IN THE SUPREME COURT OF FLORIDA

THOMAS DAUGHERTY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-860

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

# ANSWER BRIEF OF RESPONDENT

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## PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the appellate court below. This brief will refer to Petitioner as such, Defendant, or by proper name, e.g., "Daugherty." Respondent, the State of Florida, was the prosecution in the trial court below and the appellee in the appellate court below. The brief will refer to Respondent as such, the prosecution, or the State. Reference to the record on appeal will be by the symbol "R" and, if the transcript volumes are numbered separately from the record volumes, then reference to the transcripts will be by the symbol "T;" reference to any supplemental record or transcripts will be by the symbols "SR" or "ST;" and reference to the Initial Brief of Appellant on the Merits will be by the symbol "IB;" all with the appropriate volume and page numbers. For example, page one of the third volume of the record would appear as (R3 1), page one of volume two of the first supplemental record would appear as (SR2 1), and page one of volume two of the third supplemental record would appear as (3SR2 1).

## STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts for purposes of this proceeding, subject to any minor corrections, additions, or clarifications here and in the

argument that now follows. One of the things that should be noted is that the Fourth District has stayed their decision in the case of Petitioner's co-defendant, Brian Hooks, pending the outcome of the instant case. See online docket of Fourth District in case number 4D13-3173 at http://199.242.69.70/pls/ds/ds_docket?p_caseyear=2013&p_casenumber=3173&psCourt=4&psSearchType=.

## SUMMARY OF ARGUMENT

This Court should decline to address Issue One on the merits since the Fourth District's opinion in the instant case is not in conflict with this Court's opinion in Haygood v. State, 109 So. 3d 735 (Fla. 2013). Even if this Court addresses Issue One on the merits, it has no merit. The manslaughter instruction was not harmful and, therefore, not fundamental error because it was two steps removed from the crime of which Petitioner was convicted, second degree murder. Furthermore, the instruction on manslaughter by act was not harmful and, therefore, not fundamental error because an instruction on manslaughter by culpable negligence was also given and there was evidence to support the alternative theory of manslaughter by culpable negligence. Petitioner is not entitled to relief on Issue One.

Petitioner is also not entitled to relief on Issue Two. The instruction was not fundamental error where, in addition to the erroneous instruction on attempted manslaughter, the jury was

correctly instructed on the lesser included offense of aggravated battery, a lesser included offense which was nonetheless a higher level offense than attempted manslaughter. Moreover, the instruction was also not fundamental error in this case where aggravated battery and attempted manslaughter had essentially the same elements.

In sum, neither of the issues raised by Petitioner merit any relief. This Court should uphold the decision of the appellate court.

## ARGUMENT

Petitioner raises two issues in his initial brief. In Issues One and Two, he asserts that the erroneous instructions on manslaughter and attempted manslaughter constituted fundamental error. The State submits that, while error, none of the instructions in question reached the level of fundamental error. Therefore, Petitioner is not entitled to a reversal of his convictions for the second degree murder of Norris Gaynor and the attempted second degree murders of Raymond Perez and Jacques Pierre.

**PRESERVATION/ STANDARD OF REVIEW.**

The lack of preservation and the standard of review for both Issue One and Issue Two are the same. Therefore, the State addresses both together in a single section.

In order to be preserved for appellate review, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of the presentation if it is to be considered preserved. See Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982), cert. denied, 118 S. Ct. 616 (1997). "Jury instructions are 'subject to the contemporaneous objection rule, and absent an objection at trial, can be raised on appeal only if fundamental error occurred.'" State v. Weaver, 957 So. 2d 586, 588 (Fla. 2007) (quoting Reed v. State, 837 So. 2d 366, 370 (Fla. 2002)). Issues not properly preserved in the lower tribunal are generally waived on appeal except for unpreserved issues that constitute fundamental error. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

It is unrefuted that there was no objection was lodged below regarding the standard instructions on manslaughter and attempted manslaughter given to the jury on this precise ground. (SR23 2770-71, SR23 2778, SR23 2787, 2802-04) Therefore, this issue was unpreserved.

