IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES – REPORT NO. 2010-05	CASE NO. SC10-2434

COMMENTS

I. BACKGROUND

In 1994, this Court promulgated the current, standard jury instruction for the crime of attempted manslaughter; of note, this Court entitled the instruction: "Attempted **Voluntary** Manslaughter." See *Standard Jury Instructions in Criminal Cases (93_1)*, 636 So. 2d 502 (Fla. 1994) (Emphasis added).

On June 21, 2010, the First District Court of Appeal, in an attempt to apply this Court's decision in *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010) to the crime of attempted manslaughter, held that the standard jury instruction for "Attempted Voluntary Manslaughter" erroneously includes an intent to kill element. See *Rushing v. State*, Case No. 1D08_3709 (Fla. 1st DCA Jun. 21, 2010); see also *Lamb v. State*, 18 So. 3d 734 (Fla. 1st DCA 2009).

In response to *Rushing* (and other decisions invalidating the current instruction for attempted voluntary manslaughter), the Supreme Court Committee on Standard Jury Instructions in Criminal

Cases proposed the instruction *sub judice*.

II .**SUMMARY**[1]

Current Instruction

Entitled "Attempted Voluntary Manslaughter", the current, standard jury instruction on attempted manslaughter correctly distinguishes between the voluntary and involuntary forms of manslaughter. Additionally, the instruction correctly requires the State, in order to prove the crime of attempted manslaughter, to establish that the defendant acted with an intent to kill. Finally, because the current instruction requires the State to prove an intent to kill, the crime of "Attempted Voluntary Manslaughter" properly serves as the necessarily lesser included offense of attempted first degree premeditated murder.

Proposed Instruction

Still entitled "Attempted Voluntary Manslaughter", the proposed instruction no longer requires the State prove that the defendant possessed an intent to kill. Instead, the proposed instruction only requires the State to prove that the defendant intended to commit

[1]The undersigned acknowledges the length of these Comments as well as the numerous quotations contained herein. However, the undersigned notes that the law of homicide in the State of Florida is complex and often disjointed. Consequently, the undersigned sincerely believes that the proposed instruction requires an extensive and comprehensive response. In an attempt to ease the burden on this Court, these Comments include a "Summary" that, as succinctly as possible, expresses the views contained within the Comments as a whole.

an act “which would have caused death and was not justifiable or excusable attempted homicide.” Despite this substantive change, the Committee declined to re-name the proposed instruction: “Attempted Involuntary Manslaughter.”

Why is the Proposed Instruction Incorrect?

By removing the intent to kill element, the proposed instruction establishes the crime of attempted involuntary manslaughter by act. In doing so, the proposed instruction incorrectly allows the State to prove an attempted homicide without requiring the State to prove that the defendant actually intended to commit that homicide. Finally, because the crime of attempted involuntary manslaughter by act does not require an intent to kill, the proposed instruction leaves the crime of attempted, first degree premeditated murder without a necessarily lesser included offense.

Why Should This Court Reject the Committee’s Proposal?

To ensure that the crime of attempted voluntary manslaughter correctly requires the State to prove that a defendant acted with an intent to kill, and to ensure that the crime of attempted, first degree premeditated murder enjoys a necessarily lesser included offense, this Court should reject the Committee’s proposed instruction and affirm the continued validity of the current instruction.

How Does the Law Support the Current Instruction?

Read in concert, *Section 782.07, Florida Statutes* and the common law support the current instruction, not the proposed instruction. In short, the statute provides the *actus reus* whereas the case law provides the *mens rea*.

Section 782.07 lists three possible varieties of *actus reus* for the completed crime of manslaughter: (1) by act; (2) by procurement[2]; and, (3) by culpable negligence.

Although it provides for particular varieties of *actus* reus, *Section 782.07* remains wholly silent as to *mens rea* required for the commission of any form of completed manslaughter. Consequently, this Court, pursuant to *Section 775.01, Florida Statutes*, must look to the common law to ascertain the requisite mental state.

The common law recognizes two forms of manslaughter: voluntary and involuntary. Each form of manslaughter requires a particular *actus reus* as well as a distinct *mens rea*.

Traditionally encompassing intentional homicides mitigated by heat of passion, sudden combat, or imperfect self-defense, the common law crime of voluntary manslaughter requires an intent to kill; hence, the word "voluntary" connotes an intentional killing.

Traditionally encompassing either (1) the intentional commission of an unlawful act that unintentionally causes death or (2) an

[2]Given the availability of a prosecution for manslaughter by act (whether voluntary or involuntary) under a principal theory, these Comments ignore the crimes of voluntary manslaughter by procurement

unintentional death caused by culpable negligence, the common law crime of involuntary manslaughter includes two, distinct mental states. Also known as "misdemeanor manslaughter" or "unlawful act manslaughter", the common law crime of involuntary manslaughter by act requires an intent to commit an unlawful act. In contrast, the common law crime of involuntary manslaughter by culpable negligence requires a wanton or reckless disregard for the value of human life. With regard to both types of involuntary manslaughter, however, the word "involuntary" connotes an unintentional killing.

Reading the common law in concert with *Section 782.07*, the crime of voluntary manslaughter can have only one possible *actus reus* (by act) and only one possible *mens rea* (an intent to kill). Thus, voluntary manslaughter by act represents the exclusive form of voluntary manslaughter under Florida law.

Reading the common law in concert with *Section 782.07*, the crime of involuntary manslaughter can have two, possible varieties of *actus reus* (by act or by culpable negligence) as well as two possible varieties of *mens rea* (an intent to commit an unlawful act or a reckless disregard for human life). Because the *actus reus* and the *mens rea* must match, two possible combinations for involuntary manslaughter exist: (1) by act with the intent to commit an unlawful act; and, (2) by culpable negligence when characterized by a reckless

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and involuntary manslaughter by procurement.

disregard for human life. Thus, involuntary manslaughter by act represents one of two possible varieties of involuntary manslaughter under Florida law; involuntary manslaughter by culpable negligence represents the other.

Because the phrase only describes half of the crime (i.e. *actus reus*), courts should not use the phrase "manslaughter by act" or "manslaughter by culpable negligence" when referring to any particular form of manslaughter. Rather, courts should use the modifying terms "voluntary" or "involuntary" in order to communicate the accompanying *mens rea*. Thus, Florida Courts should only recognize three possibilities for manslaughter: (1) voluntary manslaughter by act; (2) involuntary manslaughter by act; and, (3) involuntary manslaughter by culpable negligence.

Regardless of whether the State charges a completed or an attempted homicide offense, courts must recognize voluntary manslaughter as a distinct crime in order to: (1) minimize the risk of an over-conviction in a case that involves some form of provocation; and, (2) provide first degree murder with a necessarily lesser included offense. Additionally, when the State charges a defendant with an attempted homicide, court must recognize attempted voluntary manslaughter as the exclusive form of attempted manslaughter; in doing so, courts will correctly require the State to prove that the defendant acted with an intent to kill.

With regard to the risk of an over-conviction, a specific instruction on voluntary manslaughter enables a jury to find a defendant guilty of an intentional killing without forcing the jury to find that the defendant necessarily committed murder. Hence, a voluntary manslaughter option allows a jury to honor its belief that some act or condition mitigated an intentional killing. Importantly, however, if a trial court fails to specifically instruct a jury that manslaughter includes intentional killings, then juries might reject manslaughter as an option in heat of passion, sudden combat, or imperfect self defense cases. In other words, if the State clearly proves that a defendant acted with an intent to kill (e.g. he found his wife in bed with another man), why would a jury find him guilty of an unintentional homicide (i.e. involuntary manslaughter) as a lesser offense? Faced with a choice between murder or involuntary manslaughter, a jury in such a case may decide that, although neither option fits the crime, the former represents a closer fit to what actually happened than the latter does. Consequently, instead of correctly finding a defendant guilty of manslaughter, a jury may "bump up" its verdict to murder – thereby "over-convicting" the defendant. Thus, by refusing to recognize voluntary manslaughter as a distinct offense, this Court runs the risk that juries will reject manslaughter as a possible option in cases wherein a sudden and sufficient provocation should otherwise

mitigate the charged offense from murder down to manslaughter.

With regard to lesser offenses, recognizing the distinction between voluntary and involuntary manslaughter ensures that each form of murder enjoys a necessarily lesser included offense. Under this Court's recent case law, the mental state for the particular form of manslaughter as a lesser offense must match the mental state for the particular form of murder as the greater offense. Because both offenses require an intent to kill, voluntary manslaughter by act serves as the necessarily lesser included offense of first degree premeditated murder. Because both offenses require the intent to commit an unlawful act, involuntary manslaughter by act serves as the necessarily lesser included offense of first degree felony murder. Finally, because both require an unacceptable level of wantonness, involuntary manslaughter by act serves as the necessarily lesser included offense of second degree murder.

With regard to the offense of attempted manslaughter, recognizing the distinction between voluntary and involuntary manslaughter prevents a jury from finding a defendant guilty of trying to kill someone when the evidence clearly shows that the defendant never wanted to kill anyone.

Without question, the crime of involuntary manslaughter by culpable negligence does not exist under Florida law. However, courts in Florida still grapple with the question of whether or not

Florida law (1) limits attempted manslaughter to voluntary manslaughter by act scenarios (which requires an intent to kill); or, (2) applies with equal force to involuntary manslaughter by act scenarios (which only require the intent to commit an unlawful act which unintentionally causes death).

Over a century ago, this Court concluded that, because all assaults with the intent to commit a homicide necessarily require an intent to kill, and because voluntary manslaughter remains the only form of manslaughter that requires an intent to kill, the crime of assault with the intent to commit manslaughter can only occur in situations wherein the defendant would have been guilty of voluntary manslaughter had the victim died.

Thirty years ago, this Court considered the question of whether or not the crime of attempted manslaughter exists. In order to answer the question and prove the existence of the crime of attempted manslaughter, this Court looked to the crime of assault with the intent to commit manslaughter.

An inchoate crime, attempted manslaughter can only occur if a defendant possesses an intent to complete the underlying offense. Thus, as with the crime of assault with the intent to commit manslaughter, only the voluntary form of manslaughter by act, which requires an intent to kill, can support an attempted manslaughter instruction.

III. MANSLAUGHTER

Murder of Manslaughter?

With regard to traditional homicides, the State of Florida only recognizes two categories of unlawful killings: murder and manslaughter. To constitute a traditional homicide, the killing must qualify as one or the other. See *Rivers v. State*, 78 So. 343, 344 (Fla. 1918) ("Unlawful homicides in this state are either murder or manslaughter.").

Manslaughter

Section 782.07, Florida Statutes negatively defines the crime of manslaughter as any killing that fails to qualify as either a murder or an excusable or justifiable homicide. See *Section 782.07*:

> *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*... (Emphases added)

See also *Rivers* at 344 ("Manslaughter is the killing of a human being by the act, procurement, or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder."); see also *Cook v. State*, 35 So. 665, 676-77 (Fla. 1903):

> It defines murder in the first, second, and third degrees in positive terms, and then, in section 2384, in negative terms, defines manslaughter as 'the killing of a human being by the act, procurement or culpable negligence of another in cases where such killing shall not be justifiable or excusable homicide, nor murder according to the provisions of this article.'

Section 782.07 expressly refers to Chapter 776 for a definition of "lawful justification" and to the other provisions of Chapter 782 for a definition of "murder" and "excusable homicide." Despite the reference to Chapter 776 for a definition of "lawful justification", the current jury instruction on manslaughter refers to the definition of "Justifiable use of deadly force" contained in *Section 782.02*. See *In re AMENDMENTS TO STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES_INSTRUCTION 7.7*, Case No. SC10_113 (Fla. Apr. 8, 2010):

> The killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant, or to commit a felony in any dwelling house in which the defendant was at the time of the killing. §782.02, Fla. Stat.

Thus, as part of Chapter 782, *Sections 782.02* and *782.03* define justifiable and excusable homicides, respectively; additionally, *Section 782.04* defines murder.

Defined by what it is not, the crime of manslaughter constitutes a residual or "catch-all" offense that encompasses killings "not bad enough to be murder" but too reprehensible to constitute no crime whatsoever. See *Stockton v. State*, 544 So. 2d 1006, 1007-08 (Fla. 1989):

> Manslaughter is defined in section 782.07, Florida Statutes (1983), as a killing by the act, procurement, or culpable negligence of another which is not justifiable or excusable homicide or murder. Manslaughter is a residual offense, defined by reference to what it is not.

See also *State v. Montgomery*, 39 So. 3d 252, 258 (Fla. 2010) (hereinafter, "*Montgomery II*"), citing *Rojas v. State*, 552 So. 2d 914, 915 (Fla. 1989) ("Characterized by what it is not, manslaughter is considered a residual offense."); see also LaFave, *Substantive Criminal Law §15.1* (2d. 2d 2003):

> It is more helpful to recognize at the outset that manslaughter is an intermediate crime which lies half_way between the more serious crime of murder, at the one extreme, and, at the other extreme, justifiable or excusable homicide, which is not criminal at all. Thus manslaughter constitutes a sort of catch_all category which includes homicides which are not bad enough to be murder but which are too bad to be no crime whatever.

In order for the jury to understand what constitutes manslaughter, the jury must understand both what qualifies as murder and what qualifies as an excusable or justifiable homicide. See *Lawson v. State*, 383 So. 2d 1114, 1114-15 (Fla. 3d DCA 1980) ("[A] complete explication of manslaughter requires definition of the acts statutorily excluded therefrom."); see also *Halfrich v. State*, 165 So. 285, 288 (Fla. 1936):

> [W]hen defining manslaughter, it is always proper for the court to instruct the jury what constitutes justifiable and excusable homicide under our statutes, so that the jury may be advised as to what is meant by the language 'justifiable homicide' as used in the definition of manslaughter.

