IN THE FLORIDA SUPREME COURT

THOMAS DAUGHERTY,

Petitioner,

v.

CASE NO. SC14-860
DCA NO. 4D08-4624
TRIAL NO. 06-878CF01B

STATE OF FLORIDA,

Respondent.
_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

INITIAL BRIEF OF APPELLANT ON THE MERITS

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PRELIMINARY STATEMENT

Mr. Daugherty was the defendant in the trial court. In this Initial Brief, he will be referred to by his proper name. All references to the record will be by a citation to the Volume Number, followed by the page number, all in parentheses.

STATEMENT OF THE CASE AND FACTS

(1) Nature of the case. This is a petition for discretionary review of the opinion of the Fourth District, Daugherty v. State, 96 So.3d 1076 (Fla. 4th DCA 2012) (rehearing granted in part and vacated earlier opinion.) This Court has granted the petition and set the case for oral argument.

(2) Course of proceedings. By Indictment, Mr. Daugherty was charged, along with two other persons, with three crimes. Count One charged that he and Brian Hooks and William Ammons committed the first-degree murder of Norris Gaynor. (R1-1) The crime was also charged so that two of the offenders could have acted as principles. (R1-1) The crime was alleged to have occurred on January 6, 2006. (R1-1)

Count Two charged Mr. Daugherty and the two others with attempting to kill, in a premeditated manner, Jacques Pierre. (R1-1-2) Again, this crime was charged so that two of the offenders could have acted as principles. (R1-2) The crime was also alleged to have occurred on January 12, 2006. (R1-1)

Count Three charged Mr. Daugherty and the two others with the attempted premeditated murder of Raymond Perez. This crime was also charged so that two of the offenders could be principles. (R1-2) The crime was alleged to have occurred on January 12, 2006. (R1-2)

To these charges, Mr. Daugherty plead not guilty. (R1-5) The jury found Mr. Daugherty guilty of the lesser included offense of second-degree murder as to Count One, (R3-533); and the lesser included offense of attempted second-degree murder with a weapon on Counts Two and Three. (R3-534, 535) (SR23-2847-2848)

(3) Disposition in the lower tribunal.

Based on the jury's verdict, the judge adjudicated Mr. Daugherty guilty of these three offenses. (R3-536) The judge then sentenced Mr. Daugherty to life in prison on Count One (R4-625)(R14-1078); thirty (30) years on Count Two (R4-628); and thirty (30) years on Count Three. (R4-631) All the sentences were ordered to run concurrent with each other. (R4-633) The judge gave Mr. Daugherty credit for the 994 days he had spent in the county jail prior to sentencing. (R4-633)

On direct appeal, the Fourth District denied relief except as to the sentencing argument. The Fourth District remanded the case back to the trial judge to reconsider the life sentence imposed on the second-degree murder conviction. Daugherty v. State, 96 So.3d 1076 (Fla. 4th DCA 2012) On remand, the trial judge reduced that sentence to 40 years in prison.

STATEMENT OF THE FACTS

Billy Ammons had pled guilty to the charges in the case and was looking at prison term between ten and twenty years. (SR20-2332,2387) He had been originally charged with a crime, first degree murder, that carried a mandatory life sentence. (SR20-2400) He ultimately pled to third-degree murder. (SR20-2407) On Wednesday night January 11, 2006, Joey Griffith, Brian Hooks and Thomas Daugherty came to the house where he was living with his mother and stepfather. (SR20-2333) At the time, he had known Hooks for about a year and Mr. Daugherty for about a month. He had known Griffith for years. (SR20-2334) He said Hooks and Mr. Daugherty came over at the same time, after 11:00 p.m. The object was to smoke marijuana and drink. They did this for about 45 minutes. They then agreed to take a drive to the beach, because they were bored. (SR20-2336) Ammons was the driver.

As they were driving, Ammons came upon the Florida Atlantic University campus. Either Mr. Daugherty or Hooks pointed out there was a man there and "it might be fun to mess with him." (SR20-2338) Everyone agreed to this and so Ammons parked his car.
There was never any discussion about killing anyone. (SR20-2390)

When they got out of the car, Ammons saw that Mr. Daugherty and Hooks had wooden bats in their hands. (SR20-2340) They all began to walk towards the man. The two men put the bats down their

pants to conceal them. Mr. Daugherty and Hooks walked in front of them and ran into some skateboarders. Hooks asked the skateboarders if they wanted to beat up some bums with them. (SR20-2341) The skateboarders apparently did not want to.

