IN THE SUPREME COURT OF FLORIDA

STANLEY McCLOUD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC14-1150
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

JAMES S. PURDY
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SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The Petitioner, Stanley McCloud, was indicted for the first-degree premeditated murder of his wife (Count I), for culpable negligence resulting in injury to one of his children (Count II), and for culpable negligence in exposing another child to injury (Count III). (I 11) The State later filed an information further charging him with the third-degree felony-murder of his wife, based on the underlying felony of aggravated assault with a firearm. (I 1) Mr. McCloud entered a plea of no contest to the charges involving his children, and received a sentence of time served as to those charges. (I 164-69)

A jury trial on the murder charge followed. (Vols. IX-XII) The State proved at trial that the victim died from a single gunshot wound. (XI 547, 564) The State introduced into evidence, and played for the jury, a recording of a 911 call the defendant made just after the shooting. (IX 277-89) During the call the defendant said he just shot his wife, and is turning himself in. (IX 277) Seven times during the call he said "I didn't mean to do it." (IX 278, 285, 286, 287) Four times during the call, he said "she made me do it;" he explained "she told me...she was going with somebody." (IX 278, 284, 285, 286) Asked if she was alive, he responded "I don't think so. I shot her with a .357." (IX 277)

The State at trial also introduced and played a recording of an interview

police had with Mr. McCloud after he was arrested that night. (XI 481-84, 489-90, 496-524) In that recording Petitioner said ten times that he shot his wife because she confessed to a recent infidelity that night and would not drop the subject. (XI 498, 499, 501, 502, 505-06, 509, 510, 514, 516, 521) He again said that he didn't mean to hurt her or kill her. (XI 499) He explained that he had shot in the dark after the television blinked off (XI 500, 502, 514) and that he didn't initially know if he had missed, or had hit her shoulder. (XI 500, 502, 511) He also said that he didn't make up his mind to shoot, and didn't intend to shoot (XI 503, 516); that it happened in a split second (XI 517); that he tensed up and his mind went blank just before he shot (XI 502); and that "it was just like a balloon that blowed up my head." (XI 509) He explained that when he initially went and got the gun from a closet, his intent was to say "now stop this" and scare her into silence. (XI 499-500, 515-16)

The arresting officer testified at trial that while in his patrol car, the defendant explained "over and over," literally dozens of times, that he didn't want to shoot but that she made him do it. (IX 301-02, 308-09)

The State also proved that the defendant's small children were in bed with their mother when the shot was fired, and that one of the children sustained a bullet graze. (IX 328-32; X 375-78, 406-07)

The defense put on no case, but successfully argued for a special jury instruction explaining the "heat of passion" defense. (XI 621-29; XII 635-37) That instruction, which takes its language from Febre v. State, 158 Fla. 853, 857, 30 So. 2d 367, 369 (Fla. 1947), read as follows:

> Heat of passion is a valid theory of defense to the depraved-mind element of second-degree murder. 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. Pursuant to Florida law, if you believe defendant's passion resulted in a state of mind where depravity - which characterized murder in the second degree - is absent, you may return a verdict of manslaughter.

(XII 705; II 365) The State argued in closing that the evidence would support a verdict of guilty of first-degree premeditated murder, second-degree murder, or third-degree felony-murder. (XII 670-73) The State did not argue the evidence supported a verdict of guilty of culpable-negligence manslaughter. (XII 673-74)

The jury was instructed that it could find the defendant guilty of first-degree premeditated murder, second-degree murder, third-degree murder predicated on aggravated assault, voluntary manslaughter, or culpable-negligence manslaughter. (XII 701-08; II 371, 352-53, 362-63, 366-68) The voluntary manslaughter instruction included the element "Stanley McCloud intentionally caused the death

of Sandra Gail McCloud." (XII 707; II 366) Third-degree murder was listed on the verdict form below second-degree murder and above manslaughter.[1] (III 373-74) After again listening to the 911 tape and the police interview tape during deliberations, the jury returned a verdict of guilty of second-degree murder. (XII 720-63, 767; III 373) The court adjudicated Petitioner guilty in accordance with that verdict, and imposed a sentence of life in prison. (XII 789; III 380-81, 383-84)