See also *Stockton* at 1008 ("In order to define manslaughter completely, the definitions of justifiable and excusable homicide and murder must be included."). However, the trial court need not provide the jury with a definition of murder higher than the charged

offense. See *Hedges v. State*, 172 So. 2d 824, 826 (Fla. 1965):

> One notes immediately that it is in the nature of a residual offense. If a homicide is either justifiable or excusable it cannot be manslaughter. Consequently, in any given situation, if an act results in a homicide that is either justifiable or excusable as defined by statute, a not guilty verdict necessarily ensues. The result is that in order to supply a complete definition of manslaughter as a degree of unlawful homicide it is necessary to include also a definition of the exclusions. *A definition of the higher degrees of homicide_as one of the manslaughter exclusions_would be necessary only if a higher degree is charged, as was the case here*. (Emphasis added)

Hence, if the State only charges a defendant with manslaughter, then the trial court need not instruct the jury on any form of murder when it instructs the jury on the charged offense of manslaughter. Similarly, if the State only charges second degree murder, then the trial court need not instruct the jury on either form of first degree murder when it defines the crime of manslaughter.

Voluntary and Involuntary Manslaughter by Act

In addition to defining manslaughter as neither murder nor excusable or justifiable homicide, *Section 782.07 Florida Statutes* lists three different ways that an individual can commit the offense: (1) by act; (2) by procurement; and, (3) by culpable negligence. Thus, the manslaughter statute establishes three, separate methods of *actus reus*.

Recently, this Court addressed a certified question that asked whether or not the particular crime of manslaughter by act requires

an intent to kill. See *Montgomery II* at 254 ("IS THE STATE REQUIRED TO PROVE THAT THE DEFENDANT INTENDED TO KILL THE VICTIM IN ORDER TO ESTABLISH THE CRIME OF MANSLAUGHTER BY ACT?"). To answer the question, this Court needed to analyze the *mens rea* for manslaughter. Ignoring the common law distinction between voluntary and involuntary manslaughter, this Court looked to the language of the statute itself and determined that the crime of manslaughter by act does not contain an intent to kill element. See *Montgomery II* at 256:

> While section 782.07(1) establishes three *forms* of manslaughter (by act, by procurement, or by culpable negligence), our present focus is on the crime of manslaughter by act. We observe that the statute does not impose a requirement that the defendant intend to kill the victim. Instead, it plainly provides that where one commits an act that results in death, and such an act is not lawfully justified or excusable, it is manslaughter. (Emphasis added)

In an apparent attempt to strictly interpret *Section 782.07*, this Court looked to the three different ways that an individual can commit the offense of manslaughter. See *Montgomery II* at 256 ("While section 782.07(1) establishes three forms of manslaughter (by act, by procurement, or by culpable negligence)..."). However, instead of correctly viewing the words "by act, by procurement, or by culpable negligence" as the three different varieties of *actus reus*, this Court erroneously viewed those words as establishing three separate "*forms*" of manslaughter. *Ibid*. Next, this Court relied upon the

actus reus language contained within the statute to erroneously conclude that the *mens rea* for manslaughter by act does not include any intent to kill. *Ibid*. As a result, *Montgomery II* suffers from two, serious errors: (1) it incorrectly suggests that the words "by act, by procurement, or by culpable negligence" establish three separate "*forms*" of manslaughter when those words only establish the three possible varieties of *actus reus*; and, (2) it incorrectly suggests that the *actus reus* language of the statute can reveal the *mens rea* for manslaughter.

Unrecognized by *Montgomery II*, *Section 782.07* remains wholly silent as to the mental state required for the commission of any form of manslaughter[3]. Consequently, a court cannot adduce the *mens rea* simply by examining the words of the statute. Put simply, a court can't interpret what isn't there. Because the manslaughter statute remains silent as to *mens rea*, courts ***must*** look to the common law in order to ascertain the requisite mental state. See *Section 775.001, Florida Statutes* ("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."). Importantly,

[3]Worth noting, the statute does not define the term "culpable negligence." Nonetheless, the current manslaughter instruction does contain a definition. See *In re Amendments to Standard Jury Instructions in Criminal Cases _ Instruction 7.7*, 41 So. 3d 853 (Fla. 2010).

Section 775.01 applies regardless of whether or not the Florida Criminal Code suffers from complete or partial silence on a particular subject. See e.g. *Febre v. State*, 30 So. 2d 367, 369 (Fla. 1947), quoting *Collins v. State*, 102 So. 880, 882 (Fla. 1925):

> There is no statutory ground of provocation or adequate cause which is applicable to the facts in this case. Therefore the common law obtains and prescribes the rule by which human conduct in such matters is controlled. The law reduces the killing of a person in the heat of passion from murder to manslaughter out of a recognition of the frailty of human nature...

Under the common law, the crime of manslaughter enjoys two ***forms***: voluntary and involuntary. Traditionally encompassing intentional homicides mitigated by heat of passion, sudden combat, or imperfect self-defense, the common law crime of voluntary manslaughter requires an intent to kill; traditionally encompassing either (1) the intentional commission of an unlawful act that unintentionally cause death (e.g. a single punch fist fight) or (2) unintentional deaths caused by culpable negligence, the common law crime of involuntary manslaughter includes two, distinct mental states. See *Fortner v. State*, 161 So. 94, 96 (Fla. 1935) (Brown, J., concurring):

> At common law manslaughter consisted in the unlawful killing of another without malice either express or implied. It was commonly divided into voluntary and involuntary manslaughter. Voluntary manslaughter was the intentional killing of another in a sudden heat of passion due to adequate provocation, and not with malice. Involuntary manslaughter consisted in the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally

> tending to cause death or great bodily harm, or in negligently doing some act lawful in itself...
>
> Our general statute on the subject of manslaughter, section 7141, C. G. L., appears to cover, in substance, both voluntary and involuntary manslaughter as they existed at common law, and reads as follows: 'The killing of a human being by the act, procurement or culpable negligence of another..."

Thus, the common law crime of manslaughter enjoys two forms: voluntary and involuntary; each form requires a different *actus reus* and a distinct *mens rea*.

Reading the common law in concert with *Section 782.07*, the crime of voluntary manslaughter can have only one possible *actus reus* (by act) and only one possible *mens rea* (an intent to kill). Thus, voluntary manslaughter by act represents the exclusive form of voluntary manslaughter under Florida law.

Reading the common law in concert with *Section 782.07*, involuntary manslaughter can have two possible varieties of *actus reus* (by act or by culpable negligence) as well as two possible varieties of *mens rea* (an intent to commit an unlawful act or culpable negligence). Because the *actus reus* and the *mens rea* must match, two possible combinations for involuntary manslaughter exist: (1) by act with the intent to commit an unlawful act; and, (2) by culpable negligence when characterized by a reckless disregard for human life. Thus, involuntary manslaughter by act represents one of two possible varieties of involuntary manslaughter under Florida law; involuntary

manslaughter by culpable negligence represents the other.

The following tables illustrate the *actus reus* and *mens rea* possibilities for the two forms of manslaughter:**Table 1 (*Actus Reus*)**

	By act?	By culpable negligence?
Voluntary manslaughter	Yes.	No.
Involuntary manslaughter	Yes.	Yes.

Table 2 (*Mens Rea*)

	Intent to kill?	Intent to commit an unlawful act?	Culpable negligence?
Voluntary manslaughter	Yes.	No.	No.
Involuntary manslaughter	No.	Yes.	Yes.

Any suggestion that *Section 782.07* eliminates the two common law forms of manslaughter (voluntary and involuntary) would require a reviewing court to erroneously conclude that, at the time of the statute's passing in 1892, the Florida Legislature expressly desired such a result. See *State v. Anderson*, 764 So. 2d 848, 849 (Fla. 3d DCA 2000):

> The cardinal rule of statutory construction is that a statute should be construed to give effect to the intention the legislature expressed in the statute. See *City of Tampa v. Thatcher Glass Corp.*, 445 So. 2d 578, 579 (Fla. 1984). For a court to hold otherwise would make the obvious mandate of the

> legislature subservient to the discretion of the court. See *Ellis v. State*, 622 So. 2d 991, 1001 (Fla. 1993). To discern legislative intent, courts must consider the statute as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence on the statute. See *McKibben v. Mallory*, 293 So. 2d 48, 52 (Fla. 1974); *Hinn v. Beary*, 701 So. 2d 579, 581 (Fla. 5th DCA 1997).

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

> Although the common_law crime of manslaughter was codified by statute in 1868, its definition as the "killing of a human being, by the act, procurement, or culpable negligence of another," which is neither excusable or justifiable, nor otherwise condemned as murder, has remained unchanged since 1892. Since that time, the quoted statutory language has been construed as embracing both voluntary and involuntary manslaughter, a construction which first led the courts to the perfectly logical conclusion that there is such an offense as assault with intent to commit manslaughter.

See also *Ibid*, n.8:

> In 1868, the Florida Legislature codified the law of homicide. Ch. 1637, Laws of Fla. (1868). The statute laid out a general definition of manslaughter, which is almost identical to Section 782.07.
>
> > "Sec. 3. The killing of one human being, by the act, procurement, or omission of another, in cases where such killing shall not be murder, according to the provisions of this chapter, is either justifiable or excusable homicide or manslaughter."
>
> The chapter continued with various sections listing certain acts, some common law manslaughter killings, others not, and assigning to them degrees of manslaughter. Voluntary heat of passion killing was listed as third_degree manslaughter. Involuntary heat of passion killing, committed under circumstances not constituting excusable homicide, was listed as fourth_degree manslaughter. In 1892, the Legislature revised the homicide statute. Title 2, Ch. 2, Fla.Rev.Stat. (1892). Manslaughter was defined exactly as it is today in Section 782.07 (§ 2384, Fla.Rev.Stat. (1892)). Degrees of manslaughter were eliminated. Certain killings (assisting

> self_murder, killing of an unborn child, abortion, unnecessary killing to prevent an unlawful act, killing by mischievous animal, drowning in an overloaded vessel, death from racing a steamboat, and killing by an intoxicated physician), all of which had appeared in the 1868 statute, were specifically listed as manslaughter. Other classic common_law manslaughters (misdemeanor manslaughter, heat of passion killings, involuntary killing of a trespasser, and killing through negligence) were no longer specifically listed but became subsumed within the general definition. The present manslaughter statute continues this structure. Classic manslaughters are contained within the general definition, and certain specific killings are separately defined as manslaughter. See §§782.08, 782.09, 782.11, Fla.Stat. (1981); §316.1931(2), Fla.Stat. (Supp. 1982).

The coeval case law of this Court, however, belies any such conclusion. See e.g. *Williams*, 26 So. at 186:

> Aside from special cases which are declared to be manslaughter by the Revised Statutes, general definitions of the offense are found in sections 2384_2388, which declare that 'the killing of a human being by the act, procurement, or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this article shall be deemed manslaughter,'... It will readily be perceived by an analysis of the language of these statutes that there is nothing in the definition of manslaughter to exclude from its provisions all intentional homicides, or to include within the definition of murder all intentional killings, unless the intention is so deliberate as to amount to a premeditated design. The ordinary case of a sudden combat, where the passions are aroused by sufficient provocation, will furnish a pertinent illustration. Here there may be an intent to take life, accompanied by an assault with a deadly weapon to carry out that intent. If the intent does not rise to the degree of a premeditated design, the killing will not be murder, but manslaughter. If the act does not result in death, why will not the party be guilty of an assault with intent to commit a felony, to wit, manslaughter? ...[T]here is nothing in our statute which implies that the intent to take life must be deliberate or premeditated [for the crime of manslaughter]...

See also *Olds v. State*, 33 So. 296, 299-300 (Fla. 1902):

> Voluntary manslaughter at common law was an intentional killing in the heat of sudden passion, caused by sufficient provocation. In deference to the infirmity of human nature, the law proceeded, in reference to this offense, upon the theory that a man might be provoked to such an extent that in a sudden heat of passion he might take life before he had time to control himself, and that in such a case he should not be punished the same as if he had committed a deliberate homicide. The distinguishing feature at the common law between murder and manslaughter was that in the one case malice exists, and in the other it is absent... An intentional killing, therefore, may not be murder when done in the heat of passion or anger, and following a sufficient provocation so close in time as to raise the presumption that it was the result of sudden impulse, and without premeditation or when committed under such circumstances as to show that the mind was not fully conscious of its own intention.