Hooks and Mr. Daugherty went to where the man was while Ammons and Griffith stayed on the other side of the road. He saw Mr. Daugherty run at the guy and take a swing at him with the bat. The man pushed Mr. Daugherty and he fell down and dropped the bat. (SR20-2343) Hooks then ran up to the guy and hit him in the shoulder. After that, they all ran away. (SR20-2343)

They all walked back to the truck, laughing. (SR20-2349) Ammons then drove them back to his house. They stayed there for a half hour or so, smoking weed and drinking. Ammons said the idea to go back out and do another beating was by mutual agreement. (SR20-2349) They got back into the truck and drove the same way they did the first time. They went by the first place and saw yellow crime tape up. (R20-2351)

This time Ammons had brought a paint gun. He found a place to park by the Performing Arts Center. Mr. Daugherty and Hooks got out and went down the stairs. Ammons and Griffith were standing by the truck, getting some more marijuana to smoke. Mr. Daugherty then came back up the stairs and said that they had found another one. (SR20-2353) Mr. Daugherty and Ammons went back down

the stairs; Mr. Daugherty pointed out where the man was laying on a bench. (SR20-2354)

Ammons saw Mr. Daugherty raise up his bat as if he was going to hit the man. Ammons started firing the paint ball gun. He says he probably fired it between five and ten times. (SR20-2354) Mr. Daugherty then hit the guy on the head with the bat. He hit the man hard. (SR20-2359) When Ammons saw blood, he stopped firing. He then ran back to the stairs. (SR20-2355) All of them soon met there. (SR20-2360) As they were walking away, Mr. Daugherty turned around and saw the man sitting on the bench with his head in his hands. He commented that the man was getting up. Mr. Daugherty and Hooks ran back towards the man. Hooks hit the man with a rake; Mr. Daugherty then hit the man with the bat twice. (SR20-2365) The man then slouched over. (SR20-2367)

Ammons went back to the truck where Griffith was and left. Mr. Daugherty and Hooks were not with them. Ammons drove away and then went looking for Mr. Daugherty and Hooks but could not find them. He tried calling on his cell phone but it took a few minutes for one of them to call him back. They told Ammons where they were and Ammons went and picked them up. (SR20-2369) They got back to the car and drove back to Ammons house. (SR20-2369)

Griffith left. Ammons, Hooks and Mr. Daugherty stayed around and started smoking more marijuana and drinking more alcohol.

They were acting hyper. (SR20-2371) They finally convinced Ammons to go back out again. Hooks said he would drive. (SR20-2372) They drove the same route until they saw another man sitting down by the bus stop on 17th Street. Hooks found a place to park by the Church by the Sea. (SR20-2373) Once they got out, Mr. Daugherty got a bat from the back of the truck bed. Hooks got a golf club out of a tool box. (SR20-2375) He also got a play plastic sword and gave it to Ammons. (SR20-2376)

They started walking toward the man when they spotted another man laying on the ground under a blanket. Ammons ran up to the guy, along with the other two, and Ammons started him with the sword. Mr. Daugherty started hitting him with the bat. The man got up and started yelling. They all ran away. Ammons had lost the sword; Hooks no longer had the golf club; Mr. Daugherty still had the bat. (SR20-2379) They got back in Hooks truck and drove back to Ammons house. (SR20-2379) Once there, Mr. Daugherty and Hooks left. (SR20-2380)

Luciano Delmore knew Mr. Daugherty, Hooks and Ammons. (SR21-2572) After Ammons was initially released from jail after his first arrest, he went to Delmore's house. Ammons told Delmore that "Look man, I went into the police station, saved my own ass. Thank God." (SR21-2572) Ammons expressed that he hoped Hooks would get out but did not care what happened to Mr. Daugherty since he had

only known him for a brief period of time. (SR21-2572)

Joey Griffith was best friends with Billy Ammons and in January of 2006, had known Mr. Daugherty for about two weeks. (SR19-2265) Before midnight on January 11, 2006, he went to Ammons house. Mr. Daugherty was there and Brian Hooks had just arrived from work. Once they were at the house, they started drinking and smoking marijuana. (SR19-2266) Mr. Daugherty was drinking vodka straight out of a bottle in addition to smoking marijuana. (R17-427) He was drunk. (R17-427) After drinking and smoking for some time, they all went for a ride to the beach. (SR19-2269) Billy Ammons is driving his black Chevy Blazer. They brought marijuana to smoke with them. (SR19-2273)

While driving near the Florida Atlantic University Campus, Mr. Daugherty and Hooks say "let's go get this one right here." (SR19-2276) They were referring to a man sitting on a bench. (SR19-2276) There had been talk as they had been driving of beating up a bum. (SR19-2277) Ammons pulled over and parked. They got out of the car; Hooks and Mr. Daugherty got bats out of the back. Griffith said neither he nor Ammons got a bat. (SR19-2280) They all start walking towards the campus. There some skateboarders out who Hooks and Mr. Daugherty talked with, asking them if they wanted to help them beat up some bums. (SR19-2282)

