IN THE SUPREME COURT OF FLORIDA

JESSIE CLAIRE ROBERTS,

Petitioner,

v.

CASE NO. SC15-1320
DCA CASE NO. 1D14-0321

STATE OF FLORIDA,

Respondent.

_____/

ON PETITION FOR DISCRETIONARY REVIEW
OF A DECISION OF THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

MARIA INES SUBER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 539538
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
ines.suber@flpd2.com

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE(S)

STATUTES

PRELIMINARY STATEMENT

Respondent's Amended Answer Brief will be referred to as "AB." Other references will be designated as set forth initially.

ARGUMENT

ISSUE I:

IT WAS FUNDAMENTAL ERROR TO FAIL TO INSTRUCT THE JURY ON ATTEMPTED MANSLAUGHTER AS A NECESSARILY LESSER INCLUDED OFFENSE OF ATTEMPTED SECOND DEGREE MURDER WHEN PETITIONER'S MENS REA WAS DISPUTED.

In its Amended Answer Brief on the Merits, Respondent argues this Court lacks discretionary jurisdiction because Petitioner Roberts failed to demonstrate conflict between the holding in her case, and this Court's decisions in **State v. Montgomery**, 39 So.2d 352 (Fla.2010), **Haygood v. State**, 109 So.2d 375 (Fla. 2010), and more recently in **Walton v. State**, 208 So.3d 60 (Fla. 2016). The Respondent is wrong.

The decisions in both **Montgomery** and **Haygood** are clear. This Court held that in Florida, even in non-capital cases, fundamental error occurred when the trial court failed to correctly instruct the jury on the offense of manslaughter (or attempted manslaughter) as the necessary lesser included offense, one-step removed of second degree murder (or attempted second degree murder). **See also**

Williams v. State, 123 So.3d 23 (Fla.2013). And, the result was no different in a case where the defendant interposed a defense or, in a case where the issue was not that an incorrect instruction was given, but rather, that no instruction was given at all. In those situations, this Court held the error was just as fundamental, as the error was in **Montgomery**, **Haygood**, and **Williams**. **See** **Walton v. State**, 208 So.3d 60 (Fla. 2016), stating at 64-65:

> . . . If giving an incorrect instruction on a necessarily lesser included offense constitutes fundamental error, then a fortiori given no instruction at all likewise constitutes fundamental error.

Inasmuch as the First District Court of Appeal held that the status of Petitioner's case as non-capital barred any claim of fundamental error, the holding in and of itself, conflicts with **Montgomery**, **Haygood**, **Williams**, and **Walton**. All of these four cases were non-capital cases, and yet, this Court held that fundamental error occurred when the trial court failed to give an instruction on the necessarily lesser included offense of manslaughter or attempted manslaughter. Thus, contrary to Respondent's claims, the First District Court's holding in this respect is in direct conflict with this Court's decisions in **Montgomery**, **Haygood**, **Williams**, and **Walton**. In addition, since the status of a case - capital vs. non-capital - does not control the finding of fundamental error on the failure of the trial court to give jury instructions on the necessary lesser offense of manslaughter or

attempted manslaughter by act, the decision of the First District court clearly misinterpreted **Jones v. State**, 484 So.2d 1194 (Fla. 1986). Petitioner's case cannot be distinguished from **Walton**, and if in **Walton** the error was found to be fundamental and deserving of a new trial, the same result should be afforded Petitioner Roberts in this cause. To be exact, in **Walton** as in this case, a defense was interposed. In **Walton** as in this case, no objection as to the lack of the jury instruction was advanced. And, in **Walton** as in this case, the record is completely silent and there is no evidence that will support a waiver of the jury instruction as was the situation in **Jones**. However, Respondent argues this case can be distinguished from **Walton** because Ms. Roberts interposed the defense of self-defense and requested instructions on the permissible lesser offenses of aggravated battery and aggravated assault. AB,15. In other words, Respondent appears to insinuate that interposing the defense of self-defense, or requesting lesser included offenses that have nothing to do with the "state of mind" of the attempted homicide, waived or cured any error when the trial court failed to instruct the jury as to attempted manslaughter by act. Petitioner disagrees.