Nearly forty years after the Court decided *Williams*, Justice Brown, in a concurring opinion, clearly expressed his belief that the crime of voluntary manslaughter requires an intent to kill whereas the crime of involuntary manslaughter (whether by act or by culpable negligence) does not. See *Fortner* at 96 (Brown, J., concurring), quoting 30 C.J. 27-28:

> The question thus raised is complicated and made difficult by reason of the fact that under 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. In this class of cases, I do not see how any one could be convicted of the crime of assault with intent to commit manslaughter, because the element of intent need not be present at all in the crime itself. On the other hand, there is a class of cases where the intent to kill *is* an element of the crime of manslaughter. The crime of assault with intent to commit manslaughter has reference to manslaughter of this latter type, and may be sustained by evidence showing an unlawful assault with the intent to kill, though without premeditated design... (Emphasis in original)

> In 30 C. J., on pages 27, 28, it is said: 'To constitute the minor statutory offense of assault with intent to kill or to commit manslaughter the assault must have been made under circumstances which would have made the act manslaughter, or murder in the second degree, if death had ensued. An assault with intent to kill lacks the element of malice necessary to constitute assault with intent to murder, or, as it is said, the offense may be committed without malice. *The gist of the offense is the intent to kill*. It is sufficient that the crime would have been *voluntary* manslaughter had death ensued from the assault, but if the crime would have been involuntary manslaughter had death ensued it is insufficient. To constitute the offense of assault with intent to commit manslaughter, the homicide, if accomplished, must have amounted to voluntary manslaughter. Some statutes require that in addition to the intent to commit manslaughter upon the person of the party assailed, the assault must be made with a deadly weapon.' (Emphases in original)

Unrecognized by *Montgomery II*, this Court's late nineteenth and early twentieth century case law supports the conclusion that the Florida Legislature did not intend to eliminate the two common law forms of manslaughter (voluntary and involuntary) when it enacted *Section 782.07*. In *Fortner*, Justice Brown specifically italicized the entire sentence "*The gist of the offense is the intent to kill*" as well as the adjective "*voluntary*", which preceded the term "manslaughter." *Fortner* at 96. This italicized language clearly shows that at least one member of this Court acknowledged the two common law forms of manslaughter (voluntary and involuntary) as far back as forty years after the Legislature passed the manslaughter statute. Additionally, to support the proposition that "To constitute the offense of assault with intent to commit manslaughter,

the homicide, if accomplished, must have amounted to voluntary manslaughter", the selection from *Corpus Juris* quoted by Justice Brown cites to the Florida Supreme Court's decision in *Williams v. State*, 26 So. 184 (Fla. 1899). See 30 *C.J.* 27-28, quoted in *Fortner* at 96. Consequently, *Williams* suggests that this Court recognized the two common law forms of manslaughter (voluntary and involuntary) as far back as seven years after the Legislature passed the manslaughter statute. Finally, this Court, in *Olds*, provided a clearly defined the common law crime of voluntary manslaughter as "an intentional killing in the heat of sudden passion, caused by sufficient provocation." *Olds* at 299.

In addition to *Williams*, *Olds*, and *Fortner*, this Court's late twentieth and early twenty-first century case law (with the exception of *Montgomery II*) further refutes any suggestion that the Legislature intended to eliminate the common law distinction between voluntary and involuntary manslaughter. To begin with, this Court, in 1983, expressly stated that it recognizes the common law distinction "between voluntary and involuntary manslaughter." See *Taylor v. State*, 444 So. 2d 931, 934 (Fla. 1983) ("Thus this Court recognized the distinction found in common law between voluntary and involuntary manslaughter."). Furthermore, as recently as 2003, this Court expressly stated that *Section 782.07* incorporates the common law forms of manslaughter. See *Bautista v. State*, 863 So. 2d 1180, 1186

n.6 (Fla. 2003):

> In 1892, the Legislature revised and consolidated the homicide statute. Degrees of manslaughter were eliminated, and certain common_law manslaughters (misdemeanor manslaughter, heat of passion killings, involuntary killing of a trespasser, and killing through negligence) were no longer specifically listed in the statute but became subsumed within the general definition of manslaughter. The general definition was amended to read: "The killing of a human being by the act, procurement, or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide or murder ... shall be deemed manslaughter...." §2384, Fla.Rev.Stat. (1892).

Thus, from *Williams* (1899) to *Bautista* (2003), this Court issued a number of opinions that clearly refute any suggestion that, in 1892, the Legislature intended to eliminate the distinction between voluntary and involuntary manslaughter.

Same Degree of Offense?

The fact that voluntary and involuntary manslaughter constitute the same degree of offense under Florida law remains wholly irrelevant to the question of whether or not courts should draw any distinction between those two forms of manslaughter. See LaFave, *Substantive Criminal Law §15.1* (2d ed. 2003) ("Although the common law drew a distinction between voluntary manslaughter and involuntary manslaughter on the basis of the different types of conduct involved, it did not do so for any purpose of providing different punishments."). Rather than representing separate crimes, voluntary and involuntary manslaughter simply represent

separate ways to commit the same offense. See LaFave, *Substantive Criminal Law §15.4*, n.2:

> In some states today voluntary and involuntary manslaughter receive the same punishment. In these states it might perhaps be considered that voluntary and involuntary manslaughter constitute two methods of committing a single crime, rather than two separate crimes.

What is Voluntary Manslaughter by Act?

The offense of voluntary manslaughter by act criminalizes the intentional killing of another, brought about by some form of sudden and sufficient provocation, when the killer lacks the premeditation required for first degree premeditated murder or the depravity required for second degree murder. Examples of voluntary manslaughter include intentional killings characterized by: (1) heat of passion; (2) mutual combat; and, (3) imperfect self-defense. See generally *Rodriguez*, 443 So. 2d at 289:

> Among the intentional killings recognized at common law as voluntary manslaughter were those committed (1) in the heat of passion, *Forehand v. State*, 126 Fla. 464, 470, 171 So. 241, 243 (1936) (a heat of passion killing is one arising from adequate provocation, that is, provocation "calculated to excite such anger as might obscure the reason or dominate the volition of an ordinary reasonable man"); *Disney v. State*, 72 Fla. 492, 502, 73 So. 598, 601 (1916) (when the mind operates in the heat of passion, "pre_meditation is supposed to be impossible, and depravity which characterizes murder in the second degree absent"); *Olds v. State*, 44 Fla. 452, 461, 33 So. 296, 299 (1902) ("A killing in sudden passion, excited by sufficient provocation, is manslaughter, not because the law supposes that this passion made ... (the slayer) unconscious of what he was about to do, and stripped the act of an intent to commit it, but because it presumes that passion disturbed the sway of reason, and made him regardless of her admonitions"); see *Collins v. State*, 88 Fla. 578, 102 So. 880 (1925); *Pridgeon v.*

> *State*, 425 So. 2d 8 (Fla. 1st DCA), rev. denied, 421 So. 2d 68 (1982); (2) in mutual combat, *Eiland v. State*, 112 So. 2d 415, 419 (Fla. 2d DCA 1959) ("[M]utual combat is predicated upon the proposition that both parties involved are at fault, neither being the aggressor more than the other, and if in such combat one slays the other, such killing is manslaughter."); see *Disney v. State*, 73 So. 598; *Holland v. State*, 12 Fla. 117 (1867_68); (3) by the use of excessive force to defend oneself, *Roberts v. State*, 425 So. 2d 70 (Fla. 2d DCA 1982), rev. denied, 434 So. 2d 888 (Fla. 1983); *Pierce v. State*, 376 So. 2d 417 (Fla. 3d DCA 1979), cert. denied, 386 So. 2d 640 (Fla. 1980); see *Martinez v. State*, 360 So. 2d 108 (Fla. 3d DCA 1978), cert. denied, 367 So. 2d 1125 (Fla. 1979); (4) by the use of excessive force to resist an unlawful arrest, *Alday v. State*, 57 So. 2d 333 (Fla. 1952); *Roberson v. State*, 43 Fla. 156, 29 So. 535 (1901); and (5) with neither premeditation nor depravity, *Cook v. State*, 46 Fla. 20, 35 So. 665 (1903); accord, *Lindsey v. State*, 53 Fla. 56, 43 So. 87 (1907) (same rule in case of assault with intent to commit second_degree murder or manslaughter); see also *Manuel v. State*, 344 So. 2d 1317 (Fla. 2d DCA 1977), cert. dismissed, 355 So. 2d 515 (Fla. 1978).

Provided the killing does not qualify as an excusable homicide, a "heat of passion" homicide provides an easily recognizable example of an intentional killing mitigated by sudden and sufficient provocation. See *Pearce v. State*, 18 So. 2d 754, 755 (Fla. 1944), citing *Wharton's Criminal Law*, 12d, Sec. 595 ("The law is that whoever kills in hot blood and heat of passion, a trespasser, shall be guilty of manslaughter."); see also *Febre v. State*, 30 So. 2d 367, 369 (Fla. 1947), quoting *Collins v. State*, 102 So. 880, 882 (Fla. 1925):

> There is no statutory ground of provocation or adequate cause which is applicable to the facts in this case. Therefore the common law obtains and prescribes the rule by which human conduct in such matters is controlled. The law reduces the killing of a person in the heat of passion from murder to manslaughter out of a recognition of the frailty of human nature, of the temporary suspension or overthrow of the reason or judgment of the defendant by the sudden access of passion

> and because in such case there is an absence of malice. Such killing is not supposed to proceed from a bad or corrupt heart, but rather from the infirmity of passion to which even good men are subject. Passion is the state of mind when it is powerfully acted on and influenced by something external to itself. It is one of the emotions of the mind known as anger, rage, sudden resentment, or terror. But for passion to constitute a mitigation of the crime from murder to manslaughter, it must arise from legal provocation.

But see *Rodriguez*, 443 So. 2d 289, n.5 ("If an *accidental* death occurs 'in the heat of passion,' the killing in most circumstances is excusable homicide. *§782.03, Fla.Stat*. (1981)."") (Emphasis in original).

Although he possesses an intent to kill, an individual acting in a "heat of passion" brought about by sufficient provocation can enjoy neither the premeditation required for first degree murder nor the depravity required for second degree murder. See *Disney v. State*, 73 So. 598, 601 (Fla. 1916):

> A killing in the 'heat of passion' occurs when the state of mind of the slayer is necessarily different from that when the killing is done in self_defense. In the heat of passion the slayer is oblivious to his real or apparent situation. Whether he believes or does not believe that he is in danger is immaterial; it has no bearing upon the question. He is intoxicated by his passion, is impelled by a blind and unreasoning fury to redress his real or imagined injury, and while in that condition of frenzy and distraction fires the fatal shot. In that condition of mind, premeditation is supposed to be impossible, and depravity which characterizes murder in the second degree absent.

Importantly, a defendant can introduce "heat of passion" evidence regardless of whether or not the State charges first or second degree

murder. See *Villella v. State*, 833 So. 2d 192, 195 (Fla. 5th DCA 2002):

> The defense of "heat of passion" is well established in Florida. It can be a complete defense if the killing occurs by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation. See §782.03, Fla. Stat. (2002); see also Fla. Std. Jury Instr. (Crim.) On Excusable Homicide. Or, as in the instant case, it can be used as a partial defense, to negate the element of premeditation in first degree murder or the element of depravity in second degree murder.

For first degree murder alone, see *Whidden* at 561:

> A sudden transport of passion, caused by adequate provocation, if it suspends the exercise of judgment, and dominates volition, so as to exclude premeditation and a previously formed design, may not excuse or justify a homicide, but it may be sufficient to reduce a homicide below murder in the first degree, although the passion does not entirely dethrone the actor's reason.

For second degree murder, see *Douglas v. State*, 652 So. 2d 887, 890-91 (Fla. 4th DCA 1995):

> [I]t seems to us that allowing crime of passion evidence only where the charge is first degree murder would be illogical. If that were the rule, the defendant charged with second degree murder would be at a disadvantage compared to a defendant who has been charged with first degree murder. The defendant charged with the more serious crime, first degree murder, could have crime of passion evidence admitted, and a better chance for a manslaughter conviction, than the defendant charged with second degree murder. Yet, as this case demonstrates, facts which may be first degree murder to one grand jury may be second degree murder to another. We thus conclude that crime of passion evidence is admissible where the charge is second degree murder.

See also *Palmore v. State*, 838 So. 2d 1222, 1224 (Fla. 1st DCA 2003):

> At trial, Appellant's sole theory of defense was that, although he committed the act which resulted in Jones' death, it constituted heat of passion manslaughter, not second degree murder. Heat of passion negating the depraved mind element of

> second degree murder is a valid defense in Florida. See *Paz v. State*, 777 So. 2d 983 (Fla. 3d DCA 2000). Appellant both requested and proffered a special jury instruction defining heat of passion in relation to second degree murder. Although not constituting excusable homicide, heat of passion under this theory of defense would reduce second degree murder to manslaughter if accepted by the jury. The State objected, arguing the applicable law regarding the defense was explained in the standard jury instructions. The trial court sustained the State's objection, and in so doing, erred.

See also *Paz v. State*, 777 So. 2d 983, 984 (Fla. 3d DCA 2000):

> In order for the defense of heat of passion to be available there must be "adequate provocation ... as might obscure the reason or dominate the volition of an ordinary reasonable man." *Rivers v. State*, 75 Fla. 401, 78 So. 343, 345 (1918). See also LaFave & Scott, *Substantive Criminal Law, §7.10* (2d ed. 1986 & Supp.) (examples of reasonable provocation for a crime of passion). Here, the undisputed record evidence reveals a classic case of manslaughter based on adequate legal provocation: Paz killed Winton immediately upon realizing that the victim had sexually assaulted his wife. After Winton went upstairs, Paz followed shortly thereafter and found his wife in a state of undress, crying, and then heard his wife yell at the victim, "Why did you do that to me?" 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." *Febre*, 30 So. 2d at 369; see *Ramsey v. State*, 114 Fla. 766, 154 So. 855 (Fla. 1934); *Martinez v. State*, 360 So. 2d 108 (Fla. 3d DCA 1978), cert. denied, 367 So. 2d 1125 (Fla.1979). Cf. *Douglas v. State*, 652 So. 2d 887 (Fla. 4th DCA) (marital squabbles occurring on day of killing do not constitute reasonable provocation for the crime of passion defense), review denied, 661 So. 2d 823 (Fla. 1995). Instead, the evidence shows a killing in the heat of passion that occurred when defendant acted in a condition of mind where "depravity which characterizes murder in the second degree [is] absent." *Disney v. State*, 72 Fla. 492, 73 So. 598, 601 (1916). Therefore, the court should have reduced the charge to manslaughter. Accordingly, we reverse the second degree murder conviction, and remand the cause for entry of a judgment of conviction for manslaughter.