Mr. Daugherty and Hooks crossed the street and walked up to

the man they had seen earlier sitting on the bench. Using both hands, Mr. Daugherty swung the wooden baseball bat at the man. (SR19-2287) Griffith said he then ran away, followed by Ammons. (SR19-2290) Hooks and Mr. Daugherty then came next. (SR19-2292)
They all walked back to the car and got into it. He did not recall any conversation between the four of them. (SR19-2295)

Ammons then drives to the Performing Arts Center. It was Ammons idea to look for another person to beat up. (R17-435) He said he and Ammons stayed at the car while Mr. Daugherty and Hooks went to find someone else to beat up. One of them said that they had found one. (SR19-2299) Ammons got his paintball gun and they all walked down the steps into the park. Mr. Daugherty is standing behind a bench and Ammons is in front of the bench. There was a man laying on the bench. (SR19-2302)

Mr. Daugherty had a baseball bat in his hands. He swung the bat over his head and in a downward motion in the area of the man's head. (SR19-2305) He saw this happen once. (R17-368) Griffith finally admits he never saw what happened. (R17-450) "Q: Did you see [Mr. Daugherty] hit Mr. Gaynor in the head? A: No." (R17-450) As Griffith was running away, he heard paintball shots being fired. (SR19-2305) He says he actually saw Mr. Daugherty hit the man with the bat. (R17-330) When everyone goes back to the car, Ammons does not want the bats to be put in his car. (R17-334) So Mr.

Daugherty and Hooks go back into the park to get rid of the bats. Griffith and Ammons then drive away without them. (R17-335)

Ultimately, Hooks and Ammons talked to each other and a couple of minutes later Ammons picks them up. (R17-338) Mr. Daugherty no longer had a bat but Hooks did. (R17-338) Griffith says that "they" said they went back and hit the guy on the bench a second time. (R17-340) He said they did this so the man on the bench would not be able to see them get rid of the bats. (R17-340) Griffith said he did not know anything about the third incident. (R17-374) He ultimately said he did nothing wrong. (R17-332,400)

Kaitlyn Brown knew Mr. Daugherty for ten years. (SR19-2239) She called him on Thursday morning, January 12, 2006, because she had not seen him in school the past couple of days. (SR19-2241) he told her that he was in trouble and he asked her to meet with him at his house. She went there. (SR19-2242) She waited for some time when Billy Ammons and Mr. Daugherty drove up. They were smoking marijuana. (SR19-2243) Mr. Daugherty told her that "they were pinning him for murder that somebody was dead and for beating down a bum." (SR19-12244)

Later that morning, he called her and asked to return. She went back to his house. Along with Mr. Daugherty, Billy Ammons, and Brian Hooks were also there. (SR19-2245) Mr. Daugherty was packing a bag; he hugged and kissed her, told her he loved her,

and left. (SR19-2247) On his way out, he told her to watch the television news at noon. She watched the video at that time and identified Mr. Daugherty and Mr. Hooks. (SR19-2247) After that she called him and told him she did not want to have anything more to do with him. (SR19-2248)

A. The Killing of Norris Gaynor

A man who knew Mr. Gaynor from the area where Gaynor stayed saw him that night. They spent some time together. (R16-243) Before he left to get something to eat at the local 7-11, the man saw a couple of guys hanging out watching them. (R16-242) He described them as white males, one with bushy curly dark hair and the other with short cut blond hair. (R16-255) They seemed to be teenagers or just a little bit older. (R16-256) Actually, he mostly saw the men with their backs to him and barely saw their faces. (R16-269) He had both men shorter than 5 feet, seven inches, although Mr. Daugherty is considerably taller. (R16-269) The man then identified Mr. Hooks and Mr. Daugherty as the two men he saw that night. (R16-257) The man said he watched the video on television and told the police it was the same two men he had seen near Mr. Gaynor. (R16-259) The man gave a variety of inconsistent answers about what he knew. He said alcohol affected his memory. (R16-279)

Todd Jackson was the first police officer on the scene. (R15-

8. He saw Mr. Gaynor slumped over on the right side of a bench, bleeding profusely. (R15-9,11,13) There were several lacerations to his face and grayish matter coming out of those cuts. (R15-11) His face was swollen and his eyes were almost swollen shut. (R15-11) His breathing was labored and it sounded as if he was choking on something. (R15-10) There was a pool of blood covering one of his feet. (R15-11)