Consequently, because this issue was not preserved, the only way in which Petitioner can win relief is if the alleged error constituted fundamental error. However, this Court has warned that the appellate courts should exercise their discretion under the doctrine of fundamental error very guardedly. Farina v.

State, 937 So. 2d 612, 629 (Fla. 2006); State v. Smith, 240 So. 2d 807, 810 (Fla. 1970)(Florida courts should be extremely wary in permitting the fundamental error rule to be an 'open sesame' for consideration of alleged trial errors not properly preserved); Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970); Ray v. State, 403 So. 2d 956, 960 (Fla. 1981). While Petitioner's burden to show "fundamental" error is very difficult, the determination of whether such error occurred is necessarily de novo. Cf. Hasegawa v. Anderson, 742 So. 2d 504, 506-7 (Fla. 2d DCA 1999)("Whether an error is fundamental is reviewed as a question of law.").

In cases involving fundamental error, an erroneous jury instruction "must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." State v. Delva, 575 So. 2d at 644-645 (quoting Brown v. State, 124 So. 2d 481, 484 (Fla. 1960)); see also Floyd v. State, 850 So. 2d 383, 403 (Fla. 2002). This means that an erroneous jury instruction is fundamental error "when the omission is pertinent or material to what the jury must consider in order to convict." Delva, 575 So. 2d at 645 (quoting Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982)); accord Reed v. State, 837 So. 2d 366, 369-370 (Fla. 2002). For example, "[f]ailing to instruct on an

element of the crime over which the record reflects there was no dispute is not fundamental error…." Delva, 575 So. 2d at 645

The State maintains that, while error occurred in the giving of the instructions, it was not harmful error under the facts of this case.

**ISSUE ONE: PETITIONER IS NOT ENTITLED TO RELIEF AS REGARDS THE JURY INSTRUCTION ON MANSLAUGHTER.**

Petitioner was convicted of the second degree murder of Norris Gaynor. Petitioner now argues that he is entitled to relief because during his trial the trial judge read the then-standard jury instructions for manslaughter by act to the jury. Petitioner relies on this Court's holding in Haygood v. State, 109 So. 3d 735 (Fla. 2013), which ruled the then-standard jury instruction on manslaughter by act constituted error, and could constitute fundamental error. Petitioner asserts that the instruction on manslaughter by act constituted fundamental error in this case. The State disagrees.

**1. The Court should decline to address the instant issue because there is no conflict between Haygood and the instant case.**

The State reiterates that, as previously stated in the State's answer brief on jurisdiction, this Court should decline to exercise its jurisdiction to review Issue One. As this Court's decisions in Persaud v. State, 838 So. 2d 529, 532 (Fla. 2003), and Jollie v. State, 405 So. 2d 418 (Fla. 1981), make

clear, this Court will review only those district court opinions that cite as "controlling authority" a case that is pending review or in or has been reversed by this Court. As this Court said in Persaud:

> In Jollie, we reaffirmed that "mere citation PCA decisions ... will remain nonreviewable by this Court" and distinguished those district court PCA opinions that cite as **controlling authority** "a case that is pending review in or has been reversed by this Court." 405 So.2d at 421.

Persaud, 838 So. 2d at 531-32 (emphasis added).

As the Fourth District stated in the opinion below:

> The parties in this case disagree over whether the evidence supported a manslaughter by culpable negligence instruction. Appellant argues that the evidence did not, while the State argues that it did. However, we need not reach that issue. Our analysis is not dependent upon the fact that the culpable negligence instruction was given.FN1 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.
>
> FN1. **Accordingly, 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. 2d DCA 2011), rev. granted, 61 So.3d 410 (Fla.2011).**

Daugherty v. State, 96 So. 3d 1076, 1078 (Fla. 4th DCA 2012) (emphasis added).

Here, the Fourth District certainly did not cite Haygood v. State, 54 So. 3d 1035 (Fla. 2d DCA), rev. granted, 61 So. 3d 410 (Fla. 2011), decision reversed, 109 So. 3d 735 (Fla. 2013), as **controlling authority**. Rather, the appellate court only referred to Haygood once, in a footnote, and only to explain that Haygood was **not** relevant to the instant case. Daugherty v. State, 96 So. 3d 1076, fn.1 (Fla 4th DCA 2012).