Provided the killing does not qualify as an excusable homicide, sudden combat provides another example of an intentional killing mitigated by sudden and sufficient provocation (i.e. voluntary manslaughter). See *Holland v. State*, 12 Fla. 117 (Fla. 1867), citing *Roscoe's Cr. Ev.*, 638 ("Where death ensues from a sudden transport of passion or heat of blood, if upon reasonable provocation and without malice, or upon a sudden combat, it will be manslaughter."); see also *Eiland v. State*, 112 So. 2d 415, 419 (2d DCA 1959):

> Under appellant's contention that this was a situation of mutual combat, we may here point out that mutual combat is predicated upon the proposition that both parties involved are at fault, neither being the aggressor more than the other, and if in such combat one slays the other, such killing is manslaughter.

But see *Rodriguez*, 443 So. 2d at 289, n.6:

> If an *accidental* death occurs "upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner," the killing is excusable homicide. *§782.03, Fla.Stat*. (1981). See *Tipton v. State*, 97 So. 2d 277 (Fla. 1957); *Aiken v. State*, 425 So. 2d 641 (Fla. 3d DCA 1983). (Emphasis in original)

Although insufficient to qualify as a justifiable homicide, an imperfect self-defense killing provides a final example of an intentional killing mitigated by sudden and sufficient provocation (i.e. voluntary manslaughter. See *Popps v. State*, 162 So. 701 (Fla. 1935) (A plainly unnecessary killing, even in self_defense, may be deemed manslaughter where a plea of justifiable homicide under statute is interposed as justification, but such defense is not

sufficiently supported to constitute an absolute bar to conviction); see also *Martinez v. State*, 360 So. 2d 108, 109 (Fla. 3d DCA 1978):

> Our review of the record reveals that the state failed to establish that the defendant killed the deceased with a depraved mind regardless of human life, an essential element of the crime of second degree murder...
>
> Nevertheless, we agree with the state that there was sufficient, although conflicting evidence adduced at trial upon which a jury could have reasonably rejected the defendant's claim of self_defense and concluded that the defendant used excessive force to defend himself or his daughter. The defendant killed the deceased with a firearm while the deceased was unarmed under circumstances which, under one reasonable view of the evidence, did not warrant the infliction of deadly force. As such, a classic case of manslaughter based on adequate legal provocation was therefore presented. The trial court should have accordingly reduced the charge from second degree murder to manslaughter upon the defendant's motion for judgment of acquittal made at the close of all the evidence in the case.

See also *Pearce v. State*, 18 So. 2d 754 (1944) (Evidence authorized rejection of defense of self_defense, but showed manslaughter rather than second_degree murder); see also *Roberts v. State*, 425 So. 2d 70, 71 (Fla. 2d DCA 1982):

> Roberts argues that the act which resulted in Robinson's death was not a product of a depraved mind, but rather occurred because he overreacted and used excessive force in the face of the decedent's threatening actions, and thus he was guilty of no more than manslaughter. The crime of manslaughter encompasses those situations in which the defendant uses excessive force to defend himself.

Because he acts under the honest but unreasonable belief that a particular threat demands a deadly response, or because he acts as the initial aggressor, an individual who acts under a theory of

imperfect self defense possesses an intent to kill but lacks the premeditation required for first degree murder or the depravity required for second degree murder. See LaFave, *Substantive Criminal Law §15.3(a)* (2d. ed. 2003):

> What if a defendant who did not initiate the difficulty honestly but unreasonably believes either that he is in danger of the injury or that killing is the only way to prevent it; or, even though he reasonably believes these things, he was at fault in bringing about the difficulty? He cannot have the defense of self_defense, for that requires both freedom from fault in the inception of the difficulty and the entertainment of beliefs which are reasonable. But is murder the only alternative? Or should the matter fall into the category of manslaughter, consisting of those homicides which lie in between murder and no crime. Some cases so hold, whether the reason for the "imperfection" of the defense is the defendant's own fault in bringing on the difficulty or the unreasonableness of the honest but erroneous beliefs which he entertains. On principle, the same rule should apply to a killing done in the case of a homicide under an "imperfect" right to defend others, as applies in the case of the homicide under an "imperfect" right of self_defense. The manslaughter provisions of some of the modern comprehensive criminal codes recognize the existence of this imperfect-right-of-self-defense or defense-of-others type of voluntary manslaughter.

See also *Pierce v. State*, 376 So. 2d 417, 418 (Fla. 3d DCA 1979):

> Under these circumstances, the jury could properly have found that since Bemben was not in fact armed, Pierce had overreacted, had used excessive force and thus was guilty of manslaughter. There was no basis, however, for a finding that in shooting Bemben the defendant acted with a depraved mind regardless of human life, an indispensable element of the crime of second degree murder. *Ramsey v. State*, 114 Fla. 766, 154 So. 855 (1934). To the contrary, the evidence is undisputed that the homicide occurred only at the culmination of a fight which was started by the victim without justification and in which Pierce was only a reluctant participant. The reduction of the second degree murder conviction to one for manslaughter is mandated by the indistinguishable case of *Martinez v. State*, 360 So. 2d 108, 109 (Fla.3d DCA 1978), cert. denied, 367 So. 2d 1125 (Fla.

> 1979)...

See also *Ross v. McNeil*, 2010 WL 2179039, n.7 (N.D. Fla. 2010):

> The evidence suggesting that Petitioner was the aggressor and that he put Mr. Pacheco in the lake distinguishes the instant case from those cases where Florida courts have reversed second degree murder convictions because the evidence showed only an impulsive overreaction by the defendant to an attack by the victim.

> Admittedly, Florida law does not recognize an affirmative defense of imperfect self-defense. See *Hill v. State*, 979 So. 2d 1134, 1134-35 (Fla. 3d DCA 2008):

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

> Nonetheless, a defendant can still argue against a murder conviction (and, conversely, for a manslaughter conviction) by providing the jury with a theory of imperfect self-defense. See *Whidden v. State*, 59 So. 561 (Fla. 1912):

> In a prosecution for murder in the first degree for the unlawful killing of a human being from a premeditated design to effect the death of the person killed, or any human being, the defendant under a plea of not guilty may introduce any relevant and proper evidence tending to show a lack of premeditated design in the admitted killing so as to reduce the offense charged to a lower degree of homicide. This defense is not inconsistent with evidence tending to show self_defense.

See also *McDaniel v. State*, 620 So. 2d 1308 (Fla. 4th DCA 1993):

> Appellant was convicted of second degree murder of his son. He argues that the trial court erred in submitting the second degree murder charge since at most the evidence proved only the crime of manslaughter. We agree and reverse based on *Borders v. State*, 433 So. 2d 1325 (Fla. 3d DCA 1983); *Pierce v. State*, 376 So. 2d 417 (Fla. 3d DCA 1979), cert. denied, 386 So. 2d 640 (Fla. 1980); and *Martinez v. State*, 360 So. 2d 108 (Fla. 3d DCA 1978), cert. denied, 367 So. 2d 1125 (Fla. 1979).
>
> In the instant case, the record reveals that Ray, the son and victim, initiated the altercation by hitting his father in the mouth and knocking him to the ground. Although the father's use of a knife to ward off further attack by his son may have been excessive, thereby negating a finding of self_defense, his acts did not evince a depraved mind. No evidence was presented that McDaniel acted out of ill will, hatred, spite, or an evil intent. The state failed to prove a prima facie case of second degree murder. Therefore, we reduce his conviction to manslaughter and remand to the trial court for resentencing.

As shown by the examples of heat of passion, sudden combat, and imperfect self defense, an individual can possess an intent to kill without possessing premeditation or a depraved mind.

A specific instruction on voluntary manslaughter enables a jury to find a defendant guilty of an intentional killing without forcing the jury to find that the defendant necessarily committed murder. However, if a trial court does not specifically instruct a jury that

manslaughter includes intentional killings, then juries might reject manslaughter as an option in heat of passion, sudden combat, and imperfect self defense cases. In other words, if the State clearly proves that a defendant acted with an intent to kill (e.g. he found his wife in bed with another man), why would a jury find him guilty of an unintentional homicide (i.e. involuntary manslaughter)? By refusing to recognize voluntary manslaughter as a distinct offense, *Montgomery II* creates an unnecesary risk that juries will reject manslaughter as a possible option in cases wherein a sudden and sufficient provocation should otherwise mitigate the charged offense from murder down to manslaughter.

What is Involuntary Manslaughter by Act?

The offense of involuntary manslaughter by act criminalizes the intentional commission of an unlawful act that unintentionally causes death. See *Smith v. State*, 65 So. 2d 303, 304-05 (Fla. 1953), quoted with approval in *Houser v. State*, 474 So. 2d 1193 (Fla. 1985):

> "The involuntary killing of a human being is the least heinous of the offenses predicable of homicide." 26 *Am.Jur.* 166. Under the common law involuntary manslaughter was defined as the unintentional killing of another by a person engaged at the time in doing an unlawful act not amounting to a felony and not likely or naturally to endanger life, or doing a lawful act in an unlawful manner. It negatives the idea of an intention to cause death and in this respect it is different from the great majority of heinous crimes in which the element of intent_express or implied_is usually an essential ingredient. In this State_as in many others _ the Legislature has defined involuntary manslaughter. Our statutes define it as (1) the killing of a human being by the act, procurement or culpable negligence of another in cases where such killing shall not be

> justifiable or excusable homicide or murder, Section 782.07, F.S.A.; or (2) the death of a human being caused by the operation of a motor vehicle by any person while intoxicated.

Some courts and commentators refer to involuntary manslaughter by act as "misdemeanor manslaughter" or "unlawful act manslaughter." See *Todd v. State*, 594 So. 2d 802, 803 (Fla. 5th DCA 1992):

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

See LaFave and Scott, *Substantive Criminal Law, §15.5*(d) (2d ed. 2003):

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

A single punch fist fight that results in death provides an easily recognizable example of the crime. See *Hall* at 92 ("This case is another tragic instance of manslaughter by single punch to the head."); see also *Acosta v. State*, 884 So. 2d 112, 113 (Fla. 2d DCA 2004):

> Although the evidence suggests that John Acosta killed his victim with the first punch during an after_school fight among

> high school students, in light of all the circumstances, we conclude that the evidence permitted the jury to convict him of manslaughter.

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

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

So long as the single punch fist fight did not arise from sudden combat, the unintended death does not qualify as "excusable" under the law. See *Section 782.03, Florida Statutes*:

> Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

Cf. *Aiken v. State*, 425 So. 2d 641, 643 (Fla. 3d DCA 1983):

> Under Sec. 782.07, Fla.Stat. (1981), a killing is not manslaughter if it involves an "excusable homicide." That is the case here. Dawson's unfortunate death was clearly one which occurred, as defined in Sec. 782.03, Fla.Stat. (1981), "upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner."
>
> For an unintentional killing to qualify as "excusable," the

defendant cannot commit an act that would have qualified as aggravated battery had the death of the victim not occurred. Compare *Section 782.03* ("without any dangerous weapon being used and not done in a cruel or unusual manner") with *Section 784.05(1)(a)*:

> A person commits aggravated battery who, in committing battery:
>
> 1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
>
> 2. Uses a deadly weapon.

The following table illustrates the comparison:

Excusable homicide	**Aggravated Battery**
"not done in a cruel or unusual manner"	"intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement"
"without any dangerous weapon being used"	"uses a deadly weapon"

Additionally, the sudden combat must immediately follow the provocation that sparked the passions of the defendant. See *Hall* at 95:

> The State presented evidence from which a jury could have rejected Hall's theory that Pobanz initiated "sudden combat" with Hall by throwing a rock toward the deck of the Beached Whale. The evidence showed that the rock struck an innocent bystander who was not known to either man. There was no evidence that Pobanz aimed the rock at Hall or that Pobanz showed any aggression toward Hall whatsoever. Even if he had, there was evidence that Hall chased Pobanz down and dodged intervention attempts by both a deputy sheriff and a hotel security guard before inflicting the fatal blow while Pobanz was otherwise distracted.

Finally, sudden combat requires the active participation of both the defendant and the victim. See also *Valencia v. State*, 597 So. 2d 372 (Fla. 3d DCA 1992):

> Contrary to the defendant's argument, the evidence adduced at trial does not establish, as a matter of law, that the defendant's admitted killing of the deceased was an excusable homicide upon a sudden combat as defined by Section 782.03, Florida Statutes (1989). To the contrary, there was no actual or figurative sudden combat between the defendant and the deceased at all; the two had not squared off for a physical fight or indeed even exchanged threats or angry words. Simply put, the evidence shows that the defendant unexpectedly turned and struck the deceased in the face with the defendant's fist, while the two were walking toward the kitchen in the house of a third party, causing the deceased to fall and hit his head on the floor which led to his death. This was a classic manslaughter under Section 782.07, Florida Statutes (1989), and was in no sense an excusable homicide upon a sudden combat.

See also *J.J.W. v. State*, 892 So. 2d 1189, 1191-92 (Fla. 5th DCA 2005):

> In this case, the evidence was such that the finder of fact could have found that there was no "sudden combat" from J.J.W.'s point of view, or "sudden and sufficient provocation." The factfinder could have found that Ferrell was simply standing with his skateboard at his side, that J.J.W. had been "looking" for Ferrell in the prior days, that Ferrell never threatened J.J.W., by word or gesture, that Ferrell was completely unprepared when J.J.W. punched him in the face and that, as in *Acosta*, J.J.W. started and finished the fight with the first punch.