Wesley Taylor is a Fort Lauderdale police officer who responded to a call at Esplanade Park. (SR14-1559) He had already been to the Florida Atlantic University campus about Mr. Pierre. He saw a black man sitting on a bench with blood draining down his head onto the ground. (SR14-1559) The man was having problems breathing. (SR14-1559)

Mr. Gaynor was seen by an emergency room physician at 3:22 a.m. (SR14-1651) He was the first person treated of the three involved in this case. (SR14-1651-1652) Gaynor looked horrible when he was brought in; he had suffered a head injury and he was not breathing. A CAT scan showed he had skull and facial fractures, as well as significant internal bleeding. (SR14-1657-1658) These injuries appeared to be the result of blunt force trauma. He was close to being dead. (SR14-1654) The emergency room physician thought he had been struck two or more times on the head. (SR14-1670) Besides the swelling on his face, there was some swelling

on his left hand. He was pronounced dead about four hours later. (SR14-1657) He died from blunt force trauma to the head. (R15-93) The injuries to the head were caused by one or maybe two blows and possibly more. (R15-100,102)

The medical examiner who testified at trial supervised the autopsy done on Mr. Gaynor on January 12, 2006. (R15-73) There was indications that Mr. Gaynor had received medical treatment prior to his death. (R15-77) The doctor could see that Mr. Gaynor suffered recent injuries to his head, body, and arms. Both of his eyes were swollen. He had cuts and bruises on the middle of his forehead. (R15-81-82) His nose was broken and his lips were swollen. (R15-82)

The skull had suffered a depressed fracture and the brain underneath it was crushed and cut in the front. It was very swollen. (R15-83) There was bleeding on the surface. (R15-83) There were extensive fractures above the eyes. (R15-83) He had bruising on his back and the back of both of his hands. (R15-85)

Mr. Gaynor suffered five cracked ribs. (R15-87) There was no bruising on the front of his body or below his waist. (R15-86) It appeared he had been struck four times in the back. (R15-113) These blows were struck with a different object than the one that struck the skin. (R15-113)

B. The Attempted Killing of Jacques Pierre

Mr. Pierre is a 75 year old man originally from Haiti. (SR14-1630) It was about 4:30 or so in the morning when he was walking toward Broward General with a newspaper in his hand. He had dropped the papers and when he bent over to pick them up, he got hit with a baseball bat on the back of his neck. (SR14-1632) When he tried to take the bat away, he got hit in the head. He also got struck on his forearm down to his wrist. (SR14-1634)

Mr. Pierre saw two men who attacked him. One was dressed in black and the other had a white shirt. He actually did not see a man dressed in black until after he viewed the video. (SR14-1641) After they finished hitting him, they ran away. (SR14-1635) He said he spent two weeks in a hospital and then was released for physical therapy. (SR14-1638)

Mr. Pierre was seen in the hospital that morning about 2:10 a.m. (SR14-1672) He had a cut on his head and some swelling on his forehead and an injury to his left forearm wrist area. (SR14-1673) He also had a skull fracture. (SR14-1673) The fracture was in the frontal bone. This is a thick bone and difficult to break. (SR14-1674) The physician thought the injuries were the result of blunt force trauma. (SR14-1675) He thought there were two blows to Mr. Pierre's head that would have caused these injuries. (SR14-1676)

Officer Taylor was working the early morning shift on January 12, 2006, a Wednesday night that turned into Thursday morning. (SR14-1545) He had a trainee with him, Anthony Aguilar. (SR14-1546) At 1:24 a.m., they were dispatched to 111 East Las Olas Boulevard in response to a report of an assault and battery. (SR14-1546) This was on the Florida Atlantic University campus. (SR14-1551) The incident had reportedly occurred at a little after 1:00 a.m. Once there, he saw an elderly man, bleeding in the head area, sitting on a bench. (SR14-1547) It appeared the man had been hit above the eye and on the forehead as well as his wrist. (SR14-1584) The man was homeless. (SR14-1553) The man gave the officer a description of two white men who had beat him. (SR14-1549) The man said he had been hit with baseball bats. The officer spoke with him for some time, about 15 minutes, while Mr. Pierre was sitting on the bench. (SR14-1576-1577)

Taylor learned from the security guard that there was a video recording in the area. (SR14-1557) At that point, Taylor viewed the video. Taylor said the video showed the man being struck by baseball bats. (SR14-1562)

C. The Attempted Killing of Raymond Perez

Mr. Perez was a 52 year old man who had been homeless since 1996. (SR-2102) He was homeless in January of 2006 and generally would sleep by the Church by the Sea. (SR18-2101) He thought he

would have gone to sleep about nine or ten p.m. on the night of January 12, 2006. He was by himself. (SR18-2105)