The Fourth District was correct in that Haygood and all of its progeny are irrelevant to the manslaughter conviction in the instant case. Here, the jury was also instructed on the lesser included offense of third-degree felony murder. Daugherty, 96 So. 3d at 1078. Therefore, in this case, manslaughter was two steps removed from the crime of which Petitioner was convicted:

second degree murder, with third degree felony murder being an intervening offense. See Echols v. State, 484 So. 2d 568, 574 (Fla. 1985)(manslaughter was three steps removed from first degree murder). Haygood applies only when manslaughter is one step removed from the second degree murder conviction.

Under these circumstances, the State submits that there is no conflict between the instant case and the Haygood case. Therefore, although this Court has the discretion to review this issue in conjunction with the review of Issue Two, this Court should not review this issue. This Court should instead uphold the decision of the Fourth District herein.

**2. The instruction on manslaughter by act was not fundamental error because it was not harmful given that manslaughter was two steps removed from the crime for which Petitioner was convicted.**

Even if this Court were to review this issue, it would be apparent that the instruction on manslaughter by act was not harmful to Petitioner because manslaughter was two steps removed from the crime for which Petitioner was convicted, second degree murder. In Haygood, 109 So. 3d at 742, fn.4, this Court cited to Pena v. State, 901 So. 2d 781, 787 (Fla. 2005) for the proposition that "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.". See also, McCloud v. State, 2014 WL 2217339 (Fla. 5th DCA 2014). Also see, State v. Abreau, 363 So. 2d 1063 (Fla. 1978). See also Joseph v. State, 42 So. 3d 323, 325 (Fla. 4th DCA 2010) (noting that when the trial court fails to properly instruct on manslaughter, a crime two or more degrees removed from that for which a defendant is convicted, the error is not per se reversible, but instead is subject to a harmless error analysis); McNeal v. State, 67 So. 3d 407, 409 (Fla. 2d DCA 2011).

As this Court in Abreau, 363 So. 2d at 1064, explained:

> 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.

Although the words "harmless error" are used, it is readily apparent that the harmless error analysis is, in this context, simply a determination that the error was not harmful in the fundamental error sense.

And in applying this analysis to this case, it is clear that any alleged error in the instruction would be deemed not harmful and, therefore, not fundamental, given the facts and the totality of the circumstances herein. See Joseph, 42 So. 3d at 325 (finding that the erroneous manslaughter instruction

amounted to harmless error because of the "defendant's admissible confession in [the] case"). Here, as Petitioner admitted, he participated in this assault on three defenseless homeless men. (SR13 1514) With regard to Norris Gaynor, although Petitioner denied an intent to kill, there was evidence that he raised the baseball bat over his head and then brought it down with both hands on Gaynor's head while Gaynor lay sleeping, evidencing an intent to hit Gaynor as hard as he could. It is beyond peradventure that Petitioner was guilty of second degree murder at a minimum.

It is also clear that this evidence would also have supported a conviction for third degree felony murder. This is relevant because, as the Fourth District noted in the opinion below: "[i]f 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 … ." Daugherty, 96 So. 3d at 1078. Again, the error was not harmful.

Petitioner asserts that the Fourth District wrongly considered the jury's pardon power given that Haygood later rejected consideration of the pardon power doctrine. But, Petitioner fails to acknowledge that what this Court did in Haygood was to reject consideration of the jury pardon doctrine in cases where manslaughter was only **one** step removed, and there was no evidence to support manslaughter by culpable negligence.

This makes sense because, if manslaughter is only **one** step removed, and the manslaughter by act instruction is erroneous and there is no evidence to support the alternative theory of manslaughter by culpable negligence, then the jury has no real alternatives to second degree murder.