See also *Maynard v. State*, 660 So. 2d 293, 295 (Fla. 2d DCA 1995):

> Contrary to appellant's argument, we conclude that the victim's death did not result from a sudden combat and thus did not constitute excusable homicide under the statute. The evidence clearly establishes that at the time of the attack, the appellant, without provocation, surprised and overwhelmed the victim by striking him twice in the head and that his response was not one of retaliation but of protection. Furthermore, there is no evidence suggesting that the victim, immediately prior to the appellant's unexpected physical battering,

> exchanged threats or angry words with her or was preparing to engage her in a physical confrontation. Thus, we conclude that there was insufficient proof of an actual or figurative combat between the appellant and the victim to establish excusable homicide as a matter of law.

Worth mentioning briefly, sudden combat plays an important role in the law of homicide. As noted earlier, an intentional killing committed during sudden combat constitutes voluntary manslaughter by act. See *Rodriguez*, 443 So. 2d at 289. Additionally, an unintentional killing committed during sudden combat constitutes involuntary manslaughter by act if the defendant would have been guilty of aggravated battery had the victim survived. *Ibid*, n.6. Finally, an unintentional killing committed during sudden combat constitutes an excusable homicide if the defendant would have been guilty of only simple battery had the victim survived. See *Section 782.03, Florida Statutes*. The following table illustrates this point:

Effect of sudden combat

Nature of the act?	**Homicide committed?**
Intentional killing	Voluntary manslaughter by act
Aggravated battery that causes death	Involuntary manslaughter by act
Simple battery that causes death	Excusable homicide

While it requires the specific intent to commit an unlawful act, involuntary manslaughter by act does not require the specific intent

to violate the law. See LaFave, *Substantive Criminal Law §15.5(a)* (2d ed. 2003):

> [F]or the defendant's conduct to be "unlawful" for purposes of manslaughter liability it is not necessary that he know that some law forbids it (in the case of an act) or commands it (in the case of an omission); in other words, there is no requirement of a specific intent to violate the law which makes his conduct unlawful.

Nonetheless, involuntary manslaughter by act contains a causation element that requires the State to prove that the defendant's intentional commission of an unlawful act legally caused the victim's death. See *Boler v. State*, 678 So. 2d 319, 323 (Fla. 1996):

> In his motion to dismiss and in argument to this Court, Oats relies upon several cases where Florida courts have dismissed convictions for manslaughter based upon a determination that the defendant's conduct could not be the legal cause of another's death. See *Tipton v. State*, 97 So. 2d 277 (Fla. 1957) (reversing manslaughter conviction against defendants who pushed elderly gas station attendant who fell and died from heart attack); *Todd v. State*, 594 So. 2d 802 (Fla. 5th DCA 1992) (reversing manslaughter conviction against defendant who stole church collection plate and was chased by parishioner who died of heart attack); *Penton v. State*, 548 So. 2d 273 (Fla. 1st DCA) (reversing manslaughter conviction against defendant who stole child's bicycle and was chased by father who died from release of fat emboli), review denied, 554 So. 2d 1169 (Fla. 1989).
>
> We find these cases distinguishable from the instant case. The cases cited by Oats involved misdemeanor-manslaughter charges based upon unintended homicides that occurred during the commission of an unlawful act not amounting to a felony. The cited cases also focus on the causation element and the foreseeability that the defendant's actions could result in physical harm; in each instance the court concluded that legal causation had not been proven. See *Tipton*, 97 So. 2d at 281-82; *Todd*, 594 So. 2d at 804_06; *Penton*, 548 So. 2d at 274-75.

See also LaFave, *Substantive Criminal Law §15.5(b)* (2d ed. 2003):

> Assuming that, while the defendant is committing an "unlawful act," a death occurs near the defendant, still the defendant is not guilty of manslaughter unless the unlawful act causes the death. Mere coincidence of time and place will not do. Yet closeness of time and place does have relevance, for it seems clear that, in addition to the necessary causal connection, the requirement that the homicide be committed "in the commission of" the unlawful act necessitates, on analogy to felony_murder, a somewhat close connection in point of time and place, as well as causal relation, between the unlawful act and the infliction of the death_causing injury.

Killings that coincide with traffic law violations demonstrate the importance of the causation requirement. Compare LaFave, *Substantive Criminal Law §15.5(a)*, n.19 (2d ed. 2003):

> *State v. Kotapish*, 171 Ohio St. 349, 352, 171 N.E.2d 505, 507 (1960) (truck driver was driving without an emergency brake, in violation of misdemeanor statute requiring it, when the foot brake failed, and the truck, unable to stop, killed a pedestrian; conviction of manslaughter held affirmed, but court indicates there would have been no liability for footbrake failure, though a criminal statute requires foot brakes, except for the misdemeanor violation with respect to the emergency brake)

with *ibid*, n.21:

> *Commonwealth v. Williams*, 133 Pa.Super. 104, 1 A.2d 812 (1938) (defendant, who had possessed a license to drive for several years, failed to renew it; while driving carefully but without a current license, defendant swerved into a telephone pole in order to avoid an approaching vehicle; his passenger was killed; conviction of manslaughter of the unlawful_act type held reversed, for the unlawful act did not cause the death, i.e., the death was not the result of the unlawful act).

Clearly, the unlawful act in *Kotapish* enjoyed a closer causal connection to the victim's death than did the unlawful act at issue in *Williams*. In *Kotapish*, the illegal decision to forego an

emergency brake led to the driver's inability to stop the truck when the foot brake failed. Presumably, a driver with an operable emergency brake could have avoided the collision with the pedestrian. In *Williams*, the illegal decision to drive without a renewed license did not lead to the driver's inability to avoid the fatal collision. Presumably, the driver would have collided with the telephone poll regardless of whether or not he possessed a valid license.

Theoretically, "unlawful act" manslaughter can include felonious acts that fail, for whatever reason, to serve as the underlying offense for felony murder. See LaFave and Scott, *Substantive Criminal Law, §15.5*(a) (2d ed. 2003) ("'Unlawful act' is a phrase, however, which also includes criminal acts other than misdemeanors. Thus a felony which for some reason will not suffice for felony_murder may do for unlawful_act manslaughter."); but see *Boler* at 323 ("The cases cited by Oats involved misdemeanor_manslaughter charges based upon unintended homicides that occurred during the commission of an unlawful act not amounting to a felony.").

Under Florida law, felonious acts that fail to serve as the underlying offense for first degree felony murder could serve as the underlying offense for either third degree felony murder or involuntary manslaughter by act. See *Section 782.04(4), Florida Statutes* ("The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the

perpetration of, or in the attempt to perpetrate, any felony other than any...").

Of note, the offenses of third degree felony murder and manslaughter both constitute second degree felonies. See *Section 782.04(4), Florida Statutes* ("[M]urder in the third degree [] constitutes a felony of the second degree..."); see also *Section 782.07(1)* ("[M]anslaughter [is] a felony of the second degree...").

A felonious assault or battery provides the best example of an offense that can support both involuntary manslaughter by act and third degree felony murder. Cf. *Hall* at 96 ("[I]f the crime of manslaughter by act did not include intentional acts that result in unintentional deaths, then there would be no applicable offense for such crimes..."). In contrast with first degree felony murder, using a felonious assault or battery as the underlying offense for a third degree felony murder charge does not implicate any "merger" concerns. See *Mapps v. State*, 520 So. 2d 92, 93 (Fla. 4th DCA 1988):

> In *Doyle v. State*, 513 So. 2d 188 (Fla. 4th DCA 1987), this court held that the merger doctrine does not preclude convictions of third_degree felony murder, where aggravated battery is the underlying felony. The Florida Supreme Court has also upheld a third_degree murder conviction where the underlying felony was aggravated child abuse. *Mahaun v. State*, 377 So. 2d 1158 (Fla. 1979). The merger doctrine, however, was not an issue in that case.

Unlike the case with first degree felony murder, third degree felony murder does not afford the State an opportunity to: (1)

"bootstrap" all felonious assaults resulting in death up to the level of first degree murder; and, (2) eliminate the need for the jury to consider other homicides such as second degree murder and manslaughter. See *Lewis v. State*, 34 So. 3d 183, 184-85 (Fla. 1st DCA 2010):

> The rationale behind the merger doctrine is to ensure that varying degrees of murder, manslaughter, and other homicides remain distinct categories. Douglas Van Zanten, *Felony Murder, the Merger Limitation, and Legislative Intent in State v. Heemstra: Deciphering the Proper Role of the Iowa Supreme Court in Interpreting Iowa's Felony_Murder Statute*, 93 Iowa L. Rev. 1565, 1574 (2008) (citing *State v. Branch*, 244 Or. 97, 415 P.2d 766, 767 (1966)). Without the merger doctrine, all felonious assaults that resulted in death would be bootstrapped up to first_degree murder regardless of whether the requisite mens rea existed.

See also *Doyle* at 189:

> Appellant's argument is that since the aggravated battery which formed the underlying felony is not separate and distinct from the homicide in the instant case, appellant's conviction for murder in the third degree under section 782.04(4), Florida Statutes (1983), was improper. Although appellant notes (and we have confirmed) that there is no Florida case law specifically dealing with the issue whether Florida follows the rule _ sometimes denominated the New York rule _ that the underlying felony must be separate and independent in order for the third degree felony murder statute to apply, he contends that such a rule may be implied from the Florida Supreme Court's discussion in *Robles v. State*, 188 So. 2d 789 (Fla. 1966), regarding said rule's application to the Florida first degree felony_murder statute.
>
> Appellant asserts that since section 782.04(4), Florida Statutes, under which appellant was charged, does not specify the types of felonies for which the third degree felony_murder rule would apply _ unlike section 782.04(1), Florida Statutes, which specifically lists the types of felonies that give rise to the first degree felony_murder rule_the Florida Supreme Court's reasoning for not adopting the New York theory is not

> applicable thereto. Furthermore, appellant contends that Florida recognizes the "merger concept" whereby the underlying aggravated battery would merge into the homicide and the entire transaction would then have to be analyzed for the presence or absence of the requisite intent, rather than allowing the prosecution to bootstrap all killings from an aggressive act into a murder simply by showing that the assault out of which the death arose was a felony.

Additionally, the same act may give rise to criminal culpability under both an involuntary manslaughter by act theory and an involuntary manslaughter by culpable negligence theory. See LaFave, *Substantive Criminal Law, §15.5*(e) (2d ed. 2003) ("[T]he fact of the defendant's unlawful conduct may generally be looked to as evidence of criminal negligence.").

Confusion in the District Courts of Appeal

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

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

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

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

Overlooked by the Fifth District, involuntary manslaughter can include an intentional act or procurement that unintentionally causes death. See LaFave, *Substantive Criminal Law §15.4* (2d ed. 2003) ("Involuntary manslaughter itself may be divided into two separate types, whose scope has been and is still undergoing slow change, and which may be labeled (1) 'criminal_negligence' manslaughter and (2) 'unlawful_act' manslaughter."); see also *Hall v. State*, 951 So. 2d 91, 96 (Fla. 2d DCA 2007):

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

See also *Montgomery v. State*, Case No. 1D07-4688 *9 (Fla. 1st DCA Feb. 12, 2009) ("[W]e hold that manslaughter by act also requires only an intentional unlawful act, rather than an intent to kill.").

Although the Second District correctly recognized the existence of the crime of involuntary manslaughter by act in reaching its decision in *Hall*, that court, in a subsequent decision, recently repeated the Fifth District's erroneous suggestion that the common law crime of involuntary manslaughter is now codified exclusively as manslaughter by culpable negligence. See *Bolin v. State*, 8 So. 3d 428, 420 (Fla. 2d DCA 2009) ("Florida law distinguishes between voluntary manslaughter, which is committed by act or procurement, and involuntary manslaughter, committed by culpable negligence. Whereas voluntary manslaughter is a crime of intent, involuntary manslaughter is not."). This erroneous interpretation of the law fails to account for the intentional act element inherent in the crime of involuntary manslaughter by act. Cf. LaFave and Scott, *Criminal Law, §15.5* p.530 (2d ed.):

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

already discussed.

Cf. also LaFave, *Substantive Criminal Law, §15.5*(e) (2d ed. 2003):

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

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

> In determining that there is no intent_to_kill element in manslaughter by act, we have come into conflict with the Fifth District. Although we reached our decision by a different route, we agree with the Second District regarding the elements of the crime of manslaughter by act. *We believe that the contrary holding espoused by the Fifth District in Barton leaves a gap in the law, as it would not allow for a manslaughter conviction in cases where the defendant commits an unlawful act that unintentionally results in the death of the victim*. Because we are unable to reconcile our holding with the Fifth District's position, we certify conflict with Barton. (Emphasis added)

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

Despite its failure to recognize the crime of involuntary manslaughter by act, *Barton* correctly holds that voluntary manslaughter can only include manslaughter by act or procurement

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

The Proposed Instruction

The proposed instruction eliminates the key distinction between voluntary and involuntary manslaughter. Whereas the current instruction correctly defines the crime of attempted voluntary manslaughter by act to the exclusion of the crime of attempted involuntary manslaughter by act, the proposed instruction accomplishes the converse: it defines the crime of attempted involuntary manslaughter by act to the exclusion of the crime of attempted voluntary manslaughter by act. In doing so, the proposed instruction creates an attempted homicide offense that inexplicably lacks an intent to kill requirement.

