IN THE SUPREME COURT OF FLORIDA

DENEAL O. BROWN

Petitioner,

Case Number: SC16-1031
L.T. Case Number: 2D14-1166

v.

STATE OF FLORIDA

Respondent.

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

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Petitioner, DENEAL BROWN, will be referred to as Petitioner, by name, or as Defendant. The respondent, The State of Florida, will be referred to as the state, the assistant state attorney, the government, or the prosecution. Mr. Brown's record on appeal in Case No. 2D09-1849, as well as the Initial and Supplemental briefs filed by his appellate counsel were submitted as part of an Appendix attached to his original Petition in the Second District Court of Appeal. Citations to the record on appeal will be made by the appropriate appendix letter, *e.g.*, "A", followed by the appropriate page number as paginated in the documents themselves.

STATEMENT OF THE CASE AND FACTS

Petitioner, Deneal Brown, was the defendant in Criminal Case No. CRC05-09269CFANO in the Sixth Judicial Circuit in and for Pinellas County, State of Florida. In said case, Mr. Brown was charged by Information with one count of Murder in the Second Degree. (A-6). Specifically, the Information charged that Mr. Brown shot and killed Deonte Oliver with a firearm. *Id*.

Mr. Brown proceeded to trial on said charge, and the state called Antonio Gillian as its first witness. (D-213). Mr. Gillian testified that he is a Sergeant with the St. Petersburg Police Department. *Id*. at 214. According to Sergeant Gillian, on May 13, 2005, he became involved in a homicide investigation at the Flagler Pointe Apartments. *Id*. Upon arriving on the scene, Sergeant Gillian learned that the victim

was deceased. *Id*. at 215-16. Sergeant Gillian then proceeded to Bayfront Hospital where he observed the victim had sustained a single gunshot wound to his chest. *Id*. at 222.

The state then called Brent Goodman to testify. *Id*. at 229. Mr. Goodman testified that he is a Forensics Technician with the St. Petersburg Police Department. *Id*. at 230. According to Mr. Goodman, he took pictures of the scene of the incident and collected various items from the scene, including a Winchester .45 auto shell casing, sandals, a swab of a red stain found at the scene, a control swab, an envelope, and two (2) handguns. *Id*. at 235.

The state then called Demetriel Oliver to testify. (E-281). Mr. Oliver testified that Deonte Oliver was his twin brother. *Id*. at 283. According to Mr. Oliver, on the date and time in question, he was working on his car which was parked a few cars away from his brother's car. *Id*. at 293-94. At the same time, Mr. Oliver's brother and Bruce Watts were putting a cover on his car. *Id*. A gray Mitsubishi Galant then pulled up. *Id*. at 294. Mr. Oliver recognized the vehicle to be the vehicle driven by Mr. Brown and his girlfriend. *Id*. at 295. Mr. Brown was driving the vehicle at the time. *Id*. at 297.

Mr. Oliver heard Mr. Brown say to the victim "I thought I told you not to drive on this street no more." *Id*. at 297. The victim responded as follows: "You can't stop me from driving on the street. This is my car. I put blood, sweat and tears

in this car. I built the motor. If I feel like burning the tires up right here, right now, that's what I'm going to do. Ain't nothing you can do to stop me." *Id*. According to Mr. Oliver, Mr. Brown then pulled out a firearm with his left hand, reached out the window of his vehicle, and shot the victim. *Id*. at 298.

Mr. Oliver then ran to his and his brother's apartment to retrieve two (2) firearms. *Id*. at 304. When Mr. Oliver returned with the firearms, Mr. Brown was gone. *Id*. at 306-07. Mr. Oliver placed the firearm in his vehicle, and at that point Mr. Watts called 911. *Id*. Roberto Rodriguez, a neighbor of Mr. Oliver's at the apartment complex, came to their aid and attempted to do CPR to no avail. *Id*. at 307. Mr. Oliver did not observe a firearm in his brother's possession at any time. *Id*.

The state then called Janteya Gibson to testify. *Id*. at 324. Ms. Gibson testified that Mr. Brown is her boyfriend and the father of her child. *Id*. at 326. According to Ms. Gibson, at the time of the incident in question, Mr. Brown was living with her at the Flagler Pointe Apartments. *Id*. at 327. At the time, Ms. Gibson owned a Mitsubishi Galant, which Mr. Brown also drove. *Id*. at 329. Ms. Gibson was not aware of any problems between Mr. Brown and the Oliver twins. *Id*. at 333.

On the date in question, Mr. Brown dropped her off at a salon, and was supposed to pick her up when she was done. *Id*. at 334. At 5:00 or 6:00 p.m., Mr. Brown unexpectedly arrived at the salon. *Id*. at 335. Mr. Brown handed her the

keys to her car, and stated that he had to handle something and left. *Id*. at 336. Ms. Gibson did not hear from Mr. Brown again until a few weeks later, and did not see him again until after his arrest, which was well over a year later. *Id*. at 337. Ms. Gibson admitted that other people drove her car aside from Mr. Brown. *Id*. at 338.