On direct review in the Fifth District Court of Appeal, the defendant relied on State v. Montgomery, 39 So. 3rd 252 (Fla. 2010). (Appellant's initial brief in 5D09-3179 at 11-17) The DCA affirmed, citing to cases then pending review in this court on the issue whether Montgomery required reversal of a second-degree murder conviction when a culpable-negligence manslaughter instruction was given. McCloud v. State, 53 So. 3rd 1206 (Fla. 5th DCA 2011). On further review in this court, the State conceded that the case should be remanded for reconsideration in light of Haygood v. State, 109 So. 3rd 735 (Fla. 2013). (State's response to Order to Show Cause, filed May 28, 2013 in case no. SC11-354) This court quashed the DCA's decision by order, remanding for the DCA to reconsider its decision in light of Haygood. McCloud v. State, 137 So. 3rd 1021 (Fla. 2014).

[1] The verdict form treated the question whether the defendant had used a firearm as an interrogatory under each substantive option, rather than laying out e.g. "second-degree murder with a firearm" as a possible verdict. (III 373-74)

On remand, the State argued that Haygood holds that "reversal is required only in those cases where...the error...effectively eliminat[ed] from consideration the only *viable* lesser offense." (State's supplemental brief at 5-6; emphasis in original) It took the position that other viable lesser included offense options had been available to the jury in this case, including culpable-negligence manslaughter and third-degree felony-murder. (Supplemental brief at 7-8) It further argued that the special instruction on heat of passion quoted above cured the Montgomery error. (Supplemental brief at 8)

The DCA issued an opinion reaffirming Petitioner's conviction as follows:

> In this case, the lesser included offense of manslaughter by act was two steps removed from the second-degree murder conviction due to the inclusion of the felony murder charge in the jury instructions and on the verdict form. Accordingly, pursuant to the ruling in Haygood v. State, 109 So. 3rd 735 (Fla. 2013), we have undertaken a harmless error analysis. See also Pena v. State, 901 So. 2d 781 (Fla. 2005). Based upon that analysis, we hold that the trial court's error in instructing the jury on the lesser included offense of manslaughter by act was harmless. Accordingly, we affirm McCloud's conviction and sentence for second-degree murder. See also Daugherty v. State, 96 So. 3rd 1076 (Fla. 4th DCA 2012), *rev. granted*, no. SDC13-1791 (Fla. May 1, 2014).

McCloud v. State, 139 So. 3rd 474 (Fla. 5th DCA May 30, 2014). This court again accepted jurisdiction in this case in December, 2014.

SUMMARY OF ARGUMENT

On remand to consider the effect of Haygood v. State, 109 So. 3rd 735, 739 (Fla. 2013) on this second-degree murder case, the DCA held that the error in instructing on manslaughter was harmless. The court did not elaborate on its reasoning, and the State's arguments for that outcome, made on remand, were not persuasive. This court should either hold that the error was in fact fundamental, on the basis that third-degree felony-murder and manslaughter are both one step removed from second-degree murder, or hold that the error was not in fact harmless, or remand for the District Court of Appeal to elucidate its reasoning.

ARGUMENT

THE DISTRICT COURT'S HARMLESS ERROR CONCLUSION IS NOT SUPPORTED BY THE RECORD. THIS COURT SHOULD HOLD THAT FUNDAMENTAL ERROR TOOK PLACE AT TRIAL, OR HOLD THAT THE RECORD CONTAINS NO BASIS TO FIND HARMLESS ERROR, OR REMAND FOR THE DCA TO SET OUT THE BASIS FOR ITS HARMLESS ERROR CONCLUSION.

Standard of review. The question before this court is a question of law, and *de novo* review therefore applies. See Haygood v. State, 109 So. 3rd 735, 739 (Fla. 2013).