In order to show the inherent flaws in the proposed instruction, these Comments outline the need to differentiate between voluntary and involuntary manslaughter by act so that trial courts can: (1) instruct juries on the appropriate, necessarily lesser included homicide offenses for attempted, first degree premeditated murder; and (2) instruct juries that the crime of attempted manslaughter requires an intent to kill.

IV. WHAT FORM OF MANSLAUGHTER CONSTITUTES THE APPROPRIATE LESSER INCLUDED OFFENSE IN A MURDER PROSECUTION?

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

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

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

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

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

> Given both the allegations of the indictment and the proof at Bolin's trial, the court was required to instruct the jury on manslaughter by act. It did not. Instead, the court instructed the jury that it could find Bolin guilty of manslaughter if it determined, among other things, "that the death of Natalie Holley was caused by the *culpable negligence* of Oscar Ray Bolin." (Emphasis supplied.) The court then defined culpable negligence for the jurors.

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

A simple rule of easy application, the mental state for the lesser form of manslaughter should match the mental state for the charged form of murder. See e.g. *Coicou v. State*, 39 So. 3d 237, 243 (Fla. 2010):

> As we explained in [*Sanders v. State*, 944 So. 2d 203 (Fla. 2006)], "[n]ecessarily lesser included offenses are those offenses in which the statutory elements of the lesser included offense are *always subsumed* within those of the charged offense." 944 So. 2d at 206 (emphasis added). It follows, then, that attempted second_degree murder is *not* a necessarily lesser_included offense of attempted first_degree felony murder. This is because attempted second_degree murder contains an element, a depraved mind, that is not an element of the greater offense.
>
> Because first degree murder requires proof of an intent to kill,

voluntary manslaughter by act (which also includes an intent to kill) constitutes the appropriate form of manslaughter as a lesser included offense. See *In re Standard Jury Instructions in Criminal Cases_Report No. 2007_10*, 997 So. 2d 403, 404 (Fla. 2008) ("Give only if 2(a) alleged and proved [(Defendant) intentionally caused the death of (victim)], and manslaughter is being defined as a lesser included offense of first degree premeditated murder."); accord *Duncan*; see also LaFave, *Substantive Criminal Law §15.2* (2d ed. 2003) ("Voluntary manslaughter in most jurisdictions consists of an intentional homicide committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing.").

Because second degree murder does not require proof of an intent to kill, involuntary manslaughter by culpable negligence constitutes the appropriate, lesser form of manslaughter. See generally *Salonko v. State*, 42 So. 3d 801 (Fla. 1st DCA 2001):

> Although the jury found, by its second_degree murder verdict, that Appellant did not intend to kill the victim, based on the instructions given, it could have returned a verdict for the lesser_included offense of manslaughter by culpable negligence while still honoring its finding that there was no intent to kill.

Finally, involuntary manslaughter by act provides the appropriate lesser form of manslaughter when the State charges a defendant with first degree felony murder. See LaFave and Scott, *Substantive Criminal Law, §15.5(a)* p.531 (2d ed.):

> [T]he unlawful_act type of manslaughter is often referred to,

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

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

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

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

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

General Intent (to commit a felony)	No.	No.	***Yes***.	No.	No.	No.
General Intent (to commit a misdemeanor)	No.	No.	No.	No.	***Yes***.	No.
Reckless Act	No.	No.	No.	No.	No.	***Yes***.

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

First Degree Murder

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

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

In other words, if you eliminate premeditation but keep the intent to kill (and do not add a depraved mind), the homicide moves straight from first degree murder to voluntary manslaughter by act (without a stopping at second degree murder). See generally LaFave, *Substantive Criminal Law §14.2* (2d ed. 2003):

> Conduct, accompanied by an intent to kill, which is the legal cause of another's death constitutes murder, unless the circumstances surrounding the homicide are such that the crime is reduced to voluntary manslaughter or such that the intentional killing is justifiable or excusable and so constitutes no crime at all.

See also *Watkins v. State*, 705 So. 2d 938, 943 n.1 (Fla. 5th DCA 1998)

(Harris, J., dissenting):

> The supreme court recognizes two types of intent to kill. First, there is the premeditated design to kill (first degree premeditated murder). Then there is the intent which falls short of the premeditated design. These are the spur of the moment, sudden impulse killings described in *Taylor v. State*, 444 So.2d 931 (Fla. 1983). But the sudden impulse killings, although not a statutory element of either, are determined by the supreme court to be voluntary manslaughter and not second degree murder.

Second Degree Murder

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

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

In other words, if you reduce the state of mind from "super" reckless to just reckless, the homicide moves from second degree murder straight to involuntary manslaughter by culpable negligence (without stopping at manslaughter by act). See *Brown v. State*, 790 So. 2d 389, 395 (Fla. 2000) (Harding, J., dissenting) ("Second_degree murder does not require intent; it only requires a form of recklessness: 'a depraved mind without regard for human life.'"); but see *Light v. State*, 841 So. 2d 623, 626 (Fla. 2d DCA 2003):

> [E]xtremely reckless behavior itself is insufficient from which to infer any malice. Moreover, other cases demonstrate that an impulsive overreaction to an attack or injury is itself insufficient to prove ill will, hatred, spite, or evil intent. See *Williams v. State*, 674 So. 2d 177 (Fla. 2d DCA 1996); *McDaniel v. State*, 620 So.2d 1308 (Fla. 4th DCA 1993).
>
> Although exceptions exist, the crime of second_degree murder

> is normally committed by a person who knows the victim and has had time to develop a level of enmity toward the victim. See, e.g., *Conyers v. State*, 569 So. 2d 1360 (Fla. 1st DCA 1990) (victim is defendant's son); *Dellinger v. State*, 495 So. 2d 197 (Fla. 5th DCA 1986) (victim is defendant's wife); *Larsen v. State*, 485 So. 2d 1372 (Fla. 1st DCA 1986) (victim is defendant's wife). Hatred, spite, evil intent, or ill will usually require more than an instant to develop. See *Hooker v. State*, 497 So. 2d 982 (Fla. 2d DCA 1986) (holding that second_degree murder established where defendant shot into occupied trailer killing stranger because of preexisting racial ill will). In this case, Mr. Light had no prior relationship with the victim prior to the victim entering the mosh pit. The conditions inside the bar made it virtually impossible for any witness to provide testimony that Mr. Light demonstrated any enmity at the time of the incident, and no such testimony was provided. The circumstantial evidence in this case regarding Mr. Light's intent or state of mind is equally supportive of a theory that Mr. Light was simply guilty of a serious, momentary misjudgment concerning the amount of force that was permissible on the dance floor or that he reacted impulsively and excessively to being hit in the genitals. Such conduct fits within the definition of culpable negligence, which allows a homicide conviction, but only as manslaughter. (Emphasis added)

Although ultimately rejected by the courts that reviewed them, two *habeas corpus* claims (one federal, one state) demonstrate the problems that arise when a trial court instructs a jury on voluntary manslaughter by act as a necessarily lesser included offense of second degree murder. See *Oliva v. McDonough*, Case No.8:05_CV_246_T_30EAJ *2 (M.D. Fla., Feb. 15, 2008):

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

> his case because the information sworn to by the State did not allege that he had the intent to kill the victim, and therefore, his counsel was ineffective by failing to object to the manslaughter jury instruction.

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

> Petitioner argues that voluntary manslaughter is a lesser included offense of first_degree murder, but not second_degree murder, and therefore, because he was charged with second_degree murder the voluntary manslaughter instruction was inappropriate. In support of his argument he cites to *Duncan v. State*, 703 So. 2d 1069 (Fla. 5th DCA 1997), and he maintains that his counsel was ineffective for failing to object to the voluntary manslaughter instruction and argue *Duncan* in support of the objection. However, in [*Rayl v. State*, 891 So. 2d 1052 (Fla. 2d DCA 2004)] the Second District Court of Appeal, the appellate court for the district in which the trial court in Petitioner's case is located, stated that "the dicta in *Duncan* suggesting that manslaughter is not a standard necessary lesser included offense of second_degree murder is an incorrect statement of law, which contradicts precedent from the Florida Supreme Court and this court." *Id.*, 891 So. 2d at 1055. If there is conflict between the district courts, the trial court is bound by the precedent in its own appellate district. See *Pardo v. State*, 596 So. 2d 665, 666_67 (Fla. 1992). "Counsel is not deficient for failing to raise an argument which runs contrary to the law or controlling precedent at trial or on appeal." *Coley v. Sec 'y of Dep't of Corr.*, 2007 U.S. Dist. LEXIS 26075 *13 (M.D. Fla. 2007) (citing *Jones v. Barnes*, 463 U.S. 745 (1983); *U.S. v. Winfield*, 960 F.2d 970, 974 (11th Cir. 1992) (finding an attorney was not ineffective for failing to argue a meritless issue)). Moreover, the dicta in *Duncan* "is without force as a judicial precedent[.]" See *Pooton v. Berutich*, 199 So. 2d 139, 142 (Fla. 2nd DCA 1967).

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

> Rayl claimed in his habeas petition that his appellate counsel should have sought rehearing from this court's decision on direct appeal because manslaughter with a firearm was not an available lesser included offense to the second_degree murder charge. Rayl asserted that of the three different ways to commit manslaughter, two were not supported by the evidence because there was no evidence of culpable negligence or procurement. The remaining way, manslaughter by act or

> voluntary manslaughter, was not a necessary lesser because that crime contained an intent_to_kill element, which was not contained within the information for second_degree murder. Rayl asserted that pursuant to *Duncan*, voluntary manslaughter is a lesser included offense of first_degree murder, but not second_degree murder and, thus, by failing to raise this issue in a motion for rehearing, appellate counsel was ineffective.

But see *Rayl* at 1055:

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

Felony Murder

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

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

In other words, if you reduce the general intent from that of a felony to a misdemeanor, the homicide moves from felony murder to involuntary manslaughter by act (without stopping at second degree murder or voluntary manslaughter by act). See *Coicou* at 243:

> [A]ttempted second_degree murder is not a necessarily lesser_included offense of attempted first_degree felony murder. This is because attempted second_degree murder contains an element, a depraved mind, that is not an element of the greater offense.
>
> [I]t is equally clear that second_degree murder cannot and should not be considered a necessarily lesser_included offense of first_degree felony murder.

Effect of *Coicou*

In *Coicou*, this Court determined that, under the *Sanders* "same elements" test, the crime of attempted second degree murder no longer constitutes a necessarily lesser included offense of the crime of attempted first degree felony murder. See *Coicou* at 241:

> Attempted second_degree murder and attempted first_degree felony murder appear to be separate on the face of the statutes because each crime contains an element that the other does not. Attempted first_degree felony murder requires that the act be committed during the course of committing a felony. See §782.051. Attempted second_degree murder requires that the perpetrator's act be "imminently dangerous to another and evincing a depraved mind regardless of human life," §782.04(2).

See also *ibid* at 243 ("[S]econd_degree murder cannot and should not be considered a necessarily lesser_included offense of first_degree felony murder.").

Applying the *Coicou* holding to other homicide offenses produces some interesting results. For instance, under the *Coicou* rationale, second degree murder no longer constitutes a necessarily lesser included offense of first degree premeditated felony. Whereas the former requires depravity and death, the latter requires premeditation, intent to kill, and death. Thus, second degree murder only serves as a permissive, lesser included offense to all forms of first degree murder.

Additionally, under the *Coicou* rationale, manslaughter by act (whether voluntary or involuntary) no longer constitutes a necessarily lesser included offense of second degree murder.

Whereas the former requires either an intent to kill mitigated by sudden and sufficient provocation or the intentional commission of an unlawful act that causes death, the latter requires depravity. Thus, under the reasoning of *Coicou*, the petitioners in both *Oliva v. McDonough* and *Ray v. State* presented meritorious claims that the reviewing courts unfortunately dismissed without sufficient consideration.

What is the Necessarily Lesser Included Offense of First Degree Premeditated Murder?

Coicou begs a simple question: what offense currently constitutes the necessarily lesser included offense of first degree, premeditated murder (whether completed or attempted)? Only the common law crime of voluntary manslaughter by act can fulfill that role. At common law, the crime of voluntary manslaughter by act shares two of the three elements contained within crime of first degree, premeditated murder: (1) intent to kill; and, (2) death. Thus, to ensure that first degree, premeditated murder (whether completed or attempted) has a necessarily lesser included offense, this Court must recognize the common law crime of voluntary manslaughter by act.[4]

[4]The failure to do so could create a "*Beck*" problem if, in a capital case, the State charges first degree, premeditated murder specifically (as opposed to charging first degree murder generally, which would provide the jury with premeditated and felony murder options). See *Beck v. Alabama*, 447 U.S. 625, 637 (1980):

Factually Dependent

Admittedly, defendants facing murder charges often dispute the nature of the killing. As a result, juries frequently resolve factual matters like motive and the presence, *vel non*, of an intent to kill. Because enmity often provides a motive (which can lead to premeditation), many individuals who possess an intent to kill also manifest a depraved mind. Hence, many murder prosecutions would support a charge of both first degree premeditated murder and second degree murder. Also, because provocation can lead to enmity (given a significant passage of time between the initial provocation and the eventual killing), many homicide prosecutions would support a charge of both second degree murder and voluntary manslaughter. See *Holland v. State*, 12 Fla. 117 (Fla. 1867):

> When it becomes necessary to decide whether the killing was upon an antecedent grudge or on a recent provocation, in order to determine the guilt of the prisoner as to murder or manslaughter, we hold the rule to be this: When an antecedent grudge has been proved and there is no satisfactory evidence to show that the wicked purpose has been abandoned, it must be clearly shown to the jury that the provocation was a grievous one in order to warrant them in finding that the blow was struck on the recent provocation and not on the old grudge.