The state then called Mohammad Alawadi to testify. *Id*. at 350. Mr. Alawadi's testimony was received out of court prior to trial as Mr. Alawadi was in poor health. Accordingly, the transcripts of Mr. Alawadi's testimony were read to the jury, with Detective Gary Gibson reading Mr. Alawadi's responses to the questions posed by counsel, which were read by counsel. Mr. Alawadi testified that he lived at the Flagler Pointe Apartments in 2005, and, during the incident in question, he was sitting on his couch looking outside his window. *Id*. at 352. According to Mr. Alawadi, he observed the Oliver brothers working on a car when a gray car pulled up. *Id*. at 354. Mr. Alawadi observed the victim talking to his assailant for a couple of minutes, then he heard "a little noise" and the victim fall back. *Id*. at 355. The assailant looked at the victim on the ground and then drove off. *Id*. at 355. Mr. Alawadi then called 911. *Id*. at 356.

According to Mr. Alawadi, the victim did not have a weapon, and the assailant was the only person in the vehicle the shot came from. *Id*. at 357, 361. Mr. Alawadi observed Demetriel Oliver take a firearm from under his car's seat and place it in his car's trunk. *Id*. at 363-65.

The state then called Roberto Rodriguez to testify. *Id*. at 377. Mr. Rodriguez testified that he lived at the Flagler Pointe Apartments on the date in question, and observed the Oliver twins working on their cars. *Id*. at 381-82. According to Mr. Rodriguez, he heard an argument ensue between one of the brothers and someone in another car. *Id*. at 382. Mr. Rodriguez heard one of the Oliver brothers say "Oh, you're telling me I can't drive over there," or, "You don't want my car over there," or, "What are you saying? I can't come through your neighborhood." *Id*. Mr. Rodriguez also heard the victim say "Oh, we're supposed to" - - "Is that what you're saying?", "Why can't we talk about this? We're supposed to be men. Why can't we talk about it like men?" *Id*. at 383.

Mr. Rodriguez then observed the assailant's car drive off fifteen (15) feet, stop, and back up to where the victim was standing. *Id*. Mr. Rodriguez heard a loud noise and observed smoke coming from the driver's side window of the assailant's car. *Id*. The victim then fell to the ground and he ran over to administer CPR to him while the assailant sped off. *Id*. at 384.

Mr. Rodriguez never observed a weapon in the victim's hands. *Id*. at 385. However, while administering CPR to the victim, Mr. Rodriguez observed Mr. Watts pick up an object covered in a cloth a few feet from the victim, and Mr. Rodriguez told Mr. Watts not to retaliate. *Id*. at 391-92.

The state then called Ron Noodwang to testify. *Id*. at 410. Mr. Noodwang testified that he is an officer with the St. Petersburg Police Department. *Id*. at 411. According to Officer Noodwang, he took part in the investigation of the Flagler Pointe shooting, and made contact with Ms. Gibson. *Id*. at 420. When Officer Noodwang inquired where her car was, Ms. Gibson explained it was located elsewhere and took him to it, at which point her car was impounded. *Id*. at 420. Additionally, as part of the investigation, Officer Noodwang located two (2) handguns under the driver's side floor mat of Demetriel Oliver's vehicle. *Id*. at 422.

The state then called Gary Gibson to testify. *Id*. at 431. Mr. Gibson testified that he is a detective with the St. Petersburg Police Department. *Id*. at 432. Detective Gibson took part in the investigation of the Flagler Pointe incident, and as part of his investigative efforts, he presented Demetriel Oliver with a photo pack, and Mr. Oliver was able to identify Mr. Brown out of the photo pack as his brother's assailant. *Id*. at 441.

The state then called Melinda Clayton to testify. *Id*. at 461. Ms. Clayton testified that she is a latent print examiner for the St. Petersburg Police Department. (F-470). According to Ms. Clayton, Mr. Brown's fingerprints matched fingerprints taken from Ms. Gibson's vehicle. *Id*. at 475-76.

The sate then called Susan Ignacio to testify. *Id*. at 479. Ms. Ignacio testified that she is a medical examiner. *Id*. at 480. According to Ms. Ignacio, she examined the victim and determined that he died of a gunshot wound to the torso. *Id*. at 486.

The state then recalled Gary Gibson to testify. *Id*. at 505. Detective Gibson testified that the victim's hands were not bagged to enable later testing for gunshot residue. *Id*. at 506.

The state then called Dorothy Banford to testify. (G-531). Ms. Banford testified that she lived at the Flagler Pointe Apartments on the date in question. *Id*. at 533. According to Ms. Banford, on the date in question, while she was getting dressed in her bedroom she heard loud voices. *Id*. at 534. Ms. Banford then looked out her window and saw a man in a car, and a man standing outside the car. *Id*. at 534-35.

Ms. Banford then observed as follows:

> MS. BANFORD: Well, he was talking to whoever was inside the car, and he said something. And I - - not screaming loud, but just little loud, and it looked as if the car was about to drive off, which it did move forward, but just for a second, and it backed right up. And I heard the shot, and the guy fell. And in the same instant, the car pulled right off.

Id. at 536-37. According to Ms. Banford, she did not see the victim holding a weapon. *Id*. at 537. After observing the foregoing, Ms. Banford called 911. *Id*. at 537.

The state then rest, and the defense moved for a judgment of acquittal which was denied. *Id*. at 561-70.