At some point he heard three guys laughing and hitting him on his arms and legs. (SR21-2576) He said there was a fourth man, in a vehicle. (SR21-2576) This is what woke him up. He felt like he was being hit with a baseball bat or some piece of wood. (SR18-2106) He believed he was hit multiple times. (SR18-2107) No one ever said anything. (SR18-2109) In response, Mr. Perez started screaming for the police. (SR18-2110) The men are leaving. One of the men, he did not know which one, took a weapon from his pocket and slashed his wrist. (SR18-2111)

Mr. Perez could identify the men as white and very young. He said there were four people present. (SR21-2576) One of the descriptions of the people included that the white male was about 5 feet, seven inches tall, and weighed about 135 pounds with blond hair that was short and straight. Perez included that the man had a light complexion, medium build, was clean shaven. (SR21-2576) He could not tell the hairstyles because he was seeing them as they walked away. (SR18-2112) After yelling at the men, they turned around and smiled at him. They had stopped laughing. (SR18-2113) After a few minutes, he saw a truck pull up from the church parking lot and then leave. He described the truck as very big, with shiny white paint. There was no lettering on the truck. (SR18-

2215) Although Mr. Perez talked about Mr. Daugherty in his testimony, he could not identify him in the courtroom. (SR18-2124) He was also clear that the person he thought was Mr. Daugherty never had anything in his hands. (SR18-2144)

Mr. Perez was seen at the hospital after complaining of right knee and right wrist pain. He also had a head injury. (SR14-1679) This injury would be consistent with being caused by blunt force trauma. (SR14-1680) He had a cut on his scalp that required sutures. (SR14-1679) He had some cuts on his right arm. (SR14-1679)

D. Science Information

1. No DNA sample recovered as part of the police investigation in this case was ever matched to Mr. Daugherty. (SR18-2214; 2216; 2219)

2. At the time Mr. Daugherty surrendered himself to law enforcement, the police did not see any injuries to his person. (SR18-2190)

SUMMARY OF THE ARGUMENT

This is a case where Mr. Daugherty conceded some criminal responsibility for the crimes charged in this case. (SR13-1514) He disputed that there ever any intent to kill anyone. (SR13-1527) There were three separate events. The first one occurred about 1:20 a.m. on the Florida Atlantic campus on Los Olas Boulevard. (R5-698) The second and third events happened between then and 4:00 a.m. at two different locations. (R5-698)

The petition in this case raises two legal issues. The first legal issue involves the decision by the Fourth District that the unobjected to jury instruction for manslaughter by act was not fundamentally flawed as found in Haygood v. State, 109 So.2d 735, (Fla. 2013). The Fourth District decision was decided prior to Haygood being decided but the Fourth District said any result from this Court would not matter because the faulty jury instruction was "actually two steps removed from second-degree murder under the facts of this case." The Fourth District reliance on the pardon power for the application of this rule of law is in error. Haygood made it clear that the pardon power has nothing to do with a determination of whether a jury instruction is fundamental error. The rule of law regarding the one step removed analysis is simply not pertinent to the result in this case.

The second legal issue is the jury instruction given on the two attempted murder convictions. The Fourth District determined, based on its precedent at the time, that there was no fundamental error. Williams v. State, 40 So.3d 72 (Fla. 4th DCA 2010) Recognizing there was a conflict between districts on this point, the Fourth District certified the conflict for resolution by this Court. There can be no serious discussion that the Fourth District's conclusion is in error.

The Fourth District has itself understood the error of its ways. In the case of Mr. Daugherty's codefendant, Brian Hooks, the Fourth District reversed his convictions for the two attempted murders and remanded for a new trial on those counts. Hooks v. State, 39 Fla. Law Weekly D2405 (Fla. 4th DCA 2014).

ARGUMENT

ISSUE ONE

THE FOURTH DISTRICT FAILED TO ACCURATELY PREDICT THIS COURT'S DECISION IN HAYGOOD V. STATE AS IT RELATES TO THE INSTRUCTION TO THE JURY ON MANSLAUGHTER BY INTENTIONAL ACT

A. STANDARD OF REVIEW

This Court reviews this Issue de novo. McDonald v. State, 957 So.2d 605 (Fla. 2007)

B. THE MERITS

In this case, the judge instructed the jury that to prove the crime of manslaughter, the "State had to prove the following elements beyond a reasonable doubt:

1. Norris Gaynor is dead.

2. a. THOMAS DAUGHERTY intentionally caused the the death of Norris Gaynor; or

b. The death of Norris Gaynor was caused by the culpable negligence of THOMAS DAUGHERTY."