Importantly, however, not everyone who intends to kill necessarily

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> For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense_but leaves some doubt with respect to an element that would justify conviction of a capital offense_the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk

disregards the value of human life. Therefore, some killings, even if intentional, may only support an instruction on manslaughter. See LaFave, *Substantive Criminal Law §15.2(a)* (2d. ed. 2003):

> Although the killing of another person — when accompanied by an intent to kill, or by an intent to do serious bodily injury short of death, or when resulting from such unreasonable and highly reckless conduct as to "evince a depraved heart" — often amounts to murder, yet it may under certain circumstances amount only to voluntary manslaughter.

Obviously, the jury's factual findings determine the degree of homicide; nonetheless, some of those findings may overlap. For example, a properly instructed jury may determine that the defendant who possesses an intent to kill and who proceeds with premeditation remains guilty of first degree premeditated murder – even if the jury also finds that defendant evinced the level of depravity required for second degree murder. In this scenario, the finding of depravity remains superfluous. As an additional example, a jury may determine that the defendant who possesses an intent to kill and evinces depravity remains guilty of second degree murder – but only if the jury also finds that the defendant did not proceed from any premeditation. See *Knight v. State*, 28 So. 759, 761 (Fla. 1900):

> If an unlawful homicide be perpetrated by an act imminently dangerous to another, and evincing a depraved mind regardless of human life, but from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery or burglary, it is murder in the first degree; otherwise it is murder in the second degree, even though

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of an unwarranted conviction.

> accompanied by an intent to kill, provided such intent does not amount to a premeditated design.

In this scenario, the finding of an intent to kill remains superfluous. Finally, if the jury finds that the defendant possesses an intent to kill, but lacks premeditation and depravity, then the defendant remains guilty of voluntary manslaughter. See generally *Feagle v. State*, 46 So. 182, 183 (Fla. 1908):

> If the assault was committed unlawfully, and with an intent to take life, but not from a premeditated design to take life, and not by any act imminently dangerous to another and evincing a depraved mind regardless of human life, it would be an assault with intent to commit manslaughter.

The following table illustrates these points:

	Intent to Kill?	Premeditation?	Depravity?
First Degree Premeditated Murder	Yes.	Yes.	Irrelevant.
Second Degree Murder	Irrelevant.	No.	Yes.
Voluntary Manslaughter	Yes.	No.	No.

Setting aside the sudden and sufficient provocation required for heat of passion or sudden combat (which make premeditation and depravity a legal impossibility), an imperfect self-defense homicide illustrates how an individual can intentionally kill another without actually possessing the premeditation required for first degree murder or the depravity required for second degree murder. To

demonstrate, even though Florida law currently does not recognize an affirmative defense of imperfect self-defense, a defendant facing a first degree murder charge nonetheless can stipulate facts that support an imperfect self-defense and argue to the jury as follows:

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

Under the stipulated facts of this hypothetical, the crime of voluntary manslaughter by act constitutes the appropriate form of manslaughter upon which the trial court should instruct the jury.[5]

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

Therefore, the trial court should instruct the jury on voluntary manslaughter by act to the exclusion of involuntary manslaughter by act and also to the exclusion of involuntary manslaughter by culpable negligence. See *Duncan* at 1070:

> We agree with Duncan that the trial court erred by merging the instructions for voluntary and involuntary manslaughter. The instruction for voluntary manslaughter should not have been given because Duncan was only charged with second degree murder. It is only when manslaughter is being defined as a lesser included offense of first degree premeditated murder that the instruction for voluntary manslaughter is to be given. *Standard Jury Instructions in Criminal Cases (93_1)*, 636 So. 2d 502, 503_504 (Fla. 1994).

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

Necessarily Lesser and Permissive Lesser Included Offenses

Based upon the foregoing analysis, the State respectfully suggests the following schedule of necessarily lesser included offenses and permissive lesser included offenses for homicide charges:

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or fundamental error under *State v. Lucas*, 645 So. 2d 425 (Fla. 1994) (if unpreserved).

	First Degree Premeditated Murder	Second Degree Murder	First Degree Felony Murder
Necessarily Included Lesser Offense	Voluntary Manslaughter by Act	Involuntary Manslaughter by Culpable Negligence	Involuntary Manslaughter by Act
Permissive Lesser Included Offenses	Second Degree Murder; Involuntary Manslaughter by Act; Involuntary Manslaughter by Culpable Negligence	Voluntary Manslaughter by Act; Involuntary Manslaughter by Act	Second Degree Murder; Voluntary Manslaughter by Act; Involuntary Manslaughter by Culpable Negligence

V. WHAT FORM OF MANSLAUGHTER SUPPORTS AN ATTEMPT INSTRUCTION?

When a trial court instructs the jury on the crime of *attempted* manslaughter, the distinction between voluntary and involuntary manslaughter remains paramount because the crime of attempted involuntary manslaughter should not exist. See *Sherouse* at 1195

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

Taylor

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

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

Taylor at 933. To answer that question, this Court looked to a decision addressing the crime of assault with an intent to commit manslaughter. See *Taylor* at 933:

> [T]he Florida Supreme Court has long recognized the crime of assault with intent to commit manslaughter...
>
> ... The crime of assault with intent to commit manslaughter was premised upon the fact that in Florida the crime of manslaughter includes certain types of intentional killings. The first case to hold there was such a crime as an assault with intent to commit

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

manslaughter was *Williams v. State*, 41 Fla. 295, 26 So. 184 (1899), wherein the defendant was charged with assault with intent to murder, but was convicted of assault with intent to commit manslaughter.

As an analytical starting point, *Williams* concluded that any assault with the intent to commit a homicide must include an intent to kill. See *Williams* at 185:

> But upon indictments for assault with intent to commit any of the grades or degrees of unlawful homicide, it will not be sufficient to show that the killing, had it occurred, would have been unlawful, and a felony; but it must be found that the accused committed the assault with intent to take life, for, although an unintentional or involuntary killing may in some cases be unlawful, and a felony, no man can intentionally do an unintentional act; and without the intent the assault cannot be punished under this statute, even though the killing, had it been committed, would have amounted to a felony.

Distinguishing the crime of aggravated assault, *Williams* held that the intent to kill constitutes the "gist" of the offense of an assault with intent to commit manslaughter. See *Williams* at 186-87:

> But the argument is more specious than sound, for the crime defined by the statute as aggravated assault does not contain all the constituent elements necessary to constitute an assault with intent to commit manslaughter. In the latter offense the intent to take life is the gist of the offense, while in aggravated assault the question of intent is not material, further than that the party committing the assault must not have a premeditated design to effect death. In the one case an assault with intent to take life must be alleged and proved; in the other, an assault with a deadly weapon must be alleged and proved, but the intent with which the assault was made, whether to take life, or to wound or injure, or whether the assault was made with any particular intent, is entirely immaterial, unless the intent should amount to a premeditated design to effect death, in which case the assaulting party would not be guilty of an aggravated assault, but would have been guilty of assault with intent to murder...

See also *Taylor* at 933 ("The Court made it clear, however, that for a conviction of assault with intent to commit manslaughter to be valid, there must be proof that the defendant did intend to kill."); see also *Lindsey v. State*, 43 So. 87, 89 (Fla. 1907)[7]:

> [W]hoever assaults another with a deadly weapon, not having a premeditated design to effect his death, and not having any intent or design to take life, is guilty of an aggravated assault. Where the assault is made with a deadly weapon and from a premeditated design to effect the death of the party assaulted, the crime is assault with intent to commit murder in the first degree. If such assault is made with an intent to take life, but such intent does not amount to a premeditated intent or design, the crime may be assault with intent to commit murder in the second degree or manslaughter, according to the facts of the case.

See also *Feagle v. State*, 46 So. 182, 183 (Fla. 1908):

> If the assault was committed unlawfully, and with an intent to take life, but not from a premeditated design to take life, and

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[7]*Lindsey* confusingly suggests that the crime of assault with intent to commit second degree murder requires an intent to kill. See also *Phillips v. State*, 162 So. 346 (Fla. 1935):

> The evidence is amply sufficient to warrant the jury in finding that at the time of the assault the accused made such assault with intent to kill. For one to have the intent to kill in the making of the assault does not necessarily mean that he had a premeditated design and fixed purpose to effect death, even for a short time before making the assault, but it means that he willfully and unlawfully makes an assault with a deadly weapon which he knows, or should know, may reasonably be expected to result in the death of the person assaulted. See *Jones v. State*, 66 Fla. 79, 62 So. 899. In a case where, if the assaulted person had died of the wound inflicted, the accused could have been held to have committed murder in the second degree, he may be properly convicted of assault with intent to commit murder in the second degree, if, fortunately, the assaulted person does not die of the wound so inflicted.

> not by any act imminently dangerous to another and evincing a depraved mind regardless of human life, it would be an assault with intent to commit manslaughter.

Because it requires proof of an intent to kill, the crime of assault with an intent to commit manslaughter requires proof of an intent to commit voluntary manslaughter. See also *Taylor* at 934:

> Thus this Court recognized the distinction found in common law between voluntary and involuntary manslaughter. The crime of assault with intent to commit manslaughter was found to exist only in those cases where, if death had resulted, the manslaughter would have been voluntary and not involuntary.

In other words, because all assaults with the intent to commit a homicide necessarily require an intent to kill, and because voluntary manslaughter remains the only form of manslaughter that requires an intent to kill, the crime of assault with the intent to commit manslaughter can only exist in situations wherein the defendant would have been guilty of voluntary manslaughter if the victim had died.

Analogizing between the crime of assault with an intent to commit manslaughter and the crime of attempted manslaughter, *Taylor* held that, because the former requires an intent to kill, so too does the latter. See *Taylor* at 934 ("By the same reasoning, it is not a logical impossibility for the crime of attempted manslaughter to exist in situations where, if death had resulted, the defendant could have been found guilty of voluntary manslaughter."); see also *Rodriguez*, 443 So. 2d at 290 ("It obviously follows from *Williams* that if the manslaughter attempted is a voluntary manslaughter, there

is no logical impediment to concluding, and we do so conclude, that one can attempt to commit a voluntary manslaughter."); but see *Devoe v. Tucker*, 152 So. 624, 626 (Fla. 1934):

> But the petitioner was not charged with an 'attempt' to commit manslaughter. On the contrary, he pleaded guilty to, and was adjudicated guilty of, the offense of assault with the intent to commit manslaughter, which is made a substantive and definite offense by section 7165, Comp. Gen. Laws, as is recognized by our former decisions, and 'express provision is made by law' for its punishment.
>
> There is a distinction between an 'attempt' to commit an offense under section 7544 and an 'assault with intent to commit' such offense. While there is considerable similarity between the two offenses, they are not in all respects the same, as will be seen by a study of the authorities.

But see also *Vogel v. State*, 168 So. 539, 543 (Fla. 1936) (Ellis, J., dissenting):

> When it is considered that any gesture or threat of violence exhibiting an intention to assault, unless immediate contact is impossible, is an 'assault', and that an 'attempt' means an intention to commit the act of physical violence coupled with an act or movement in execution of the intent sufficiently near to the consummation of the purpose to make it probable, it is impossible to conceive a case where an attempt to commit a felony would not be an assault to that end. (Internal citations omitted)

When reviewing the facts of *Taylor* in order to determine the defendant's mental state, the Court clearly concluded the "sufficient" evidence established that the defendant acted with an intent to kill. See *Taylor* at 934:

> In the present case there was sufficient evidence to support the jury's verdict that appellant had attempted manslaughter. On the night of the shooting, appellant was tending a bar he owned. The three victims came in and started arguing with him

> about his firing Harry Clayton and about proper ownership of a dart throwing trophy. There is conflict in the testimony as to how much the victims actually provoked or threatened appellant before he grabbed his shotgun and started shooting. However, it is clear that appellant intentionally fired the shotgun at Clayton. This is sufficient proof that he intended to kill him.

After determining that the defendant in *Taylor* acted with an intent to kill, however, this Court inexplicably held that the crime of attempted manslaughter only requires the intent to commit an unlawful act. See *Taylor* at 934:

> 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.

Confusion about *Taylor's* holding

In *Taylor*, this Court clearly answered the certified question in the affirmative; hence, the offense of attempted manslaughter does exist in the State of Florida. Also quite clear, this Court limited the crime of attempted manslaughter to instances of manslaughter by act or by procurement. See *Taylor* at 934:

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

Therefore, quite clearly, the crime of attempted manslaughter by culpable negligence does not exist. See *Cooper v. State*, 905 So. 2d 1063, 1064 (Fla. 4th DCA 2005), citing *State v. Brady*, 685 So. 2d 984 (Fla. 5th DCA 1997) ("Attempted manslaughter by culpable negligence is a nonexistent crime."); see generally LaFave and Scott, *Criminal Law, §6.2(c)(2)*, p.502 (2d ed.):

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

Unfortunately, however, *Taylor's* repeated use of the phrase "intent to kill", coupled with the holding statement's use of the phrase "intent to commit an unlawful act", has led to confusion in the District Courts of Appeal. Consequently, those courts still grapple with the question of whether or not *Taylor*: (1) limits attempted manslaughter to voluntary manslaughter by act scenarios (which requires an intent to kill); or, (2) applies with equal force to involuntary manslaughter by act scenarios (which only require the intent to commit an unlawful act which unintentionally causes death). See *Williams v. State*, 40 So. 3d 72, 75 (Fla. 4th DCA 2010)

("[L]anguage from *Taylor* seems to have created some confusion about the elements of attempted manslaughter and the proper wording of a jury instruction on the charge.").