Griffin v. State, 160 So.3d 63 (Fla. 2015), lends some guidance on this issue. In **Griffin** this Court held that giving an incorrect jury instruction on manslaughter by act was fundamental error even in cases where the jury was

instructed on the alternative lesser included offense of manslaughter by culpable negligence **and the evidence did not support a conviction** of manslaughter by culpable negligence. The court explained that the issue finding fundamental error did not turn on the culpable negligence instruction. But instead, the issue was whether the interposed defense - in that case misidentification - waived all elements of the crime other than identity - including the elements of intent. The Court answered the question in the negative, and clarified that intent remained in dispute, and remained the burden of the State to prove because intent determined what level of offense had been committed. The Court explained:

> **When the question before the jury is whether an unlawful homicide occurred, and the jury finds that the killing was not justifiable or excusable**, the jury must then determine the degree of the offense based upon the intent, if any, that the State proves existed at the time of the homicide. A homicide found to be unlawful is not automatically just one offense, but will be one of several possible homicide offenses depending upon the nature of the intent or the lack of any intent at the time of the homicide. . . . Thus, it can be seen that in every killing alleged to be an unlawful homicide, the jury must necessarily consider the intent behind the killing, or find lack of intent behind the killing, before it can determine what, if any, offense has been committed.

Griffin, 160 So.2d 3d at 68-69. **Griffin** simply reiterated the established principle of law that in every homicide or attempted homicide, the "state of mind" of the accused is always in dispute and pertinent as to what the jury has to consider, and that regardless of the affirmative defense, "the intent" remains the

burden of the prosecutor to prove, because "intent" is what determines the level of offense that has been committed. **See Haygood v. State**, 109 So.2d 252 (Fla.2010)(manslaughter by act pertains to a disputed element of the offense (the defendant's state of mind) and the error (the erroneous manslaughter by act instruction) was pertinent and material to what the jury had to consider in the defendant's case). **See also State v. Dominique**, ___So.3d ____, 2017 WL 1177619, 42 Fla.L.Weekly S386 (Fla.2017), where this Court in discussing **Haygood**, stated:

> Intent is always pertinent in a homicide [attempted homicide] prosecution and where as here, the jury concludes there was not intent to kill [second degree murder-attempted second degree murder] **the question then arises what nonintentional homicide lesser offenses are available for the jury's consideration and supported by the evidence.** In **Haygood**, we found fundamental error occurred because manslaughter by act was misinstructed to require an intent to kill and was thus unavailable as a nonintentional lesser included offense. The instruction on manslaughter by culpable negligence was given but was not supported by the evidence - thus not curing the fundamental error created by the erroneous manslaughter by act instruction. (e.s.)

Thus, it is clear from the above quoted holdings in **Griffin**, and **Dominique** discussing **Haygood**, that a defendant claiming justifiable use of deadly force as a defense would not waive any of the elements of intent that the state is required to prove in each prosecution for an unlawful killing or an unlawful attempted killing. Indeed, it appears that whether the killing or the attempted killing was justifiable

by use of deadly force is an issue that all the juries must respond in every single homicide or attempted homicide case before the juries even consider what degree of unlawful killing or attempted killing the state has proved, if any. **Griffin**, **Haygood**, **Dominique**. And that the crucial determination to a finding of fundamental error in a case is whether the jury had a nonintentional homicide lesser offense available, and if it did, whether the evidence supported any of the lesser nonintentional homicide offenses. **Dominique**, **Haygood**.

In this case, the State charged Petitioner with the attempted second degree murder of Howard - a nonintentional attempted killing. The jury was instructed on attempted second degree murder, but it was not instructed on any nonintentional attempted killings that were lesser included offenses of the main crime. Therefore, once the jury decided that the attempted killing of Howard was not justified, [1] the jury had no other alternative but to convicted Petitioner of the attempted homicide in the second degree. And it is important to note with emphasis that in this case, the evidence introduced at trial supported an attempted manslaughter by act conviction.