The defense then called Bruce Watts to testify. *Id*. at 571. Mr. Watts testified that he was with the Oliver twins during the incident in question, and was assisting the victim as he put a cover on his car. *Id*. at 572, 583. According to Mr. Watts, he was present when the victim was shot, but did not see the actual shooting. *Id*. at 572. Mr. Watts testified that there were two (2) individuals in the assailants' vehicle, and he did not know which of the two individuals shot the victim. *Id*. at 573. Mr. Watts did not see Demetriel Oliver run into his apartment to retrieve firearms after the incident, however, he did see him with two (2) firearms. *Id*. at 575.

The defense then called Kirk Keithley to testify. *Id*. at 599. Mr. Keithley testified that he is an officer with the St. Petersburg Police Department. *Id*. at 600. According to Officer Keithley, he took part in the investigation of the Flagler Pointe incident, and interviewed Mr. Watts and Mr. Oliver. *Id*. at 601. Mr. Watts told Officer Keithley that he couldn't see the individuals in the assailant's car. *Id*. at 602-03.

Additionally, Officer Keithley testified that Mr. Oliver told him as follows:

> OFFICER KEITHLEY: Mr. Oliver told me that he was putting a cover on another vehicle in the parking lot with Mr. Watts, and that's when he heard one gunshot, and this gray-colored vehicle with some bondo work on it leave the scene, and that he - - he told me that his twin brother was the person that was shot.

Id. at 604. Mr. Oliver further stated that he did not see the shooting suspect in his car. *Id*.

The defense then called Mr. Brown to testify. *Id*. at 614. Mr. Brown testified that at the time of the incident in question, he lived in the same apartment complex as the Oliver twins. *Id*. at 615. According to Mr. Brown, there were no problems between the Oliver twins and himself. *Id*. On the date in question, Mr. Brown drove a friend to the apartment complex to meet a girl. *Id*. at 616-22. After meeting the girl, Mr. Brown and his friend started to drive away from the complex and, as they were doing so, the victim started yelling "I told you - - "I told your boss that I can drive my car wherever I want to," or something along those lines. *Id*. at 616-22. An argument ensued and the victim was saying "Y'all want to do it. Let's do it." *Id*. at 624.

According to Mr. Brown, he then backed up his car a little bit, and the victim lifted up his shirt to show Mr. Brown that he had a firearm. *Id*. The victim reached for his firearm, and the passenger in Mr. Brown's vehicle then leaned across and shot out the driver's side window at the victim, following which they drove off. *Id*. at 626-27. Mr. Brown thereafter drove to the salon and returned the car to Ms. Gibson. *Id*. at 628.

The defense then rest its case. *Id*. at 645.

The state then recalled Officer Noodwang to testify. *Id*. at 646. According to Officer Noodwang, Mr. Watts previously explained the incident to him as follows:

> OFFICER NOODWANG: He said at that particular time he was helping the victim put his car cover on his car. He said a car pulled up from the east, facing west, pulled up right near the victim. Some words were starting to exchange, and he ultimately seen the driver of the car put his hand out through the window with a gun in his hand, and then actually shoot the victim, and then the car sped off.
>
> OFFICER NOODWANG: He said that the vehicle pulled up there in the beginning. They had their confrontation, verbal confrontation. The vehicle started to pull off, just a very few feet forward. It stopped. It backed up. The suspect started saying something again, and then that's when he seen the actual hand come out of the car window and shoot.

Id. at 648.

The state then recalled Gary Gibson to testify. *Id*. at 650. According to Detective Gibson, Mr. Watts was previously presented with a photo pack and identified Mr. Brown as the individual who shot the victim. *Id*. at 656.

The state then called Charles Wincolowicz to testify. *Id*. at 662. Mr. Wincolowicz testified that at the time of the incident in question, he was employed as a security guard, and worked at the apartment complex neighboring the Flagler Pointe Apartments. *Id*. at 665. According to Mr. Wincolowicz, he knew the Oliver twins from his work, and had never heard of them carrying or shooting firearms. *Id*. at 666.

The state then rest. *Id*. at 667.

Then, by agreement of the parties, defense counsel read a portion of the deposition that was taken of Mr. Watts as follows:

> MR. TAGER: "QUESTION: You ever see them shoot guns off in the air? Be off in the middle - - be off in the outside - - shoot off rounds?"
>
> "ANSWER: Yes.
>
> "QUESTION: They ever do that in apartment complexes or when they're driving around?
>
> "ANSWER: In the parking lot in the apartment complex.

Id. at 672.

The state then recalled Demetriel Oliver to testify. *Id*. at 673. According to Mr. Oliver, he, nor his brother, discharged a firearm during the incident in question. *Id*. at 674.

The state then rest, and the defense renewed its motion for judgment of acquittal, which was again denied. *Id*. at 676, 81. A charge conference was held, during which the following exchange occurred:

> THE COURT: All right. Then we have - - when there are lesser included crimes or attempts, and manslaughter is the only lesser included offense that I think is applicable to this second degree murder.
>
> And we have manslaughter, and that is standard. I didn't put in "procure." I took that out. However, I left in "Deneal Brown intentionally caused the death of Deonte

> Oliver, or the death of Deonte Oliver was caused by the culpable negligence of Deneal Brown."
>
> So one is voluntary manslaughter and one is involuntary manslaughter. I would assume you would want both of them, right, Mr. Tager?
>
> MR. TAGER: Yes, sir.
>
> THE COURT: All right. Do you have any objection to this manslaughter instruction?
>
> MR. TAGER: No, sir.

