

IN THE SUPREME COURT OF FLORIDA

**IN RE: STANDARD JURY
INSTRUCTIONS IN
CRIMINAL CASES –
REPORT NO. 2010-05 /**

CASE NO.: SC10-2434

**RESPONSE OF THE STANDARD JURY INSTRUCTION
COMMITTEE (CRIMINAL) TO COMMENTS**

Three comments were received in case number SC10-2434. One comment pertained to the Committee’s Trafficking proposals and two comments pertained to the Attempted Voluntary Manslaughter proposal. The Committee discussed these comments and the response of the Committee is as follows:

1. Traffickings – Comment from Mr. Kennett

After the Committee sent Report 2010-05 to this Court, the Second District issued *Ewing v. State*, 36 Fla. L. Weekly D421 (Fla. 2d DCA February 25, 2011). The *Ewing* opinion pointed out a potential problem with the box of lesser-included offenses for standard jury instruction 25.2 (sale, purchase, manufacture, delivery, or possession with intent, a controlled substance).

The Committee and Mr. Kennett realized that the boxes of lesser-included offenses for the Trafficking proposals suffered from the same defect identified in *Ewing*. Accordingly, the Committee voted unanimously to amend the boxes of lesser-included offenses and the Comment section for its Trafficking proposals.

Because trafficking can be committed by sale, purchase, manufacture, delivery, bringing into the state, or possession, the Committee wrote a new comment explaining that the lesser-included offenses depend on what was charged and what was supported by the evidence. Since most trafficking trials are based solely on possession, the Committee put Possession in the Category One box with a reference that Possession is only a Category One lesser-included offense if Trafficking via Possession is charged. The Committee also added a note to the Comment section explaining that there is no crime of Attempted Delivery or

Attempted Conspiracy. Other than the boxes of lesser-included offenses and the Comment section, there are no changes from the Committee's original recommendation. The new proposals are attached in Appendix A.

2. Attempted Voluntary Manslaughter – Comments from Mr. Kennett and Ms. Millsaps.

This Court has received numerous comments arguing that Florida manslaughter law tracks the common law. Some of these comments were part of the jury instruction case that accompanied the *Montgomery* opinion. SC10-113. The comments in this case - from Mr. Kennett and Ms. Millsaps - reflect that continuing argument.

This Court has not receded from *Montgomery*, although there is a prior case from this Court that supports the position of Mr. Kennett and Ms. Millsaps. *Taylor v. State*, 444 So. 2d 931 (Fla. 1983). Moreover, there have been a series of District Court opinions that have reversed convictions for attempted second degree murder and attempted manslaughter because the existing standard instruction for attempted voluntary manslaughter, Instruction 6.6, has been found to constitute fundamental error. Instead of waiting for this Court to decide whether the crime of attempted manslaughter exists in the wake of *Montgomery*, the Committee thought it best to get something in the pipeline as quickly as possible.

Because this Court has rejected the idea that Florida manslaughter law tracks the common law of manslaughter, the Committee cannot adopt the ideas of Mr. Kennett and Ms. Millsaps. Accordingly, the Committee used the manslaughter instruction, Instruction 7.7, that was published when *Montgomery* was issued and grafted an attempt instruction onto it. If the Court changes its position in one of the "tagged" *Montgomery* cases, such as *State v. Thomas*, SC09-1984, or in one of the attempted voluntary manslaughter cases currently pending, such as *State v. Rushing*, SC10-1244, the Committee will revise its recommendation. Under the current state of the law, however, the Committee unanimously voted to stay with the proposal that has been forwarded to the Court.

Respectfully submitted this _____ day of
March, 2010.

The Honorable Samantha L. Ward
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CERTIFICATE OF FONT SIZE

I hereby certify that this report has been prepared using Times New Roman
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HONORABLE SAMANTHA L. WARD
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