Indeed even the Respondent, albeit not intentionally, agrees with this

[1]On Issue II, Petitioner argues fundamental error occurred when her jury was told that she had the duty to retreat before she could use deadly force. The statute at the time of Petitioners case did not impose a duty to retreat before she could use deadly force.

proposition because in its Amended Answer Brief on the Merits, Respondent points to the very evidence that would have supported a conviction of attempted manslaughter by act. Respondent states that Petitioner Roberts admitted she shot at Howard on the neck, and that after the shooting she ran from the scene. Excerpts of Petitioner's testimony during cross-examination were quoted by the State, all for the proposition that Petitioner admitted to intentionally shooting at the victim in the neck from l0 feet away. AB,2,8,13. Under the Respondent's rationale and inferences, intending to commit an act that could have caused the death of Howard but did not, is essence, admitting that Petitioner committed attempted manslaughter by act - the nonintentional lesser included offense of attempted second degree murder.[2] **See Haygood**, at 742 (Haygood's unambiguous admission that he intended to strike, head butt, choke and trip Tuckey, is admitting to intending the commission of an act or a series of acts that caused the death - that evidence essentially eliminated the alternate means of committing manslaughter - manslaughter by culpable negligence - as viable lesser offense).

Moreover, the fact that the jury was instructed, at Petitioner's request, on the intentional permissible lesser included offenses of aggravated battery and

[2]Manslaughter is defined as the killing of a human being by act, procurement, or culpable negligence of another, without lawful justification, and in cases in which such a killing is not excusable homicide or murder. Section 782.07(1), Florida Statutes.

aggravated assault should not affect the finding that fundamental error occurred when the jury was not instructed on attempted manslaughter by act. Both aggravated battery and aggravated assault are not viable lesser offenses . Both crimes are specific intent crimes. **See** Sections 784.03(1)(a) and 784.045(1), Florida Statutes (aggravated battery). **And see also** Section 784.021, Florida Statutes (aggravated assault). [3] And more important, the State introduced no evidence from which the jury could have reasonably found that Petitioner committed either of those intentional crimes, which of course explains the jury's verdict in this cause. (R,II,205)

At trial, Howard testified that Petitioner and Mackey were at a bus stop when she arrived with her cousin Marks to get Mackey and take her home. Inside of the car, Marks asked Mackey if she had any cannabis. Mackey got out of the car, approached Petitioner and returned with the cannabis. (R,V,280-81; 283; 285-

[3]Attempted manslaughter by act is not subject to mandatory minimum sentences under the 10-20-life statute, although the use of firearm during the commission of an attempted manslaughter could result in the reclassification of the offense, thus making it a second degree felony punishable by up to l5 years in prison. In contrast aggravated battery, a second degree felony punishable by up to l5 years in prison, could subject a person to a 25 to life minimum mandatory sentence under the l0-20-life statute, if during the commission of the offense a firearm was discharged causing death or great bodily harm. Aggravated assault, a third degree felony punishable by up to 5 years in prison, was a qualifying offense under the l0-20-life statute at the time of the offense. Thus an aggravated assault conviction could subject a person to a 25 to life minimum mandatory sentence, if during the commission of the offense a firearm was discharged and the discharged cause death or great bodily harm

86) Marks wanted the cannabis on credit or free in exchange for rides, and Mackey called Petitioner over to the car. Petitioner did not agree and told Marks that he needed to either pay or return the cannabis. (R,V,286,287) Marks insisted, and Petitioner appeared mad and pulled out a gun and placed it by her side. (R,V,287,303) Howard got out of the car and confronted Petitioner because she wanted to know why she pulled out a gun. Howard punched Petitioner on the face. (R,V,290,291) When Petitioner was punched, Petitioner raised the gun and shot Howard who was standing within 10 feet away. Howard was scared, got inside of her car, and Marks drove her to the hospital where she remained about 5 days. The injuries left scars which Howard displayed for the jury. (R,V, 296,298; 288,293) Howard admitted that when she confronted Petitioner and the two started the argument, Mackey got in between the two. When Howard hit Petitioner, Petitioner had not threatened her in any way, and Howard testified that Petitioner shot her as a reaction to her punch. (R,V,307,308) Howard estimated a couple of seconds passed between Howard's punch and Petitioner's shooting her. (R,V,314)