Id. at 681-82.

Thereafter, closing arguments were held and the case was submitted to the jury along with the following jury instruction as to the lesser included offense of manslaughter, stated in relevant part:

MANSLAUGHTER

> To prove the crime of Manslaughter, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. Deonte Oliver is dead.
>
> 2. Deneal Brown intentionally caused the death of Deonte Oliver.
>
> OR
>
> The death of Deonte Oliver was caused by the culpable negligence of Deneal Brown.

(A-110).

Thereafter, the jury returned a verdict of guilty as to the charge of Murder in the Second Degree. *Id*. at 123. A sentencing hearing was held, and Mr. Brown was ultimately sentenced to life imprisonment. *Id*. 125-30.

On Direct Appeal, attorney Gonzalo Gayoso raised six grounds for relief in Mr. Brown's Initial Brief, and an additional ground for relief through the filing of a Supplemental Initial Brief. *See*, (I). However, Mr. Gayoso failed to argue on appeal that the manslaughter by act jury instruction utilized in Mr. Brown's case was fundamentally flawed, and that he was thereby entitled to a new trial. *Id*.

Thereafter, Mr. Brown filed a Petition for Writ of Habeas Corpus in the Second District Court of Appeal, arguing he was deprived of his right to the effective assistance of counsel by his appellate counsel's failure to argue on appeal that the manslaughter by act jury instruction utilized in his case was fundamentally flawed and that he was thereby entitled to a new trial, however, said Petition was denied. *Brown v. State*, 145 So.3d 883 (Fla. 2d DCA 2014). Mr. Brown then petitioned this Court for review, and this Court quashed the Second District's decision, and remanded for reconsideration in light of its decision in *Griffin v. State*, 160 So. 3d 63 (Fla. 2015). *Brown v. State*, 177 So. 3d 1263 (Fla. 2015). The Second District then ordered supplemental briefing in light of the decision in *Griffin*, and ultimately opined as follows:

> We reconsider Deneal Brown's petition alleging ineffective assistance of appellate counsel in light of the

subsequent decision in *Griffin v. State*, 160 So.3d 63 (Fla.2015). Our conclusion that Mr. Brown is entitled to no relief is unchanged.

Mr. Brown was charged with second-degree murder. His counsel told the jury in his opening statement: "I believe that the evidence is going to show that this was self-defense, that what turned into a verbal confrontation then turned into gun play, ... but the person who shot [the victim] was just quicker than he was." Mr. Brown testified at trial that as he was driving out of the victim's apartment complex, the victim engaged him in a verbal altercation. Mr. Brown started to drive away but returned when the victim challenged him and his friend, who was a passenger in the car, to a fight. Mr. Brown testified that his friend shot the victim when the victim reached for his gun. Nevertheless, Mr. Brown's counsel argued in closing, "I told you this was a case about self-defense, and I told you that's what the evidence is going to show. This is a case of self-defense."

The State disputed the presence of Mr. Brown's friend and Mr. Brown's argument that the shooting was in self-defense, arguing that Mr. Brown's acts of driving back to the victim and then shooting him in the torso demonstrated a depraved mind without regard for human life. The jury found Mr. Brown guilty as charged, and the trial court sentenced him to life in prison with a twenty-five-year mandatory minimum term in accordance with the jury's findings that Mr. Brown discharged a firearm during the commission of the offense and that the discharge caused the victim's death.

"Claims of self defense and defense of another involve 'an admission and avoidance'." *Keyes v. State*, 804 So.2d 373, 375 (Fla. 4th DCA 2001) (quoting *Williams v. State*, 588 So.2d 44, 45 (Fla. 1st DCA 1991)). By arguing without qualification that he or his friend acted in self-defense, Mr. Brown necessarily conceded that either intentionally caused the victim's death. "[A] defective instruction in a

> criminal case can only constitute fundamental error if the error pertains to a material element that is disputed at trial." *Daniels v. State*, 121 So.3d 409, 418 (Fla.2013). Thus, the manslaughter by act instruction that the supreme court held to be erroneous in *State v. Montgomery*, 39 So.3d 252 (Fla.2010), was not fundamental error in Mr. Brown's case because it did not prevent the jury from considering whether the evidence fit the elements of manslaughter. *Cf. Daniels*, 121 So.3d at 418–19 (holding the faulty manslaughter by act instruction was fundamental error because the defendant admitted to shooting the gun to scare someone but insisted he did not aim at anyone and did not intend to kill); *Horne v. State*, 128 So.3d 953, 956–57 (Fla. 2d DCA 2013) (holding that because the defendant testified that he felt his life was threatened and that he intended to shoot the victim in the leg but did not intend to kill the victim, the faulty instruction was fundamental error).
>
> Petition denied.

Brown v. State, 197 So. 3d 69, 69–70 (Fla. 2d DCA 2016) (footnotes omitted).