Generally, the test for harmless error is whether there is a reasonable possibility that the error affected the verdict. Menendez v. State, 87 So. 3rd 644, 660-61 (Fla. 2011). Since criminal defendants are entitled to have their juries properly instructed on the elements of all charged offenses and their lesser included offenses, where an incorrect instruction pertains to an element that is material to the jury's deliberation and is in dispute, and manslaughter is one step removed from the offense at conviction, fundamental error occurs. Haygood v. State, 109 So. 3rd 735, 742 (Fla. 2013).

Argument. The Fifth District Court of Appeal, on remand after this court ordered it to reconsider this case in light of Haygood, announced that giving the faulty manslaughter-by-act instruction comprised harmless error. McCloud v. State,

139 So. 3rd 474 (Fla. 5th DCA 2014). The DCA concluded that manslaughter by act is two steps removed from second-degree murder *in this case*, in the sense that third-degree felony-murder appears between the two on the verdict form. The court cited Pena v. State, 901 So. 2d 781 (Fla. 2005) and Daugherty v. State, 96 So. 3rd 1076 (Fla. 4th DCA 2012), *rev. granted*, 2014 WL 7251739 (Fla. 2014), in concluding that placement of the offenses on the verdict form dictates how many degrees removed a lesser offense is from the offense at conviction. Pena does not support the Fifth DCA's conclusion in this case, or the similar conclusion reached by the Fourth DCA in Daugherty.

Pena involved a prosecution for first-degree murder by drug distribution, which is a statutory alternative to first-degree premeditated murder and first-degree felony-murder. Section 782.04(1)(a)(3), Florida Statutes, provides that

> (1)(a) The unlawful killing of a human being:
>
> 3. Which resulted from the unlawful distribution of [various controlled substances] ...when such drug is proven to be the proximate cause of death of the user;
>
> is murder in the first degree and constitutes a capital felony.

Pena unsuccessfully defended that charge on the basis that causation was not shown, then argued on appeal to the Second DCA that the trial court had fundamentally erred by not defining justifiable and excusable homicide; that court

affirmed and certified the question to this court. Id. at 782-86. This court acknowledged cases which hold that where a defendant is found guilty of second-degree murder, failure to define justifiable and excusable homicide is deemed fundamental error even if the record does not support either theory. See 901 So. 2d at 787-88, *citing* Rojas v. State, 552 So. 2d 914 (Fla. 1989) and Blandon v. State, 657 So. 2d 1198 (Fla. 5th DCA 1995). This court distinguished that line of cases and found no fundamental error, holding that justification and excuse "were not material issues" in Pena's case given the nature of the charge. Id. at 787-88. This court further stated that since Pena's jury was instructed on second-degree murder and third-degree murder as well as manslaughter, harmless-error analysis was appropriate given the fact that the affected instruction was three steps removed from the offense at conviction. Id. Ultimately, this court held that fundamental error was not present and approved the Second DCA's decision to affirm. Id. at 788.

The Fourth DCA in Daugherty relied on Pena in holding that whenever a defendant is found guilty of second-degree murder, provided the court instructed on third-degree murder, no flaw in the manslaughter instruction can amount to fundamental error - because more than one "step removed" is present, and therefore harmless-error analysis is mandatory. Daugherty, 96 So. 3rd at 1078. The opinion in

Daugherty expressly states that the DCA's decision was based on the fact the jury had an opportunity to exercise its pardon power. 96 So. 3rd at 1078. The 2012 decision in Daugherty, which is pending belated review in this court, predates this court's express statement in Haygood v. State, 109 So. 3rd 735 (Fla. 2013), that the controlling caselaw in this context "is not hinged on the right of the jury to issue a jury pardon despite the evidence." 109 So. 3rd at 742.