But, here, as the Fourth District found, the erroneous manslaughter instruction was **two** steps removed. Therefore, the jury did have alternatives to second degree murder. Different considerations applied in such a situation, and this Court recognized that when it acknowledged that the manslaughter instruction might not be fundamental error in cases where the instruction was **two** steps removed. In this case, it is clear that the evidence supported a second degree murder conviction, as well as a third degree murder conviction. That being so, the issue of the jury pardon doctrine becomes relevant; if the jury had the option of "pardoning" the defendant by finding the defendant guilty of the intervening lesser of third degree murder (even though the evidence also supported a conviction for second degree murder) but did not do so, the jury also would not have found Petitioner guilty of manslaughter by act, even if correctly instructed. The error was impertinent or immaterial to what the jury must consider in order to convict. This means the error was not, in fact, fundamental under these circumstances. The Fourth District did not err in considering the issue of the

jury's pardon power given the fact that manslaughter was **two** steps removed from second degree murder.

For all the foregoing reasons, Petitioner has not established the trial court's error in instructing the jury on manslaughter by act constituted **fundamental** error. This Court must uphold the decision of the Fourth District in affirming Petitioner's conviction and sentence for second degree murder.

**3. The instruction on manslaughter by act was not fundamental error because an instruction on manslaughter by culpable negligence was also given and there was evidence to support the alternative theory of manslaughter by culpable negligence.**

There is another basis on which the Fourth District could have affirmed the second degree murder conviction even if the second degree murder conviction were not two steps removed from the offense of manslaughter. In the instant case, with respect to the lesser included crime of manslaughter, the judge instructed the jury that "the State must prove the following elements beyond a reasonable doubt. One, Norris Gaynor is dead. Two, Thomas Daugherty intentionally caused the death of Norris Gaynor, or the death of Norris Gaynor was caused by the culpable negligence of Thomas Daugherty." (SR23 2770) The judge went on to define culpable negligence for the jury. (SR23 2770-2771) The judge also stated that "[i]n 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." (SR23

2771) The instructions given were similar to those given in Haygood.

In Haygood, this Court ruled that, based on State v. Montgomery, 39 So. 3d 252 (Fla. 2010), the manslaughter by act instruction given in Haygood, and in the instant case, was error. Further, it could constitute fundamental error under certain circumstances.

The instant case does not involve those circumstances, however. Therefore, Petitioner's conviction and sentence for second degree murder can, and must, be affirmed even upon application of the Haygood decision.

In Haygood, both the manslaughter by act and manslaughter by culpable negligence instructions were given. This Court found fundamental error had occurred under the facts of that case because the manslaughter by act instruction was erroneous **and because there was no evidence to support the alternative manslaughter by culpable negligence instruction**. As this Court pointed out in Haygood:

> Significantly, **there was no evidence to support a finding that Tuckey's death resulted from culpable negligence**. Haygood's unambiguous admission that he intended to strike, headbutt, choke, and trip Tuckey essentially eliminated the alternate means of committing manslaughter - manslaughter by culpable negligence - as a viable lesser offense. **Thus, second degree murder was the only offense realistically available to the jury under the evidence presented in this case and the instructions given** - instructions that required the jury to find intent to kill in order to convict Haygood for manslaughter by act.

> ***
>
> The jury's verdict of second-degree murder is proof that it necessarily found Haygood lacked intent to kill. But, because of the faulty instruction on manslaughter, the jury was deprived of the ability to decide whether Haygood's lack of intent to kill, when considered with all the other evidence, fit within the elements of the offense of manslaughter. Based on the evidence presented, **the only non-intentional homicide offense remaining for the jury's consideration in this case was second-degree murder.**
>
> ***
>
> We hold that giving the manslaughter by culpable negligence instruction does not cure the fundamental error in giving the erroneous manslaughter by act instruction where the defendant is convicted of an offense not more than one step removed from manslaughter and the evidence supports a finding of manslaughter by act, **but does not reasonably support a finding that the death occurred due to the culpable negligence of the defendant.**

Haygood, 109 So. 3d at 742-43 (emphasis added). Also see Daniels v. State, 121 So. 3d 409, 419 (Fla. 2013)("In reaching the verdict that it did - second-degree murder - the jury necessarily concluded that Daniels had no intent to kill. Because of the continuing requirement in part of the 2008 instruction that the jury find intent to kill in order to convict for manslaughter by act, the jury was left with second-degree murder as the only other non-intentional alternative.").