(R3-499) (SR23-2770) The judge then gave the standard jury instruction as to culpable negligence. (R3-499-500) (SR23-2770-2771) The judge then told the jury that "In order to convict of manslaughter by intentional act, it is not necessary for the State to prove that the defendant had a premeditated intent to cause death." (R3-500) (SR23-2771)

It is now well established that the jury instruction given in this case for manslaughter by intentional act is fundamentally wrong. State v. Montgomery, 39 So.3d 252 (Fla. 2010) This Court has also held that the giving of the culpable negligence portion of the manslaughter instruction does not remedy the error when there is no evidence to support the giving of that instruction. Haygood v. State, 109 So.3d 735 (Fla. 2013)

The Fourth District came to two conclusions about the instruction. The first conclusion was that the parties disputed that there was evidence to support the giving of the culpable negligence instruction. As argued by Mr. Daugherty before the Fourth District, there is simply no evidence of culpable negligence. Mr. Daugherty maintains that position before this Court.

The Fourth District then determined that it would not matter how Haygood would be decided. In a footnote to the following paragraph, the Fourth District said that "our resolution of this issue will not be affected by the Florida Supreme Court's ultimate determination regarding the certified question in Haygood v. State, 54 So.3d 1035 (Fla. 2nd DCA 2011), rev. granted, 61 So.3d 410 (Fla. 2011)

> Our analysis is not dependent upon the fact that the culpable negligence instruction was given. Even

without considering that the jury received the manslaughter by culpable negligence instruction, we find that there is an independent reason why giving the manslaughter instruction, as a lesser included offense of the murder charge, was not fundamental error in this case. As our supreme court has explained, 'When the trial court fails to properly instruct on a crime two or more degrees removed from the crime for which the defendant is convicted, the error is not per se reversible, but instead is subject to a harmless error analysis." Pena v. State, 901 So.2d 781, 787 (Fla. 2005). Here, because the jury was also instructed on the lesser included offense of third-degree felony murder, manslaughter was actually two steps removed from second-degree murder under the facts of this case. See Echols v. State, 484 So.2d 568, 574 (Fla. 1985) (holding that manslaughter was a lesser included offense that was three steps removed from first degree murder where the jury, if inclined to exercise its "pardon" power, could have returned verdicts of second-degree or third-degree murder). If the jury had been inclined to exercise its pardon power, it could have returned a verdict of third-degree felony murder, which was the next lower crime on the verdict

form; the evidence in this case would have supported a conviction for third-degree felony murder. We conclude that the error in the manslaughter by act instruction was harmless and did not constitute fundamental error.

This reasoning is wrong. By statute, manslaughter is the "killing of a human being by the act, procurement, or culpable negligence of another . . . ." Section 782.07(1), Florida Statutes. In this case, while the instruction on culpable negligence was given, there was no evidence to support it. There was no indication by the prosecution, nor was there a theory of defense, that argued that the killing was anything but intentional. This being the case, the jury certainly would not have chosen this option. The confusion that existed by the erroneous manslaughter instruction would cause a jury to engage in the same problematic exercise condemned in State v. Montgomery, above.

The Florida Supreme Court held that Montgomery was "entitled to an accurate instruction on the lesser included offense of manslaughter." Mr. Daugherty is also entitled to an accurate instruction under the facts of his case. The error is fundamental precisely because the error "is pertinent or material to what the jury must consider to convict." State v. Delva, 575 So.2d 643 (Fla. 1991), quoting Stewart v. State, 420 So.2d 862 (Fla. 1982) The culpable negligence aspect of the manslaughter instruction

played no role in the actual decision in the case.

Fundamental error exists only when there is a factual dispute about an element of the crime relating to the unlawful instruction. Stewart v. State, 420 So.2d 862 (Fla. 1982) In this case, it was a disputed element at trial as to the intent element of the killing of Mr. Gaynor. This is what makes the error fundamental.

The Fourth District's attempt to predict this Court's result in Haygood fails this test. The Fourth District believed that the rule of law that would come from Haygood would be grounded on the application of the pardon power. Haygood explicitly rejected this analysis. The pardon power analysis is not controlling in Mr. Daughtery's case because of the application of the greater rule of law.

Mr. Daughtery was charged with one count of first degree murder. He was convicted of second degree murder. His case contains the error detailed in *Montgomery v. State*, 39 So.2d 252 (Fla. 2010). Mr. Daughtery got an instruction on third degree murder. The Fourth District determined that because of this, Mr. Daugherty was not entitled to relief because he did not fit within the one degree removed rule that would result in fundamental error. Instead, Mr. Daugherty's case was to be judged by a harmless error analysis. In its decision, the Fourth District said that error was not harmful because the third-degree instruction allowed the jury to exercise

its pardon power. "If the jury had been inclined to exercise its pardon power, it could have returned a verdict of third-degree felony murder, which was the next lower crime on the verdict form; the evidence in this case would have supported a conviction for third-degree felony murder."