The Daugherty court relied on Echols v. State, 484 So. 2d 568 (Fla. 1985), *cert. den.,* 479 U.S. 871 (1986), as well as on Pena. Echols involved a contract killing carried out by two shots to the back of the head of an old man with an artificial leg. 484 So. 2d at 574. Echols appealed his first-degree murder conviction and death sentence to this court, and argued that the trial court had erred in declining to give a non-standard instruction which would have included *two* readings of the definitions of excusable and justifiable homicide. Id. This court denied relief, noting that "no reading of the evidence would justify a finding of justifiable or excusable manslaughter" on the facts of the case, and noting "[i]n addition" that manslaughter was three steps removed from the offense at conviction. Id.

Neither Pena nor Echols stands for a rule that in an appeal from a conviction for second-degree murder, a manslaughter instruction can never contain a

fundamental error as long as a third-degree murder instruction was read. This court did not purport to announce such a holding in either case, and in Pena, this court did not discuss a conflicting principle it had announced in Herrington v. State, 538 So. 2d 850 (Fla. 1989). In Herrington, the defendant was convicted of second-degree murder; his jury was instructed on manslaughter by act, but the court declined to instruct in addition on third-degree felony-murder. This court reversed his conviction, holding that "[e]ven though the court gave an instruction on manslaughter, which, like third-degree felony murder, is a second-degree felony, the failure to instruct on third-degree felony-murder cannot be deemed harmless error because third-degree felony-murder is only one step removed from the crime charged." 538 So. 2d at 851. In so holding, this court cited Dicicco v. State, 496 So. 2d 864 (Fla. 2d DCA 1986), Piantadosi v. State, 399 So. 2d 382 (Fla. 3rd DCA), *rev. den.*, 408 So. 2d 1095 (Fla. 1981), and Hunter v. State, 389 So. 2d 661 (Fla. 4th DCA 1980). Dicicco, Piantadosi, and Hunter all hold that the degree of a lesser offense determines how far removed it is from the offense at conviction, and further hold that multiple offenses of the same degree can all be "one step removed" from the offense at conviction. Since this court does not reverse itself *sub silentio*, see Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002), Herrington is still good law, as is the precedent it relies on.

This court should hold that Herrington controls this case, and that the second-degree felonies of third-degree murder and manslaughter are *both* one step removed from the first-degree felony of second-degree murder. That holding would prevent a situation where placement of offenses on the verdict form can dictate the outcome of a murder case. See United States v. Washington, 714 F. 3rd 962, 970-71 (6th Cir.), *cert. den.*, 134 S. Ct. 336 (2013) (rejecting interpretation of federal sentencing guidelines that would give greater weight to offenses listed higher on verdict form); United States v. Major, 676 F. 3rd 803, 814 (9th Cir.), *cert. den.,* 133 S. Ct. 280 (2012) (same; interpretation would leave outcomes subject to "caprice.")

The Second DCA has questioned whether the one-step analysis familiar from State v. Abreau, 363 So. 2d 1063 (Fla. 1978), logically applies in cases governed by State v. Montgomery, 39 So. 2d 352 (Fla. 2010). The degrees of murder known to the common law are *sui generis* in that the same set of facts can underlie any of multiple verdicts, since it is entirely trusted to a jury to judge whether a defendant premeditated his actions, or acted with a depraved heart or in the heat of passion. To show fundamental error in the Montgomery context, a defendant must establish that the manslaughter instruction included "intent to kill," and that there was a dispute regarding the affected element of the murder charge, i.e., the defendant's mental state. Berube v. State, 149 So. 3rd 1165, 1168 (Fla. 2d DCA 2014). The

further requirement that he show manslaughter was one step removed from the offense at conviction is redundant, since the fact that intent was at issue establishes prejudice on its own. Id. Since the Abreau analysis is designed to effectuate the right to a jury pardon, see 363 So. 2d at 1064, it has no logical applicability here, since this court has made it clear in Haygood that cases that guard the right to a jury pardon have no relevance in the Montgomery context.