This Court granted review, and this Brief follows.

SUMMARY OF THE ARGUMENT

Mr. Brown did not concede the issue of intent by claiming that a third party shot the victim in self-defense. Instead, by raising a claim of self-defense, Mr. Brown expressly put the issue of intent in dispute. Furthermore, by claiming misidentification, Mr. Brown did not concede the intent with which *he* may have acted. Accordingly, the trial court fundamentally erred by providing the jury with a manslaughter jury instruction which misstated the intent element of the offense. Consequently, Mr. Brown's appellate counsel performed ineffectively by failing to argue on appeal that the manslaughter jury instruction utilized in his case was fundamentally flawed and that he was thereby entitled to a new trial. Accordingly, this Court should quash the Second District's Opinion, and remand Mr. Brown's case with directions that the Second District grant his Petition for Writ of Habeas Corpus, vacate the affirmance of his Direct Appeal, and remand his case to the circuit court for a new trial.

ARGUMENT AND CITATION TO AUTHORITY

I. MR. BROWN WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSITANCE OF COUNSEL BY HIS APPELLATE COUNSEL'S FAILURE TO ARGUE ON APPEAL THAT THE TRIAL COURT FUNDAMENTALLY ERRED BY GIVING THE THEN STANDARD JURY INSTRUCTION ON MANSLAUGHTER BY ACT, WHICH WAS FOUND TO BE FUNDAMENTALLY FLAWED BY THIS COURT, AND, AS SUCH, THE SECOND DISTRICT'S OPINION SHOULD BE QUASHED.

STANDARD OF REVIEW

This Court reviews a claim of ineffectiveness of appellate counsel as follows:

> To grant habeas relief on the basis of ineffectiveness of appellate counsel, this Court must resolve the following two issues:
>
> > [W]hether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
>
> Bradley v. State, 33 So.3d 664, 684 (Fla. 2010) (quoting Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986)). Under this standard, "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." Anderson v. State, 18 So.3d 501, 520 (Fla. 2009) (quoting Freeman, 761 So.2d at 1069).

Bevel v. State, 221 So. 3d 1168, 1183 (Fla. 2017).

ARGUMENT ON THE MERITS

Mr. Brown was deprived of his right to the effective assistance of counsel by his appellate counsel's failure to argue that, because the jury was provided with a fundamentally erroneous manslaughter jury instruction, he was entitled to a new trial. Accordingly, Mr. Brown is entitled to have the denial of his Petition for Writ of Habeas Corpus reversed, to have the affirmance of his direct appeal vacated, and is further entitled to a new trial.

In the court below, the state conceded that the manslaughter jury instruction utilized in Mr. Brown's case was flawed, as it erroneously instructed the jury that to find Mr. Brown guilty of manslaughter, the jury had to find Mr. Brown intentionally caused the death of the victim. However, the state argued, and the court agreed, that because Mr. Brown claimed that a third party shot the victim in self-defense, Mr. Brown admitted the killing was intentional, and, as such, Mr. Brown was not entitled to relief because the erroneous instruction did not concern a disputed element of the offense.

The Second District's decision finding that the flawed manslaughter instruction did not concern a disputed issue because Mr. Brown claimed that a third party shot the victim in self-defense conflicts with the decisions in *Stinson v. State*, 69 So. 3d 291 (Fla. 1st DCA 2009), *Ward v. State*, 12 So. 3d 920 (Fla. 1st DCA 2009), *Dowe v. State*, 162 So. 3d 35 (Fla. 4th DCA 2014), *Griffin v. State*, 160 So.

3d 63 (Fla. 2015), and *State v. Montgomery*, 39 So.3d 252 (Fla. 2010), and, as such, the Second District's decision should be quashed.

A. The flawed instruction.

As to the offense of manslaughter, the jury was instructed, in relevant part, as follows:

MANSLAUGHTER

> To prove the crime of Manslaughter, the State must prove the following two elements beyond a reasonable doubt:
>
> 3. Deonte Oliver is dead.
>
> 4. Deneal Brown intentionally caused the death of Deonte Oliver.
>
> OR
>
> The death of Deonte Oliver was caused by the culpable negligence of Deneal Brown.

(A-110).

This Court has explained that the foregoing standard instruction is flawed because the "crime of manslaughter by act does not require that the State prove that the defendant intended to kill the victim." *State v. Montgomery*, 39 So. 3d 252, 259 (Fla. 2010). Instead, "the intent which the State must prove for the purpose of manslaughter by act is the intent to commit an act that was not justified or excusable, which caused the death of the victim." *Montgomery*, 39 So. 3d at 259–60. Use of the flawed instruction constitutes fundamental error if the issue of intent is "pertinent

or material to what the jury must consider in order to convict." *Montgomery*, 39 So. 3d at 258 (quoting, *State v. Delva*, 575 So.2d 643, 645 (Fla.1991)).