But, in the instant case, in contrast to Haygood, there was indeed evidence to support the manslaughter by **culpable negligence** instruction. In order to prove the crime of manslaughter by culpable negligence, the State had to prove that

1) Norris Gaynor was dead **and** 2) Norris Gaynor's death was caused by Appellant's culpable negligence. §782.07, Fla. Stat.

> Culpable negligence is a course of conduct showing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard for the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.
>
> The negligent act or omission must have been committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.

Fla. Std. Jury Instr. (Crim.). [Manslaughter] (SR23 2771)

As Petitioner essentially conceded in closing argument, Petitioner was guilty of aggravated battery on Jacques Pierre, Raymond Perez, and Norris Gaynor; defense counsel merely argued that Petitioner was not guilty of anything beyond an aggravated battery. (SR23 2693, 2731) He did so by arguing that Petitioner had no intent to kill. However, the evidence adduced by the State went far beyond aggravated battery and reached the level of manslaughter by culpable negligence.

The evidence in its totality included the fact that Petitioner and his cohorts announced their intention to beat up on homeless men, that they attacked not one, not two, but three defenseless and vulnerable homeless men, indicating no accident

but a deliberate pattern of behavior, that **they repeatedly beat the victims about the head and upper body where they would be most vulnerable, and that they did so with weapons (for example, a bat and a rake) which could, and did, cause great bodily harm and death** as compellingly evidenced by the testimony of the two live victims who were left with severe injuries, as well as by the deceased Gaynor's viciously shattered head. Not least among the evidence was a video of the vicious attack on one of the victims which the jury could view to determine for themselves whether Petitioner appeared to be behaving in a culpably negligent manner during this criminal episode.

In its totality, this evidence was sufficient for the jury to conclude that, even accepting Petitioner's disavowed intent to kill, Petitioner's course of conduct on the fatal night in question showed that he had a reckless disregard of human life, of the safety of persons exposed to his behavior, and such an entire want of care as to raise a presumption of a conscious indifference to consequences. It also was sufficient for the jury to conclude that Petitioner demonstrated wantonness, recklessness, a grossly careless disregard for the safety and welfare of the public, and such an indifference to the rights of others as was equivalent to an intentional violation of such rights. The jury could, based on this evidence, have properly concluded Petitioner's behavior demonstrated that he consciously

did an act or followed a course of conduct that he must have known, or reasonably should have known, was likely to cause death or great bodily injury to the murdered victim, Norris Gaynor. In short, the evidence was sufficient for the jury to conclude Petitioner committed manslaughter by culpable negligence and to support a conviction for manslaughter under the culpable negligence theory.

Because there was evidence to support the alternative theory of manslaughter by culpable negligence, as distinct from Haygood, the jury in the instant case had a viable "non-intentional alternative" to second-degree murder in the instant case. Thus, the jury did have a choice, unlike the jury in Haygood. Yet, they still chose to find the defendant guilty of second-degree murder. In sum, the erroneous manslaughter instruction was not harmful and, therefore, not **fundamental** error in light of the facts of this case. Cf. Berube v. State, 149 So. 3d 1165 (Fla. 2d DCA 2014)(erroneous manslaughter by act instruction not harmful under facts of case).

Below, the appellate court declined to address this particular aspect of Respondent's argument below, having concluded that the fact that manslaughter was two steps removed sufficed as grounds upon which to affirm Petitioner's conviction. Therefore, if this Court were to reject the Fourth District's reasoning with regard to the two steps removed

analysis, it appears that this Court would have to remand for the Fourth District to expressly consider whether the facts supported this aspect of Respondent's argument. However, the State submits that the appellate court could, and should, again affirm Petitioner's conviction and sentence for second degree murder even after application of this Court's decision in Haygood.