Marks testified consistent with Howard, but in addition, he testified that Petitioner had the gun under her shirt prior to her pulling it out. (R,V,328). Marks described the gun as a revolver and stated that before he even reacted to its presence, Howard exited the car and started arguing with Petitioner. (R,V,329)

Howard asked Roberts why she had pulled the gun and the two got closer to each other. Marks saw Howard hit Petitioner. After the hit, and while Mackey was pulling at Petitioner, she took a step back, raised the gun, pointed at Howard and shot her in the neck. Marks testified that after the punch, Petitioner did not make any efforts to leave but after she shot at Howard, Petitioner looked at Marks and left the scene. (RV,330,331,334) Gardell Branch, a stranger to the parties, was at the parking lot and saw the shooting. Branch testified Howard and Petitioner argued and he saw Petitioner pull a gun from her waistline and shoot at Howard. (R,V,359,363) After the shooting Petitioner took off running. Branch never saw Howard punch Petitioner. (R,V,365,366,369)

Petitioner testified that Mackey returned to the bus stop to get some weed, which Mackey removed from her pocket. Mackey returned to Howard's car but subsequently called Petitioner over. Petitioner stated she stood by the passenger side and asked Mackey for her MP3 player. Mackey pointed to her purse inside the car and Petitioner reached over to get it from the purse. When she did that, Marks pushed her and Petitioner pulled her gun and held it by her side. She never threatened anyone. (R,VI,447,448,449,450) Marks insinuated that he was going to call for assistance and Mackey requested that Petitioner go home. Petitioner started to walk toward the bus stop, and Howard exited the car and started to

approach Petitioner as if she was going to punch her. (R,VI,438-439; 452) Both Mackey and Howard were talking to Petitioner at the same time. Howard cussed at her and reached over Mackey and punched her. As soon as Howard hit her, Petitioner raised the gun and shot Howard. (R,VI, 453,497) Petitioner testified she shot at Howard as a reaction to the punch, and because she was in fear that she was going to be beat up by both Howard and Marks. Petitioner ran from the scene and was arrested a few days later. Petitioner told the police she shot Howard in self-defense. (R,VI, 454,495,509-460)

Even though the above summarized evidence would not have reasonably supported a verdict for the intentional permissible lesser offenses of aggravated battery and/or aggravated assault, and notwithstanding **Walton** controls the resolution of this case, Respondent argues that instead of granting Petitioner any relief, this court should recede from and overrule **Walton** arguing that its holding went too far because it forces the trial court to be an advocate for the defendants by injecting theories of defense into their case; the holding allows the defendants to sandbag the prosecutors and the judicial system by waiving rights, remaining silent, and later claiming that they are entitled to a new trial per **Walton**; and the holding prohibits the defendants from pursuing an all-or-nothing strategy thereby restricting defendants from their right to determine how to defend themselves.

AB,8,9,14. Petitioner disagrees.

Although in Florida, the presumption in favor of stare decisis is strong, and the doctrine is of fundamental importance to the rule of law, court precedents are not sacrosanct, and the doctrine may bend when "there has been 'a significant change in circumstances after the adoption of the legal rule,'" or where there has been "an error in legal analysis." **Brown v. Nagelhout**,84 So.3d 304,309 (Fla.2012); **Puryear v. State**, 810 so.2d 901,905 (Fla.2002); **Rotemi Realty, Inc. V. Act Realty C.**, 911 Ao.2d 1181,1188 (Fla.2005)(quoting **Dorsey v. State**, 868 So.2d 1192,1199(Fla.2003)). Stare decisis does not yield based on a conclusion that a precedent is merely erroneous, but that an error is of sufficient gravity to justify departing from precedent where the prior decision is "unsound in principle" or "unworkable in practice." **Id**. (quoting **Allied-Signal, Inc. V. Div. Of Taxation**, 504 U.S. 768,783 ,112 S.Ct. 2251, ll9 L.Ed.2d 533 (1992)). Nonetheless, the presumption in favor of stare decisis may be overcome upon a consideration of the following factors:

> (1) Has the prior decision proved unworkable due to reliance on an impractical legal "fiction"? (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law? And (3) have the factual premises underlying the decision changed so drastically as to leave the decisions's central holding utterly without legal justification?