Superimposing the Abreau one-step requirement on the already clear requirements for showing that Montgomery error is fundamental can have the anomalous result of excluding defendants genuinely affected by the error from automatic reversal, as this case shows. At common law, heat of passion killings were treated as voluntary manslaughter. Febre v. State, 158 Fla. 853, 857, 30 So. 2d 367, 369 (1947); Olds v. State, 44 Fla. 452, 33 So. 296, 299-300 (Fla. 1902); see Haygood, supra, 109 So. 3rd at 747 (Canady, J., dissenting) (noting that a sudden heat of passion "could provide [a] basis for a rational jury to return a verdict for manslaughter by act.") In this case, what went on in the defendant's mind was the only disputed issue, and his heat of passion defense was amply supported by evidence. A misleading instruction on manslaughter *cannot* be deemed immaterial to what the jury had to consider in order to apply the law to the facts of this case, see Haygood, and a legal framework that treats such an error as

fundamental, or not, depending on how the verdict form is arranged is overly rigid.

For the foregoing reasons, this court should hold that fundamental error infected Petitioner's trial. His mental state was disputed, the jury necessarily had to resolve the dispute to reach a verdict, the manslaughter instruction added the extra element of intent to kill, and the defendant denied having any such intent repeatedly and memorably in the moments and hours following the shooting. The jury reached its verdict only after listening to the 911 call and that night's police interrogation again. On this record, the extraneous element may well have prevented the jury from considering the manslaughter by act verdict which the common-law tradition strongly suggests was the appropriate verdict in this case. Febre; cf. Haygood.

If this court holds that fundamental error did not take place at trial, this court should still quash the DCA's decision and remand for a new trial, since none of the reasons the State argued in support of a harmless-error holding, in supplemental briefing below, are persuasive. First, it argued that Montgomery error cannot be fundamental unless manslaughter by act is the *only* viable lesser included offense, and the instructional error prevented the jury from considering *that single option*. (State's supplemental brief at 5-7) This court in Haygood did not set out any such new rule of law; it held that since the culpable-negligence manslaughter option was

factually unsupported in Haygood's case, reading that instruction could not have effectively alleviated the prejudice from reading the voluntary-act manslaughter instruction. 109 So. 3rd at 743. This court did *not* hold that in *all* cases where proof of culpable negligence could conceivably support a verdict, instructing on that theory *necessarily* renders the flawed voluntary-act manslaughter instruction immaterial to what the jury must decide. The State posited for the first time in its supplemental brief that the jury in this case *might* have found the presence of both the heat of passion and a negligent act (pulling the trigger without volition). (Supplemental brief at 7) That argument was not advanced by the State at trial, and the jury certainly could rationally have found the presence of both the heat of passion and a voluntary act (retrieving the gun and taking aim).

The State also relied on the fact the jury had the option of finding the defendant guilty of third-degree felony-murder, based on the underlying felony of aggravated assault. (Supplemental brief at 7-8) However, no jury has yet determined that the State proved the underlying felony of aggravated assault beyond a reasonable doubt. An appellate court may not substitute its judgment for that of a jury. Sullivan v. Louisiana, 508 U.S. 275, 279-80 (1993); Haygood, 109 So. 3rd at 743. The State relied at trial on Appellant's interview with police to support the third-degree-murder theory of guilt, but that interview does not at all

clearly show an assault. While the defendant agreed at one point with the detective's suggestion that he might have intended to scare his wife, what the defendant described was fetching the gun while he had it in mind to frighten her into silence, then later shooting in the dark, after the television blinked off and after his wife "just kept right on about [the other man], right on about him, right on about him." (XI 514; see XI 514-22) The defense moved at trial for judgment of acquittal of third-degree murder on the basis the evidence does not suggest the victim saw the gun; the court denied the motion, finding a prima facie case sufficient to go to the jury. (XI 532-35) However, the State's proof left open the distinct possibility that the jury found the State did not prove beyond a reasonable doubt that the defendant ever showed the gun to the victim. See generally Viveros v. State, 699 So. 2d 822, 825 (Fla. 4th DCA 1997) (victim must be aware of impending attack to support assault conviction). Since the proof also left open the clear possibility that the jury rejected a culpable-negligence theory, the State has failed to show there is no reasonable possibility the Montgomery error affected the verdict.