B. The use of the flawed instruction constituted fundamental error.

In *Griffin v. State*, 160 So. 3d 63 (Fla. 2015), the defendant was convicted of the second degree murder of Thomas Mills. *Griffin*, 160 So. 3d at 65. The defendant testified that someone else shot the victim and he had therefore been misidentified. *Id*. The manslaughter jury instruction found to be flawed in *Montgomery* was given to the jury, and this Court explained that use of the instruction constituted fundamental error because:

> a sole defense of misidentification does not concede or fail to place in dispute intent or any other element of the crime charged except identity when the offense charged is an unlawful homicide. The district court concluded that where identity is the defense, "[t]here is no dispute regarding the elements of an offense when the manner of the crime is conceded and the sole defense is mistaken identity." *Griffin*, 128 So.3d at 90. The district court therefore assumed that the "manner of the crime" in this case included the intent with which the crime was committed, that intent being ill will, spite, or evil intent required for second-degree murder. However, the "manner" of the crime was simply death by gunshot. Because he testified that he saw Mills shot, Griffin can be said to have conceded that Mills died by gunshot, but he cannot be found to have expressly or impliedly conceded the intent underlying that shooting simply by challenging the element of identity of the shooter. Griffin did not concede any element of second-degree murder by testifying and asserting that he did not pull the trigger.
>
> The district court's analysis and conclusion overlook the

fact that Griffin did not have an obligation to argue that the manner of the shooting did not establish the requisite intent, or to expressly dispute any other elements of the crime. Without dispute, Mills was killed by a gunshot through the window of the vehicle in which he was sitting. This simple fact, standing alone, does not establish the intent, or lack of intent, by which the shooting occurred—and thus it does not establish what degree of homicide may have been committed. It must be remembered, as we said long ago, that "[t]he plea of not guilty puts in issue every material element of the crime charged in the information, and before a jury is warranted in returning a general verdict of guilty against an accused every material element of the crime charged must be proved to their satisfaction beyond all reasonable doubt." *Licata v. State*, 81 Fla. 649, 88 So. 621, 622 (1921).

Where a defendant sits mute and exercises his or her right to remain silent, the burden is on the State to prove all elements involved in the degree of the homicide for which the defendant is convicted. It defies logic to conclude that expressly disputing the identity of the perpetrator and remaining silent on the remaining elements of the crime would concede all the elements but identity. The State's burden of proof does not change simply because the defendant speaks up and contests one element, such as his identity as the perpetrator.

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. For example, if the State has charged first-degree murder, a necessary jury inquiry is whether the State proved premeditated intent to kill. Lacking that proof, the jury must then

determine whether the defendant killed "by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life." Fla. Std. Jury Instr. (Crim.) 7.4. "Imminently dangerous to another and demonstrating a depraved mind" is defined in pertinent part as an act that "is done from ill will, hatred, spite, or an evil intent." If the jury concludes that the killing was neither premeditated nor done with a depraved mind as that term is defined, the jury must then decide if the defendant is guilty of manslaughter by having committed an intentional act that resulted in death, but without any intent to kill or evil intent (depraved mind) on the defendant's part. 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 any intent behind the killing, before it can determine what, if any, offense has been committed.

Certainly, where a defendant expressly concedes one or more elements of a crime, those elements can be characterized as no longer in dispute for purposes of a fundamental error analysis. *See*, *e.g.*, *Stewart v. State*, 420 So.2d 862, 863 (Fla.1982) (holding that failure to instruct on element of intent to permanently deprive another of property in robbery prosecution was not fundamental error where the defendant "admitted that he stole personal property from the victim"); *Morton*, 459 So.2d at 324 (element of intent to permanently deprive not in dispute where defendant conceded robbery occurred). In the present case, other than the fact that Mills was shot, Griffin did not concede any other elements of the crime charged; he simply contested his identity as the perpetrator. The State's burden still remained to prove that the shooting was done with a depraved mind, but without intent to kill, as set forth in the standard jury instructions. Thus, we conclude that intent remained a matter that was pertinent or material to what the jury must consider in order to convict Griffin of the crime charged or a lesser included offense, notwithstanding his claim of misidentification.

A defendant is entitled to an accurate instruction on the charged offenses and all lesser included offenses. *See Montgomery*, 39 So.3d at 258; *see also Williams v. State*, 123 So.3d 23, 29 (Fla.2013); *Haygood*, 109 So.3d at 742 (citing *Montgomery*, 39 So.3d at 258). We explained in *Montgomery*, "Characterized by what it is not, manslaughter is considered a residual offense. Consequently, we have held that the failure to provide a complete instruction on manslaughter may constitute fundamental error." *Montgomery*, 39 So.3d at 258 (citation omitted). "This is true regardless of whether there is ample evidence to convict the defendant of the higher crime." *Williams*, 123 So.3d at 29. " '[W]hether the evidence of guilt is overwhelming or whether the prosecutor has or has not made an inaccurate instruction a feature of the prosecution's argument are not germane to whether the error is fundamental.' " *Id.* (quoting *Reed v. State*, 837 So.2d 366, 369 (Fla.2002)).