Second District's Interpretation of *Taylor*

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

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

But see *In re Standard Jury Instructions in Criminal Cases_Report No. 2007_10*, 997 So. 2d 403, 404 (Fla. 2008):

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

However, without addressing *Hall's* express interpretation of *Taylor*, the Second District, based upon a concession by the State, recently held that the crime of "attempted manslaughter by intentional act"

does not require an intent to kill. See *Gonzalez v. State*, 40 So. 3d 60, 62 (Fla. 2d DCA 2010):

> At oral argument the State conceded that, based on [*State v. Montgomery*, 35 Fla. L. Weekly S204, S205 (Fla. Apr. 8, 2010)], Gonzalez's conviction for attempted second_degree murder must be reversed due to the then_standard jury instruction for attempted manslaughter by intentional act which was read to the jury.

Essentially, the Second District concluded in *Gonzalez* that the crime of attempted involuntary manslaughter by act ("attempted manslaughter by intentional act") exists under Florida law. As involuntary manslaughter by act does not require an intent to kill, *Gonzalez* clearly conflicts with *Hall*. See *Hall* at 96 ("An intent to kill is required to commit an attempted manslaughter because no person can attempt to cause an unintentional death."). Thus, the Second District appears to have created its own decisional conflict. See *In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc*, 416 So. 2d 1127, 1130 (Fla. 1982) ("The ground, maintenance of uniformity in the court's decisions, is the equivalent of decisional conflict as developed by supreme court precedent in the exercise of its conflict jurisdiction.").

Fifth District's Interpretation of *Taylor*

The Fifth District interpreted *Taylor* as requiring an intent to kill for the crime of attempted manslaughter, but in doing so erroneously limited manslaughter by act or procurement solely to

voluntary manslaughter scenarios. See *Barton* at 641:

> *Taylor v. State*, 444 So. 2d 931 (Fla. 1983), held that an intent to kill is a prerequisite for conviction of assault with intent to commit manslaughter pursuant to *Williams v. State*, 41 Fla. 295, 26 So. 184 (1899). Adopting the *Williams* rationale, *Taylor* held that the crime of attempted manslaughter exists in situations where, if death resulted from an act of the defendant, the defendant would be guilty of voluntary (i.e., intentional) manslaughter at common law. Voluntary manslaughter at common law (as to which there can be an attempt) has been statutorily enacted in Florida as "the killing of a human being by the act (or) procurement ... of another, without lawful justification." § 782.07, Fla.Stat. (1985). The words "act" and "procurement" obviously refer to acts evidencing an intent to kill, as required at common law for voluntary manslaughter. Involuntary (i.e., negligent) manslaughter at common law has been statutorily enacted in Florida as a killing caused by "culpable negligence" (see § 782.07, Fla.Stat. (1985))_ and there is no such crime as "attempted manslaughter by culpable negligence." *Taylor* at 934.

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

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

> intent to kill, although that intent lacks sufficient deliberation to elevate the homicide to first degree murder. See *Williams*, 41 Fla. at 299_300, 26 So. at 186.

However, eight years after authoring a concurring opinion in which he interpreted *Taylor* as requiring an intent to kill for the crime of voluntary manslaughter, Judge Cobb joined in an opinion which stated that the crime of attempted manslaughter only requires the intent to commit an unlawful act. See *State v. Brady*, 685 So. 2d 984, 986 (Fla. 5th DCA 1997) ("In *Taylor*, the court stated that there may be a verdict for attempted manslaughter if there is proof that the defendant had the requisite intent to commit an unlawful act.").

First District's Interpretation of *Taylor*

In contrast with the Second District's decision in *Hall* as well as the Fifth District's decisions in *Barton* and *Sherouse*, the First District interpreted *Taylor* as only requiring an intent to commit an unlawful act for the crime of attempted manslaughter. See *Montgomery* at *6-7 ("We interpret [*Taylor*] as requiring the State to prove only an intent to commit an act that would have resulted in the death of the victim except that the defendant was prevented from killing the victim or failed to do so."). The First District dismissed Judge Cobb's concurring opinion in *Sherouse* as relying erroneously on dicta from the *Taylor* decision. *Ibid*:

> Although Judge Cobb correctly notes in his concurring opinion in *Sherouse* that the *Taylor* court referred to an intent to kill when discussing voluntary manslaughter (i.e., manslaughter by act or procurement), this language can only be construed as

> dicta when compared with the *Taylor* court's direct statement of its holding.

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

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

See also *Watkins* at 939 (“The difficulties that inhere in attempted second_degree murder are undeniable, if not novel.”).

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

> We now hold that there are offenses that may be successfully prosecuted as an attempt without proof of a specific intent to commit the relevant completed offense. The key to recognizing these crimes is to first determine whether the completed offense is a crime requiring specific intent or general intent. If the state is not required to show specific intent to successfully

> prosecute the completed crime, it will not be required to show specific intent to successfully prosecute an attempt to commit that crime. We believe there is logic in this approach and that it comports with legislative intent. Second_degree and third_degree murder under our statutes are crimes requiring only general intent.

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

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

Cf. *Rodriguez*, 443 So. 2d at 289:

> Although one cannot attempt to do an unintentional act, *Williams v. State*, 41 Fla. 295, 26 So. 184 (1899); but see *Gentry v. State*, 437 So. 2d 1097 (Fla. 1983), manslaughter embraces both intentional (voluntary) killings, see W. LaFave & A. Scott, *Criminal Law* §§ 75_77 (1972); 2 C. Torcia, *Wharton's Criminal Law* §§ 153_165 (14th ed. 1979); R. Perkins, *Perkins On Criminal Law* 51 (2d ed. 1969), and unintentional (involuntary) killings, see W. LaFave & A. Scott, supra, §§ 78_79, at 586; 2 C. Torcia, supra, §§ 166_172, at 263; R. Perkins, supra, at 70.

Cf. also *Brown*, 790 So. 2d at 397 (Harding, J., dissenting) ("I find that it is logically impossible to commit the crime of attempted second_degree murder.").

Fourth District's Interpretation of *Taylor*

Recently, the Fourth District attempted to interpret the Florida Supreme Court's decision in *Taylor* with regard to the elements of attempted manslaughter. See *Williams v. State*, 40 So. 3d 72 (Fla. 4th DCA 2010). In *Williams*, the Fourth District, like the Fifth and the First, recognized the repeated references to an "intent to kill" that permeate the *Taylor* opinion. See *Williams* at 75 ("In reaching its decision [in *Taylor*], the court discussed a defendant's intent to kill as an element of the crime [of attempted manslaughter]."). The Fourth District also recognized the Second District's holding in *Hall* that "no person can attempt to cause an unintentional death." *Williams* at 75, quoting *Hall* at 96. Nonetheless, the Fourth District concluded that this Court's decision in *Montgomery* "clarified" that an intent to kill is not an element of either manslaughter or attempted manslaughter. See *Williams* at 75:

> The Second District explained that an intent to kill is an element of attempted manslaughter "because no person can attempt to cause an unintentional death." *Id*. at 96. However, such intent is not an element of manslaughter.
>
> Our Supreme Court has now clarified the elements of both manslaughter and attempted manslaughter, and has relegated *Taylor*'s reference to "an intent to kill" to dicta. *Montgomery*, 2010 WL 1372701, at *3. Any confusion about what noun the adjective "intent" modified was put to rest in *Montgomery*.

In essence, the Fourth District agreed with the First District that the repeated references to an "intent to kill" that permeate this Court's decision in *Taylor* represent nothing more than ignorable

dicta.

The First District's interpretation of *Taylor* remains incorrect

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

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

See also *Brown*, 790 So. 2d at 397(Harding, J., dissenting) ("Most of the jurisdictions that have considered the issue have concluded that the crime of attempted depraved mind or reckless murder does

not exist."); see also *State v. Gray*, 654 So. 2d 552, 553 (Fla. 1995), quoting *Amlotte v. State*, 456 So. 2d 448, 450 (Fla. 1984) (Overton, J., dissenting), but superceded by *Section 782.051(1), Florida Statutes*:

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

But see *Gentry v. State*, 437 So. 2d 1097, 1099 (Fla. 1983):

> In the instant case, the appellant, while allegedly in a drunken state, swore at his father, choked him, snapped a pistol several times to his head and when the weapon failed to fire, struck the father in the head with the gun. Had a homicide occurred, there can be no doubt that the appellant could have been successfully prosecuted for second_degree murder without the state adducing proof of a specific intent to kill. The fact that the father survived was not the result of any design on the part of the appellant not to effect death but was simply fortuitous. We can think of no good reason to reward the appellant for such fortuity by imposing upon the state the added burden of showing a specific intent to kill in order to successfully prosecute the attempted offense.

Under the First District's interpretation of *Taylor*, the State can charge the crime of attempted (involuntary) manslaughter by act if a single-punch fist fight results in a "knock-out", not death. This defies the logic, as the alleged perpetrator would lack the intent to cause death. Yet, nothing in *Montgomery* would prevent such an "absurd" result. See generally *Brown*, 790 So. 2d at 391 (Harding, J., dissenting) ("[I]f the underlying crime is a general intent crime, the State can prove an attempt of that crime without ever establishing that the defendant intended to commit the underlying offense. This is an absurd result.").

The following table highlights the positions adopted by the various courts of this State on the question presented:

Is the Intent to Kill an Element of the Offense?

	Taylor	2d DCA	5th DCA	1st DCA	4th DCA
Voluntary manslaughter	Yes.[8]		Yes. See *Barton*; *Sherouse*.		
Involuntary manslaughter	No.		No. See *Barton*.		
Manslaughter by act	??[9]	No. See *Hall*.	Yes. See *Barton*.[10]	No. See *Montgomery*.	No. See *Williams*.
Manslaughter by procurement			Yes. See *Barton*.		
Manslaughter by culpable negligence			No. See *Barton.*		
Attempted manslaughter	??[11]	?? See *Gonzalez*; but see *Hall*.	Yes. See *Barton*.	No. See *Montgomery*.	No. See *Williams*

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

[8]*Taylor* at 934 ([I]t is not a logical impossibility for the crime of attempted manslaughter to exist in situations where, if death had resulted, the defendant could have been found guilty of voluntary manslaughter.").

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

[10]*Barton* incorrectly suggests that involuntary manslaughter only includes manslaughter by culpable negligence.

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

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

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

See also *Barton* at 641:

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

See also *Hall* at 96:

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

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

District's concerns, as expressed in *Montgomery*, do not apply. See generally *Montgomery* at *2 ("[Appellant] contends the trial court fundamentally erred in giving the standard jury instruction for manslaughter by act, as it erroneously suggests that intent to kill is an element of that crime. We agree..."). Put simply, the standard jury instruction on attempted voluntary manslaughter could not erroneously suggest that the State was required to prove an intent to kill in order to establish the crime of attempted involuntary manslaughter by act because the crime of attempted involuntary manslaughter by act does not exist. See generally *Watkins* at 942 (Harris, J., dissenting) ("Under *Taylor*'s reasoning, even if Watkins had an unpremeditated intent to kill, it would not have constituted attempted second degree murder but rather attempted manslaughter.").

Under the current, standard jury instruction on attempted manslaughter, the Second and Fifth Districts appear to have successfully interpreted this Court's decision in *Taylor*. Entitled "Attempted ***Voluntary*** Manslaughter", the current instruction correctly requires the State to prove that a defendant possessed an intent to kill. See *Rogdriguez*, 443 So. 2d at 289, n.4 ("Apparently, the rule in the majority of the United States is that there is such a crime as attempted *voluntary* manslaughter. See Sachs, *Is Attempt To Commit Voluntary Manslaughter A Possible Crime*?, 71 Ill.B.J. 166 (1982).") (Emphasis in original); see also *Standard Jury*

Instructions in Criminal Cases (93_1), 636 So. 2d 502 (Fla. 1994):

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

But see *In re Standard Jury Instructions in Criminal Cases_Report No. 2007_10*, 997 So. 2d 403, 404 (Fla. 2008):

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

By requiring the State to prove an intent to kill, the current instruction: (1) recognizes that attempted voluntary manslaughter serves as the exclusive form of attempted manslaughter; (2) minimizes the risk of an over-conviction in a case involving heat of passion, sudden combat, or imperfect self-defense; and, (3) provides first degree murder with a necessarily lesser included offense.

Still entitled "Attempted Voluntary Manslaughter", the proposed instruction no longer requires the State prove that the defendant possessed an intent to kill. Instead, the proposed instruction only requires the State to prove that the defendant intended to commit an act "which would have caused death and was not justifiable or excusable attempted homicide." Despite this substantive change,

the Committee declined to re-name the proposed instruction: “Attempted Involuntary Manslaughter by Act.”

VI. CONCLUSION

To ensure that the crime of attempted voluntary manslaughter correctly requires the State to prove that a defendant acted with an intent to kill, and to ensure that the crime of attempted, first degree premeditated murder enjoys a necessarily lesser included offense, this Court should reject the Committee’s proposed instruction and affirm the continued validity of the current instruction.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the Honorable Lisa T. Munyon, 425 N. Orange Ave., Suite 1130, Orlando, Florida 32801-1515, c/o Bart Schneider, Office of the General Counsel, 500 S. Duval Street, Tallahassee, Florida 32399-1925, by MAIL on March ___, 2011

Respectfully submitted and served,

_____

MICHAEL T. KENNETT

Florida Bar No. 177008

C/O
Florida Department of Corrections
Office of the General Counsel
2601 Blair Stone Road
Tallahassee, Fl 32399-2500