Strand v. Escambia County, 992 So.2d 150 (Fla. 2008)(quoting **North Fla. Women'sHealth & Counseling Servs., Inc. v. State**,866 So.2d 208,217 (Fla. 2006)("Fidelity to precedent provides 'stability to the law and to the society governed by that law." However, the doctrine 'does not command blind allegiance to precedent.' Stare decisis yields 'when an established rule of law has proven unacceptable or unworkable in practice.'" (citations omitted). **See also Valdes v. State**, 3 So.3d 1067, 1076-l077 (Fla.2009).

None of the circumstances claimed by the Respondent merit that this Court recede and overrule its decision in **Walton**. It has always been the duty of the trial court to instruct the jury as to the law and merely doing what the trial court ought to do, does not turn the judge into an advocate for the defendants. Moreover, the sandbagging concern cited by Respondent is not really realistic, nor does **Walton** serve as a limitation to what defense defendants wish to pursue. If in a homicide [or attempted homicide] the jury is instructed as to all intentional and nonintentional killings, no issue of sandbagging will occur because in those circumstances - if any of the jury instructions dealing with the nonintentional killings (second degree and manslaughter) are not wanted by the defense, a simple question by the trial court on the record would no doubt produce a negative response which pursuant to **Jones** would constitute a waiver even if counsel

waived the lesser offense on behalf of the non-capital defendant.

Therefore, this Court should find fundamental error occurred when the jury was not instructed on the nonintentional lesser included offense - one step removed - of attempted manslaughter by act, and quash the decision of the First District Court of Appeal, and remand with instructions that Petitioner be afforded a new trial on the attempted-second degree murder.

ISSUE II

THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT MS. ROBERTS HAD A DUTY TO RETREAT BECAUSE SHE WAS ENGAGED IN UNLAWFUL ACTIVITY WAS NOT ONLY ERRONEOUS BUT THE ERROR WAS FUNDAMENTAL IN NATURE BECAUSE IT DEPRIVED PETITIONER OF HER RIGHT TO HAVE THE JURY DECIDE WHETHER HER USE OF DEADLY FORCE WAS JUSTIFIABLE.

Petitioner incorporates by reference all of the arguments and cited authority advanced in the Petitioner's Initial Brief on the Merits.

ISSUE III

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT 1 OF THE INFORMATION.

Petitioner incorporates by reference all of the arguments and cited authority advanced in the Petitioner's Initial Brief on the Merits.

CONCLUSION

Based on the foregoing arguments and supporting authority, advanced in the Petitioner's Initial Brief on the Merits and in this Reply Brief on the Merits, Petitioner requests this Court to find that fundamental error occurred when the trial court failed to instruct the jury on attempted manslaughter by act as the necessary lesser included offense of attempted second degree murder. As a consequence, this Court should quash the decision of the First District Court of Appeal and remand with instructions that Petitioner be granted a new trial where her jury is correctly instructed on attempted manslaughter by act.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to , Assistant Attorney General, at crimapptlh@myfloridalegal.com, and, via US Mail, to Jessie Claire Roberts, J51716, Lowell Correctional Institution - Annex, 11120 NW Gainesville Rd., Ocala, FL 34482-1479, on this date, May 26, 2017.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Rule 9.210 of the Florida Rules of Appellate Procedure, this brief was typed in Times New Roman 14 Point font.

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/s/ Maria Ines Suber
MARIA INES SUBER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 539538
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
ines.suber@flpd2.com

ATTORNEY FOR PETITIONER