The State further suggested in its supplemental brief that the heat-of-passion language that was included in the instructions given below clarified any problem with the manslaughter instruction as a whole, in that the jurors heard "if you

believe defendant's passion resulted in a state of mind where depravity...is absent, you may return a verdict of manslaughter." (Supplemental brief at 8) However, that language does not resolve, or even purport to address, the Montgomery problem, i.e., the disapproved provision of the standard instruction that ties intent to cause death to voluntary-act manslaughter.

If this court does not remand for a new trial, it should still quash the DCA's decision and remand, directing the DCA to set out the reasoning behind its harmless-error conclusion. The court's opinion, set out in full above at page 5, states on the subject *only* that "we have undertaken a harmless error analysis" and that "[b]ased upon that analysis, we hold that the trial court's error in instructing the jury on the lesser included offense of manslaughter by act was harmless." McCloud v. State, 139 So. 3rd 474 (Fla. 5th DCA 2014). This court in Ventura v. State, 29 So. 3rd 1086 (Fla. 2010), quashed an order affirming a conviction, and remanded for the Third DCA to reconsider the matter and set out its harmless-error reasoning, when that court affirmed a conviction based on only one aspect of the appropriate analysis. 29 So. 3rd at 1091. Here *no* aspect of the DCA's analysis was set out. As this court noted in Ventura,

> [w]e cannot assume that an analysis was conducted or review that which remains hidden behind the written opinion. In other words, the decision does not reflect *any* consideration by the appellate court of whether the [error]

> *contributed to* the conviction.... It is important for the... reasoning of the court [to be] set forth for the guidance of all concerned and for the benefit of further appellate review.

Id. (Emphasis in original.) The United States Supreme Court has similarly held that

> Harmless-error review looks...to the basis on which the jury *actually rested* its verdict. The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict surely would have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the findings to support that verdict might be - would violate the jury-trial guarantee.

Sullivan v. Louisiana, 508 U.S. 275, 289-90 (1993) (emphasis in original; citations omitted).

At trial, the Montgomery error amounted to a deprivation of Petitioner's right to due process of law, protected by the federal and Florida constitutions, as well as a deprivation of his right to trial by jury, protected by both constitutions. In the context of incorrect jury instructions in criminal cases, the rights to trial by jury and due process of law are interrelated. Sullivan v. Louisiana at 278. In criminal cases both due process clauses protect the right to accurate jury instructions on the relevant law. Henderson v. State, 20 So. 2d 649, 651 (Fla. 1945). Appellant has not yet been tried by a jury which was accurately instructed that one of its options was

to find him guilty of voluntary-act manslaughter in light of the provocation that was amply proved at trial. The appellate proceedings to date in this case have also compromised the right to trial by jury, in that the DCA "hypothesized a guilty verdict that was never in fact rendered" on the aggravated assault underlying third-degree felony-murder. See Sullivan v. Louisiana, supra, 508 U.S. at 279. This court should accordingly quash the decision of the Fifth DCA finding any error harmless.

CONCLUSION

Petitioner has shown that this court should quash the Fifth DCA's decision affirming his second-degree murder conviction, and either

(a) hold that third-degree murder and manslaughter are both one step removed from second-degree murder, find fundamental error, and remand for a new trial; or

(b) hold that no basis exists in the record for a finding of harmless error, and remand for a new trial; or

(c) remand for the Fifth DCA to set out on what basis it found harmless error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed to the Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida, 32118, crimappdab@myfloridalegal.com and Kristen L. Davenport, kristen.davenport@myfloridalegal.com and mailed to Stanley McCloud, DOC #U33481, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026-2000, on this 16th day of January, 2015.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

Nancy Ryan

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