Haygood has now made clear that the issue of the flawed jury instruction is not related to the exercise of the jury's pardon power. "The dissent contends that the jury pardon power was the basis of the majority's decision in both Montgomery and this case; and it further suggests that the finding of fundamental error in both cases is completely divorced from the question of whether any evidence would have supported a conviction of the lesser included offense of manslaughter. This is incorrect. This decision is not based on the jury pardon power doctrine and is not hinged on the right of the jury to issue a pardon despite the evidence. To the extent the Fourth District relies on jury pardon power cases, this theory has been discredited.

This Court, using Judge Altebrand's concurring and dissenting opinion from the Second District's Haygood opinion as its starting point, stated plainly - "I simply fail to see the logic by which a fundamental error of this kind becomes harmless merely because

a jury receives an alternative instruction that has little or no application to the evidence presented at trial."

This Court has reiterated the rule of law that says that Haygood was "firmly founded on the longstanding principle that a defendant is entitled to have the jury correctly instructed on the crime charged and the lesser included offenses." This was made clear by what the Second District had decided. Haygood v. State, 54 So.3d 1035 (Fla. 2nd DCA 2011). Haygood was convicted of second-degree murder. Relying on Montgomery, Haygood argued that giving the erroneous manslaughter instruction was fundamental error and entitled him to a new trial. The Second District rejected this argument because the jury had also been instructed on the culpable negligence instruction component of manslaughter. This was in spite of the agreement there was no evidence to support giving that part of the manslaughter instruction. This Court said this was wrong.

To the extent the Fourth District says that the evidence could have supported a conviction for third-degree murder, this is not accurate. The State made no such claim. Instead, it simply relied on the fact that the jury got such an instruction. While the parties have argued about whether the evidence supported the culpable negligence instruction, no comparable attention has

been paid to third degree murder. Mr. Daugherty did argue that there was no evidence that supported giving this instruction.

The claim that a defendant is entitled to an accurate instruction on a lesser offense should be applicable to Mr. Daugherty. The evidence of intent was in dispute. There is no evidence of either culpable negligence or third-degree murder. This means giving the manslaughter condemned in Montgomery is fundamental error in Mr. Daugherty's case.

This Court formulated the pardon power rule relating to jury instructions in State v. Abreau, 363 So.2d 1063 (Fla. 1978) It was in the context of whether a jury instruction, that was not challenged at trial, was fundamental error. In Abreau, the trial judge gave an instruction that was one-step removed from the main charge but refused to give an instruction on a lesser offense two steps removed. This Court decided that this constituted a legally significant difference because "since in the latter situation, unlike the former, the jury is given a fair opportunity to exercise its inherent "pardon" power by returning a verdict of guilty as to the next lower crime. For example, if a defendant is charged with offense "A" of which "B" is the next immediate lesser-included offense (one step removed) and "C" is the next below "B" (two steps removed), then when the jury is instructed on "B" yet still convicts the accused of "A" it is logical to assume that the panel

would not have found him guilty only of "C" (that is, would have passed over "B"), so that the failure to instruct on "C" is harmless. If, however, the jury only receives instructions on "A" and "C" and returns a conviction on "A", the error cannot be harmless because it is impossible to determine whether the jury, if given the opportunity, would have "pardoned" the defendant to the extent of convicting him on "B" (although it may have been unwilling to make the two-step leap downward to "C")."

This rule of law is limited to a specific circumstance based on permitting a jury to engage in a legal fiction. The availability of the pardon power is widely condemned, yet equally widely accepted. It is the unconstitutional authority of a jury to ignore the law and find an accused guilty of a crime (not guilty) despite facts to the contrary. Sanders v. State, 946 So.2d 953 (Fla. 2006)

This Court has created an appellate remedy for this doctrine. It articulated a rule of law that it is per se reversible error to not instruct on a one-step removed crime. Reddick v. State, 394 So.2nd 417 (Fla. 1981) To this end, it simply does not matter whether the instruction itself was flawed nor whether the flawed instruction related to disputed issue of material fact. The not giving of the instruction was error, even if there was no evidence to support giving it. Fisher v. State, 834 So.2d 921 (Fla. 3rd DCA 2003).