In this case, once the jury determined that the homicide was not justifiable or excusable, the intent underlying the unlawful homicide was pertinent or material to what the jury had to consider in order to convict Griffin of second-degree murder or the lesser offense of manslaughter by intentional act. Griffin's claim of misidentification did not concede the element of intent as to the shooting, and he was entitled to an accurate instruction as to manslaughter, which he did not receive. By convicting Griffin of second-degree murder, the jury necessarily found that he possessed no intent to kill—and the State conceded as much by charging second-degree murder. In addition, the jury was instructed that "[i]n order to convict of Second Degree Murder, it is not necessary for the State to prove the defendant had an intent to cause death." Because the manslaughter instruction given to the jury erroneously required that to convict for the lesser included offense of manslaughter by act, the jury must find Griffin committed an act intended to cause Mills' death, the jury was essentially foreclosed from finding Griffin guilty of that

lesser offense when they found he had no intent to kill.

Griffin, 160 So. 3d at 67–70 (footnotes omitted).

Here, the Second District concluded that because Mr. Brown claimed a third party shot the victim in self-defense, he admitted the killing was intentional, that the issue of intent was therefore not in dispute, and, as such, the use of the flawed instruction did not constitute fundamental error. *See, Brown*, 197 So. 3d at 69–70. The Second District's finding is plainly wrong.

Like *Griffin*, other than the fact Mr. Oliver was shot, Mr. Brown "did not concede any other elements of the crime charged; he simply contested his identity as the perpetrator." *Griffin*, 160 So. 3d at 69. Accordingly, "[t]he State's burden still remained to prove that the shooting was done with a depraved mind, but without intent to kill, as set forth in the standard jury instructions." *Id*. More specifically, contrary to the Second District's finding, Mr. Brown's claim that a third party shot the victim in self-defense does not act as a concession that the killing was done with a depraved mind regardless of human life, *i.e.,* the intent element for the offense of second degree murder. *See*, § 782.04(2), Fla. Stat. Accordingly, the issue of intent remained in dispute. *See, Griffin*, 160 So. 3d at 67–70.

Even more specifically, an intent to shoot in self-defense does not by itself demonstrate an intent to kill. Not every shot intentionally made is a shot intended to kill. For instance, this Court, as well as the First and Fourth districts have found

that where a defendant claims self-defense, the use of the faulty manslaughter instruction nonetheless constitutes fundamental error. *See*, *Montgomery*, 39 So. 3d at 255, fn. 1 (Noting an issue in the case was whether the defendant acted in self-defense); *Stinson v. State*, 69 So. 3d 291 (Fla. 1st DCA 2009) (Defendant raised a claim of self-defense, but giving of erroneous manslaughter instruction nonetheless constituted fundamental error); *Ward v. State*, 12 So. 3d 920 (Fla. 1st DCA 2009) (accord), and *Dowe v. State*, 162 So. 3d 35 (Fla. 4th DCA 2014) (accord) (*for facts see*, *Dowe v. State*, 39 So. 3d 407, 408 (Fla. 4th DCA 2010)). In fact, the Second District itself has recognized that an intentional shooting can be done with the intent to incapacitate rather than to kill. *See*, *e.g.*, *Horne v. State*, 128 So. 3d 953, 956-57 (Fla. 2d DCA 2013) (holding that because the defendant testified that he felt his life was threatened and that he intended to shoot the victim in the leg but did not intend to kill the victim, the faulty instruction was fundamental error); *Stoddard v. State*, 100 So. 3d 18 (Fla. 2d DCA 2011) (Giving of the erroneous manslaughter instruction constituted fundamental error despite the defendant's reliance on a claim of self-defense – as an aside, the decision in *Stoddard* indicates that a different result would have occurred had the jury been instructed on manslaughter by culpable negligence, however, that theory has likewise been dispensed with by this Court, *see*, *Haygood v. State*, 109 So. 3d 735 (Fla. 2013)). Simply put, a defendant can intend to shoot someone in self-defense, *i.e.*, with the intent to incapacitate, without likewise

intending to kill them. Accordingly, a concession that the victim was intentionally shot is not a concession that the defendant intended to kill the victim, and thus does not render the issue of intent moot. *See*, *Montgomery*, 39 So. 3d at 255, fn. 1; *Stinson*, 69 So. 3d 291; *Ward*, 12 So. 3d 920; *Dowe*, 162 So. 3d 35; *Horne*, 128 So. 3d 953; *Stoddard*, 100 So. 3d 18.

Furthermore, instead of acting as a concession of intent, a claim of self-defense expressly puts the element of intent at issue. A defendant claiming self-defense is claiming that he was not acting with premeditation or with a depraved mind, and is instead claiming that he acted with the intent to defend himself. If, as the Second District has found, a defendant raising a claim of self-defense in the context of a charge of second degree murder necessarily conceded he acted with a depraved mind, thus removing the issue of intent from the jury's consideration, no defendant could ever be acquitted on self-defense grounds, as a problem of circularity would arise, to wit: if the defendant raising a claim of self-defense is admitting he acted with a depraved mind, then he is admitting he did not act from a reasonable belief that the force was necessary to prevent imminent death or great bodily harm as required to support a claim of the justifiable use of deadly force. *See*, Fla. Std. Jury Instr. (Crim.) 3.6(f). Accordingly, the raising of a claim of self-defense in a trial on the charge of second degree murder does not concede the element of intent, but, instead, necessarily places the element in dispute.

