IN THE SUPREME COURT OF FLORIDA

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

PETITIONER'S REPLY BRIEF ON THE MERITS

On Certiorari Review from the Fourth District Court of Appeal

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TABLE OF CONTENTS

CONTENTS **PAGE**

AUTHORITIES CITED

CASES **PAGE(S)**

FLORIDA STATUTES (2011)

STATEMENT OF THE CASE AND FACTS

Petitioner relies on its original statement of the case and facts. The lengthy recitation of the underlying facts of this case made by the Respondent were unnecessary since the issue involved in this case is one of pure law.

REBUTTAL 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 its Answer Brief, Respondent spends a great deal of time on the facts. (AB. 1-5, 20, 33). However, the issue before this Court is purely a question of law: whether Williams was afforded his constitutional right to have his jury correctly instructed on the pertinent points of law as to the lesser included offense of attempted manslaughter by act. The facts essential to this issue of law are not disputed.

In its Answer Brief, Respondent also invites this Court to ignore established precedent. Montgomery is not open for debate, but a decided case establishing legal precedent. State v. Montgomery, 39 So. 3d 252 (Fla. 2010). The issue here is whether Montgomery applies to *attempted* manslaughter in addition to manslaughter.

Respondent makes the argument that the manslaughter statute, §782.07, Florida Statutes (2011), should not be given a strict interpretation, but should be interpreted according to old common law. (AB. 9-16) However, this Court has long held that:

> A statute that expressly or by implication supersedes the common law and which does not do violence to organic provisions or principles of the state, becomes the controlling law within its proper sphere of operation.

DeGeorge v. State, 358 So. 2d 217, 220 (Fla. 4th DCA 1978). Our state statute, then, *is* the law in Florida regarding the crime of manslaughter. As Respondent pointed out, common law manslaughter was replaced by statute as far back as 1868. (AB. 10) And as far as applying a strict interpretation of §782.07(1), under Florida case law and statute, a strict interpretation in a defendant's favor is *exactly* how this Court should construe the manslaughter statute and its applicable jury instructions. See State v. Hamilton, 660 So. 2d 1038, 1044 (Fla. 1995); §775.021(1), Florida Statutes (2011).

Although Respondent implies that Montgomery might or should not remain "good law" (AB. 22), 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.'

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 v. State, 34 Fla. L. Weekly at D360; *approved*, 39 So. 3d 252 (Fla. 2010).

Respondent argues that:

> 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.

(AB. 31-32) There is no substance to the Respondent's distinction between "intent to kill" and an "act intended to cause … death," as these phrases would be understood by a jury. There is no way jurors would think that the "act" had a mind of its own, able to form its own intents. The jurors would think it is the *defendant* who must have the intent to cause death (that is, to kill), and that the defendant furthers that intent by committing an act directed at its fulfillment.

Montgomery clearly holds:

> [W]e 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.

Montgomery, 39 So. 3d at 258. The same holds true here, where the charged crime was attempted first-degree murder, the defendant was convicted of attempted second-degree murder after the jury was erroneously instructed on the lesser included offense of attempted manslaughter. As held in Montgomery:

> If the jury is not properly instructed on the next lower crime, then it is impossible to determine whether, having been properly instructed, it would have found the defendant guilty of the next lesser offense. . . . Because Montgomery's conviction for second-degree murder was only one step removed from the necessarily lesser included offense of manglaughter . . . fundamental error occurred in his case which was per se reversible where the manslaughter instruction erroneously imposed upon the jury a requirement to find that Montgomery intended to kill Ellis.

39 So. 3d at 259.

The reason the erroneous imposition of an intent to kill element constitutes fundamental error stems from the amorphous distinction between attempted second degree murder and attempted manslaughter by act. The two offenses differ only in the degree of mental culpability of the offender. For second degree murder, the state of mental culpability is described as the commission of an act "imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, . . ." §782.04(2), Fla. Stat. For manslaughter by act, the state of mental culpability is described as the intentional commission of an unlawful act which

resulted in the death of the victim. Hall v. State, 951 So. 2d 91, 96 (Fla. 2d DCA 2007) (en banc); Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009). While the distinction may be somewhat amorphous, it is one which the jury must make. Whenever a jury finds a defendant guilty of second degree murder (or its attempt), the jury could have found the defendant guilty of manslaughter. That is because the distinction between the two offenses turns upon a single factual finding, *i.e.*, the degree of the defendant's mental culpability. Such a factual finding is always subject to the interpretation of reasonable jurors - and reasonable jurors may differ. In order to make this distinction fairly, as required by due process, the jury must be ***completely*** and ***correctly*** instructed on the offense of manslaughter by act or its attempt.