**ISSUE TWO: PETITIONER IS NOT ENTITLED TO RELIEF AS REGARDS THE ATTEMPTED MANSLAUGHTER INSTRUCTION. (RESTATED)**

Petitioner was convicted of the attempted second degree murders of Jacques Pierre and Raymond Perez. Petitioner now argues that he is entitled to relief because during his trial the trial judge read the then-standard jury instructions for attempted manslaughter. Petitioner relies on this Court's holding in Williams v. State, 123 So. 3d 23 (Fla. 2013), which ruled the then-standard jury instruction on attempted manslaughter constituted error. Petitioner asserts that the instruction on attempted manslaughter constituted fundamental error in this case. The State disagrees.

**1. The instruction was not fundamental error where the jury was also correctly instructed on the lesser included offense of aggravated battery, a lesser included offense which was, nonetheless, a higher level offense than attempted manslaughter.**

Petitioner was convicted of two attempted second degree murder convictions based on the attacks on Jacques Pierre and

Raymond Perez. The jury was instructed among other things on aggravated battery and attempted voluntary manslaughter. With respect to the attempted voluntary manslaughter instruction, the jury instructed the jury that before they could find Petitioner guilty of attempted voluntary manslaughter, the State had to prove the following 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 [alternatively, Raymond Perez] except that someone prevented THOMAS DAUGHERTY from killing Jacques Pierre [alternatively, Raymond Perez] or he failed to do so." (R3 506, 513; SR23 2778-2779, 2787)

This Court's opinion in Williams, 123 So. 3d at 26, and the Court's earlier opinion in Montgomery, 39 So. 3d at 257, held that an instruction requiring the jury to find that the defendant intentionally caused the death of the victim was error. Thus, the attempted voluntary manslaughter instruction given herein was error. However, the State submits that it was not fundamental error under the facts and circumstances of the instant case.

This is because the instant case presents a fact pattern not addressed in Williams. In Williams, this Court held that "a trial court commits fundamental error in giving the standard jury instruction on attempted manslaughter by act where the

defendant is convicted of a crime no more than one step removed from the improperly instructed offense." Williams, 123 So.3d at 27. Williams did not address the question of whether the error remains fundamental when the jury is also instructed, and **correctly so**, on another lesser included offense of attempted second degree murder, an offense which is the same level offense as, if not an even higher level offense than, attempted manslaughter.

In the instant case the jury was instructed, among other things, on attempted second degree murder, and aggravated battery with a deadly weapon and/or great bodily harm, and attempted manslaughter. (R3 504-507; R3 511-514; SR23 2779-2780; SR23 2788-2789) Attempted manslaughter is a third degree felony. § 782.07(1), Fla. Stat.; § 777.04, Fla. Stat.; Aggravated battery is a second degree felony. § 784.045(2), Fla. Stat.; § 775.087, Fla. Stat. Clearly, aggravated battery is a higher level offense than attempted manslaughter. Moreover, aggravated battery is listed as a category two lesser included offense of attempted second degree murder in the Schedule of Lesser Included Offenses in the Florida Standard Jury Instructions (Criminal) 6.4 despite the fact that it is the same in penalty as attempted second degree murder. Also see State v. Franklin, 955 So. 2d 564 (Fla. 2007)(in concluding that appellate court improperly reversed aggravated battery conviction because it was

not lesser in penalty than attempted second degree murder, this Court ruled that in order for an offense to be a lesser included offense it need not result in a lesser penalty); Valdes v. State, 970 So. 2d 414, 416 (Fla. 3d DCA 2007)(aggravated battery is a category II, permissive lesser included offense of attempted second degree murder).

Instructively, in Richards v. State, 128 So. 3d 959 (Fla. 2d DCA 2013), the court found that the reading of the standard jury instruction on attempted manslaughter was not fundamental error despite Williams. In Richards, the defendant was instructed on the lesser included offenses of aggravated battery and attempted manslaughter and was convicted of attempted second degree murder. The court noted that aggravated battery is a lesser included offense of attempted second degree murder according to the Schedule of Lesser Included Offenses in the Florida Standard Jury Instructions (criminal) 6.4. The Richards court held that the erroneous instruction on attempted manslaughter was not fundamental because Richards was convicted of attempted second degree murder, which the court reasoned was an offense not one but two steps removed from attempted manslaughter.