The pardon power rationale in the jury instruction context is limited to a specific circumstance. The appropriate rule of law in Mr. Daugherty's case is not dependent on the pardon power, as Haygood made clear. This is because the purpose of instructing a jury on a lesser included offense in his case is consistent with what judges tell juries at the time of the instruction - it is to permit the jury's fact-finding prerogative. Stuckey v. State, 972 So.2d 918 (Fla. 5th DCA 2007), rev. denied, 980 So.2d 491 (Fla. 2008) A standard instruction given at the end of any criminal trial is that the jury "must follow the law as is it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending on you to make a wise and legal decision in this matter." Standard Jury Instruction 3.10, Rules for Deliberation.

Despite this clear admonition, the law allows a jury to exercise a pardon as a matter of grace. To this end, the pardon power of a jury should not be abolished (as a practical matter it could not be). However, it should not affect the decision in reviewing the harmfulness of the error in an erroneous jury instruction unless that is the argument made. The pardon power argument should be limited to those instances where the omitted instruction is one step removed.

The rule of law of Haygood respects the rule of law pertaining to when a jury must be instructed on a permissive lesser included offense. First, all of the elements of the permissive offense are alleged in the charging document and second, there is some evidence to support a conviction for that lesser offense. Wimberly v. State, 498 So.2d 929 (Fla. 1986). Haygood recognized that the giving of a wrong instruction on a permissive lesser offense, regardless of its place in the chain, must be evaluated against this standard. (Another standard instruction tells the jury that "You may find the defendant guilty as charged in the [information] [indictment] or **guilty of such lesser included crime as the evidence may justify or** not guilty.") (Emphasis supplied).

The manslaughter jury instruction given in this case was error. Everyone agrees on this. The question is what is the effect of this error? Mr. Daughtery's intent on the murder count was in dispute. The record did not support giving either the culpable negligence part of the manslaughter instruction nor the third-degree murder instruction. This should mean that the instructional error in this case should be treated as fundamental and requires a new trial on the second-degree murder conviction.

ISSUE TWO

THE FOURTH DISTRICT OPINION IS INCONSISTENT WITH THIS COURT'S DECISION IN WILLIAMS V. STATE AS IT RELATES TO INSTRUCTING THE JURY ON MANSLAUGHTER BY INTENTIONAL ACT

A. STANDARD OF REVIEW

This Court reviews this Issue de novo. McDonald v. State, 957 So.2d 605 (Fla. 2007)

B. THE MERITS

The instructional mistake for manslaughter as a lesser of first-degree murder is repeated in both Counts Two and Three in the attempted first degree murder charges. The explicit lesser included offense for the crimes of attempted first degree murder was "attempted voluntary manslaughter" (R3-506 as to Count Two; and (R3-513 as to Count Three). The instruction said to prove Mr. Daugherty guilty of attempted voluntary manslaughter, "the State must prove the following element beyond a reasonable doubt:

> 1. THOMAS DAUGHERTY committed an act or procured the commission of an act, which was intended to cause the death of Jacques Pierre and would have resulted in the death of Jacques Pierre except that someone prevented THOMAS DAUGHERTY from killing Jacques Pierre or he failed to do so.

(R3-506) Again, the judge told the jury that "In order to convict of Attempted Voluntary Manslaughter it is not necessary for the State to prove that the defendant had a premeditated intent to cause death." (R3-506) This same instruction was given as to Count Three, relating to Raymond Perez. (R3-513)

There is no question that this instruction is unlawful. There is no question the erroneous instruction involved a disputed issue of material fact. The Fourth District has put to rest any dispute about this. In Mr. Daugherty's co-defendant's case, the Fourth District has determined that the jury instruction at issue was fundamental error requiring reversal of a new trial.

The relief was granted pursuant to the filing of a habeas petition alleging ineffective assistance of appellate counsel. "In the direct appeal, Petitioner's appellate counsel argued that there was fundamental error in the jury instruction. We affirmed without certifying a conflict or providing a citation. Hooks v. State, 39 Fla. Law Weekly D2405 (Fla. 4th DCA 2014). This prevented petitioner from obtaining relief following the Florida Supreme Court's decision resolving the conflict between District Courts in Williams v. State, 123 So.3d 23 (Fla.2013). We agree with Petitioner that it would be manifestly unjust to deny him the same remedy that has been afforded to other similarly situated defendants." Hooks v. State, 39 Fla. Law Weekly D2405 (Fla. 4th DCA 2014).

CONCLUSION

Based on the foregoing arguments and authorities, the Petitioner respectfully requests this Court answer both questions in the affirmative and quash the decision of the Fourth District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered by U.S. Mail/Email to: Jeanine Germanowicz, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-3432, CrimAppWPB@myfloridalegal.com, dated this 12th day of January, 2015.

CERTIFICATION OF FONT SIZE

I HEREBY CERTIFY that this document was generated by computer using Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully Submitted,

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