 (Fla. 1st DCA 2010)*; Noack v. State*, 36 Fla. L. Weekly D1036 (Fla. 1st DCA May 13, 2011)

In *Coiscou v. State*, 43 So.3d 123 (Fla. 3d DCA 2010), the Third District found the same attempted manslaughter instruction to be *per se* reversible error in light of *Montgomery*. *See also Burrows v. State*, 36 Fla. L. Weekly D1277 (Fla. 3d DCA June 15, 2011)(same and certifying conflict with the Fourth District's decision below)

The Fifth District has also found the attempted manslaughter jury instruction to be fundamental error. In *Burton v. State*, 36 Fla. L. Weekly D738 (Fla. 5th DCA April 8, 2011), the Court found that, after considering *Montgomery*, *Lamb* and *Rushing*, the instruction was fundamentally flawed and certified conflict with the Fourth District decision below. In *Hodges v. State*, 36 Fla. L. Weekly D1243 (Fla 5th DCA June 10, 2011), the Court found that appellate counsel was ineffective for failing to raise the defect in the instruction:

> We initially denied the petition, citing to *Williams v. State*, 40 So.3d 72 (Fla. 4th DCA 2010), a decision of the Fourth District Court of Appeal. During the pendency of Hodges' motion for rehearing, however, we have *reconsidered Williams* and have concluded that our reliance on it was wrong. *See Burton v. State*, 36 Fla. L. Weekly D738 (Fla. 5th DCA, Apr.8, 2011). Given the Florida Supreme Court's April 2010 *Montgomery* decision, we are bound to conclude that appellate counsel should have raised the issue at the appellate level before our decision in the appeal was final. *See Minnich*, 36 Fla. L. Weekly D216: *Bailey*, 36 Fla. L. Weekly D217; *Sharpe v. State*, 39 So.3d 342 (Fla. 1st DCA 2010);

> *Asberry v. State*, 32 So.3d 718 (Fla. 1st DCA 2010); *Toby v. State*, 29 So.3d 1138 (Fla. 1st DCA 2009). We accordingly grant the writ, vacate the judgment and remand for a new trial.

Id.

Thus, each of the other Courts of Appeal have concluded that the attempted manslaughter instruction suffers from the same infirmity as the manslaughter instruction and constituted fundamental error. The other Courts of Appeal have also concluded that *Montgomery* is controlling and requires reversal. This is consistent with longstanding principles of Florida jurisprudence that any change in established precedents are to made by this Court:

> '(I)f and when such a change is to be wrought by the judiciary, it should be at the hands of the Supreme Court rather than the District Court of Appeal. . . . The majority decision would appear to flatly overrule a multitude of prior decisions of our Supreme Court, a prerogative which we do not enjoy.'

Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973), *citing with approval dissent in Jones v. Hoffman*, 272 So.2d 529, 534 (Fla. 4th DCA 1973).

For all of these reasons, the decision of the Fourth District below was wrongly decided. This Court should answer both of the certified questions in the affirmative and reverse with directions to grant Petitioner a new trial.

CONCLUSION

Based on the foregoing arguments and the authorities cited, Williams respectfully requests this Honorable Court to answer both questions in the affirmative, and to remand this case for a new trial.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender
Fifteenth Judicial Circuit of Florida

DEA ABRAMSCHMITT
Assistant Public Defender
Florida Bar No. 084506

JOHN M. CONWAY
Assistant Public Defender
Florida Bar No. 0267724

The Criminal Justice Building
421 3rd Street- Sixth Floor
West Palm Beach, Florida 33401
(561) 355-7600

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the Initial Brief has been furnished to Assistant Attorney General Celia Terenzio, Counsel for Respondent, 1515 North Flagler Drive, 9TH Floor, West Palm Beach, Florida 33401-3432, by courier this 1st day of July, 2011.

_____

Of counsel

CERTIFICATE OF FONT COMPLIANCE

Counsel hereby certifies that the instant brief has been prepared with Times New Roman 14-point font.

_____

Of counsel