Here, the jury had the option of convicting the defendant for aggravated battery, a lesser included offense of the charged crime, which was also a lesser included offense of attempted

second degree murder and, yet, a higher level offense than attempted manslaughter. This Court has relied upon its decision in State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978), wherein this Court found that the jury must be given "a fair opportunity to exercise its inherent 'pardon' power by returning a verdict of guilty as to the next lower crime," and if the jury is not given this opportunity, the error is per se reversible. But in this case, the jury was indeed given the opportunity to exercise its "pardon power." Yet, the jury consciously chose to reject that aggravated battery option and find the defendant guilty of attempted second degree murder instead. Therefore, the alleged error in the instructions for attempted manslaughter was not harmful and should not be deemed fundamental.

This Court should therefore uphold the Fourth District's decision to affirm Petitioner's convictions and sentences.

**2. The error in giving the instruction on attempted manslaughter was not fundamental error where the jury was also correctly instructed on aggravated battery, a crime which, in this case, has essentially the same elements as attempted manslaughter.**

There is another reason why the attempted manslaughter instruction should not be deemed fundamental. In this case, the striking with the bat provides the intentional act for both the aggravated battery and the attempted manslaughter. The crimes of attempted manslaughter and aggravated battery cannot be distinguished in this manner.

In Williams, this Court concluded that the crime of attempted manslaughter is still a viable offense in light of State v. Montgomery, 39 So. 3d 252 (Fla. 2010). In so doing, this court overlooked an underlying problem, which was recognized by the First District Court of Appeal in Montgomery v. State, 70 So.3d 603, FN 2 (Fla. 1st DCA 2009), wherein the appellate court stated as follows:

> **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).

(Emphasis added).

If the rationale of this Court's decision in Montgomery was applied to the facts of this case, the jury would have been instructed that attempted manslaughter required the defendant to commit an unlawful act, in this case the battery, which was likely to cause death, but did not result in the death of the victim. These are the same elements as aggravated battery and,

thus, any error in giving the wrong attempted manslaughter instruction was not fundamental error where the jury also had the option of finding Petitioner guilty of aggravated battery but declined to do so.

Here, the jury was instructed that to prove aggravated battery, the state had to establish that the defendant intentionally caused great bodily harm, permanent disability or permanent disfigurement or in the process used a deadly weapon. (R3 507, 514; SR23 462-463; 471-472) A weapon is a deadly weapon if it is used or threatened to be used in a way likely to cause death or great bodily harm. (R3 507, 514; R23 462-463; 471-472)

Below, the evidence is unrebutted that Petitioner committed the unlawful act of bashing the victims about the head with a baseball bat. Petitioner even conceded this at trial. (SR13 1514) In this case, a baseball bat was a deadly weapon likely to cause death or great bodily harm. Thus, based upon the facts of this case, any attempt to distinguish the crimes of attempted manslaughter and aggravated battery is nothing more than a distinction without a difference. As a result, giving the jury the wrong attempted manslaughter instruction is not fundamental error in light of the fact that the jury received the correct instruction regarding aggravated battery.

Again, Petitioner is not entitled to relief. This Court should uphold the decision of the Fourth District.

**3. The Fourth District has stayed habeas relief in the co-defendant's case.**

Petitioner makes much of the fact that the Fourth District granted habeas relief in co-defendant Brian Hooks' case. Hooks v. State, 39 Fla. L. Weekly D2405 (Fla. 4th DCA 2014). Petitioner fails to mention that the Fourth District has stayed their decision in the case of Petitioner's co-defendant, Brian Hooks, pending the outcome of the instant case. See online docket of Fourth District in case number 4D13-3173 at http://199.242.69.70/pls/ds/ds_docket?p_caseyear=2013&p_casenumber=3173&psCourt=4&psSearchType=.

## CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court UPHOLD the decision of the Fourth District and DENY relief to Petitioner.

## CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on March 9, 2015:

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief was computer generated using Courier New 12 point font.

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