When viewed in this manner, the rationale supporting the finding of fundamental error in the omission of instructions on justifiable and excusable homicide is the same rationale employed by the Montgomery district court in finding fundamental error in the erroneous instruction on the elements of manslaughter by act, *i.e.*, the erroneous inclusion of an "intent to kill" element. As stated in Montgomery:

> [I]f the jury found the defendant did not intend to kill, the erroneous instruction effectively precluded the jury from choosing between two possible verdicts: second degree murder or manslaughter by act. Under the erroneous instruction, the jury was directed to pick the greater of

> these two offenses . . . . Such interference with the jury's deliberative process tainted the underlying fairness of the entire proceeding.

Montgomery v. State, 34 Fla. L. Weekly at D362. In the present case, the instruction on the lesser offense of attempted manslaughter by act erroneously imposed an "intent to kill" element. The erroneous instruction so altered the character of the attempted manslaughter option as to effectively preclude the jury from finding Petitioner guilty of attempted manslaughter by act. Specifically, if the jury found that Williams did not intend to kill the victim, attempted second degree murder was the **only** option available; the attempted manslaughter option was effectively withdrawn from consideration by the erroneous instruction. The erroneous instruction substantially interfered with the jury's fact-finding and deliberative process and amounted to an unwarranted and inexcusable intrusion into the jury room. The jury was forced to convict Petitioner of the higher offense of attempted second degree murder. The error is properly described as "fundamental," so as to permit argument for the first time on appeal.

This Court has carved out a well-defined rule for fundamental error respecting inaccurate instructions on the necessarily lesser included offense of manslaughter. See State v. Lucas, 645 So. 2d 425, 427 (Fla. 1994); Miller v. State, 573 So. 2d 337 (Fla. 1991); Rojas v. State, 552 So. 2d 914 (Fla. 1989). The rule is well justified due to the fact that manslaughter (or its attempt) is a residual offense

defined by reference to what it is not, and because the distinction between manslaughter and second degree murder is amorphous. This Court has ruled:

> [F]ailure to give a complete instruction on manslaughter during the original jury charge is fundamental error which is not subject to harmless error analysis where the defendant has been **convicted** of either manslaughter or a greater offense not more than one step removed, **such as second degree murder**.

State v. Lucas, 645 So. 2d 425 (Fla. 1994) (emphasis added). In Rojas v. State, the defendant was charged with first degree murder and convicted of second degree murder. Rojas, 552 So. 2d 914. This Court held that an error in the manslaughter instruction constituted fundamental error notwithstanding the fact that Rojas had been charged with first degree murder.

Lucas and Rojas also negate Respondent's claim that this case involves the doctrine of the "jury pardon." (AB. 33) There is no reasonable contention that the jury pardoned Petitioner down from attempted first degree murder to attempted second degree murder. The State cannot get into the minds of the jurors in that respect. The verdict must be accepted on its face for the conclusion that the State failed to prove the element of premeditation or intent. Petitioner is not seeking a "pardon" down to the offense of attempted manslaughter by act, and there is no legal basis to support the claim that a verdict of attempted manslaughter (on retrial) would constitute a jury pardon.

Respondent's legal analysis asks the appellate courts to make a finding of fact, *i.e.*, the degree of the defendant's mental culpability, for the first time on appeal. Appellate courts do not make factual findings for the first time on appeal. That is beyond the scope of appellate review. The error is fundamental

Respondent encourages a case-by-case basis to determine fundamental error as to this issue. However, State v. Montgomery, sets out a clear, bright-line test, and the Respondent would impose a fuzzy, hard-to-apply standard which would involve the appellate judges weighing the evidence and substituting themselves for the trial jury. This Court should reject that approach in the interest of a uniform rule that produces similar results in similar cases.

Because the jury in the case below was not properly instructed on attempted manslaughter by act, and it found Williams guilty of attempted second-degree murder, it is impossible to determine whether, having been properly instructed, the jury would have found him guilty of attempted manslaughter. This constitutes fundamental error.

Nothing in this Reply brief, or omitted from it, is intended to concede the arguments made in Petitioner's Initial Brief on the Merits.

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,

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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 _____ day of September, 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