In fact, the Second District's own precedent reflects that the raising of a claim of self-defense does not concede the element of intent. *See*, *Poole v. State*, 30 So. 3d 696 (Fla. 2d DCA 2010) (Defendant raised a claim of self-defense and was found guilty of second degree murder, despite the raising of a claim of self-defense, the court reversed the second-degree murder conviction and remanded for the entry of a conviction for manslaughter, thus recognizing the raising of a claim of self-defense does not *ipso facto* concede the issue of intent); *See also*, *Sandhaus v. State*, 200 So. 3d 112 (Fla. 5th DCA 2016) (Second degree murder conviction reduced to manslaughter by the appellate court, despite defendant's raising of a claim of self-defense). Simply put, the only element at issue in the context of a defendant claiming self-defense is in fact the element of intent. Accordingly, the erroneous manslaughter jury instruction utilized in Mr. Brown's case constituted fundamental error, as it removed the element of intent from the jury's deliberations. *See*, *Griffin*, 160 So. 3d at 67–70.

Further still, even if a claim of self-defense somehow acted as an admission that the killing was done with a depraved mind, the issue of intent nonetheless remained in dispute in Mr. Brown's case. More specifically, Mr. Brown claimed that a third party shot the victim in self-defense, ergo, at most, he admitted the intent with which the third party shot the victim, but admitted nothing with respect to his own intent. *See*, *Griffin*, 160 So. 3d at 68 ("It defies logic to conclude that expressly

disputing the identity of the perpetrator and remaining silent on the remaining elements of the crime would concede all the elements but identity. The State's burden of proof does not change simply because the defendant speaks up and contests one element, such as his identity as the perpetrator.") Accordingly, because Mr. Brown did not concede the issue of intent, the issue remained pertinent and material to what the jury had to consider in order to convict, and, as such, the use of the faulty manslaughter instruction constituted fundamental error. *See*, *Id*.

In the words of *Griffin*, "[b]y convicting [Mr. Brown] of second-degree murder, the jury necessarily found that he possessed no intent to kill—and the State conceded as much by charging second-degree murder." *Griffin*, 160 So. 3d at 69-70. "In addition, the jury was instructed that '[i]n order to convict of Second Degree Murder, it is not necessary for the State to prove the defendant had an intent to cause death.'" *Id*. at 70. "Because the manslaughter instruction given to the jury erroneously required that to convict for the lesser included offense of manslaughter by act, the jury must find [Mr. Brown] committed an act intended to cause [the victim's] death, the jury was essentially foreclosed from finding [Mr. Brown] guilty of that lesser offense when they found he had no intent to kill." *Id*. "Because [Mr. Brown] was convicted of second-degree murder, an offense only one step removed from manslaughter, and because he did not concede the intent by which the homicide was committed, [the burden of] proof of that issue remained on the State, and

remained in dispute notwithstanding [Mr. Brown's] defense[s] of misidentification [and self-defense]." *Id*. Consequently, as the issue of intent remained pertinent and material to what the jury had to consider in order to convict, and the erroneous manslaughter jury instruction utilized in Mr. Brown's case removed the element of intent from the jury's deliberations, the giving of said instruction constituted fundamental error, and Mr. Brown is thereby entitled to relief. *See*, *Id*.

C. Appellate counsel was ineffective.

In *Horne v. State,* 128 So. 3d 953 (Fla. 2d DCA 2013), the court explained that to establish a claim of ineffective assistance of appellate counsel:

> the petitioner must show that counsel performed deficiently and that " 'the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.' " *Downs v. Moore*, 801 So.2d 906, 909–10 (Fla.2001) (quoting *Wilson v. Wainwright*, 474 So.2d 1162, 1163 (Fla.1985)). This court applies the law in effect at the time of the appeal to determine whether counsel's performance was deficient, but it applies current law to determine whether the petitioner is entitled to relief. *Brown v. State*, 25 So.3d 78, 80 (Fla. 2d DCA 2009).

Horne, 128 So. 3d at 956.

Appellate counsel for Mr. Brown filed his Initial Brief on July 14, 2010, and a Supplemental Brief on November 21, 2011. Mr. Brown's direct appeal was not affirmed until March 14, 2012. The Opinion in *Montgomery*, 39 So. 3d 352 was issued on April 8, 2010. Additionally, the opinions in *Stinson*, 69 So. 3d 291 and

Ward, 12 So. 3d 920 were entered in 2009. Accordingly, Mr. Brown's appellate counsel performed deficiently by failing to argue that the manslaughter by act instruction was fundamentally erroneous based on *Montgomery, Stinson,* and *Ward,* and/or by failing to request supplemental briefing to do so. *See, e.g.*, *Banek v. State*, 75 So. 3d 762, 764 (Fla. 2d DCA 2011) (Appellate counsel performed deficiently in failing to seek supplemental briefing on the issue of whether the attempted manslaughter by act instruction was fundamentally erroneous based upon *Montgomery v. State*, 70 So. 3d 603, 607 (Fla. 1st DCA 2009) which issued after the filing of the Initial and Answer Briefs).

Furthermore, Mr. Brown was overwhelmingly prejudiced by his appellate counsel's deficient performance, as had counsel argued on appeal that the manslaughter by act jury instruction utilized in Mr. Brown's case was fundamentally erroneous, Mr. Brown would have ultimately been afforded a new trial as a part of the direct appeal process. Mr. Brown acknowledges that had appellate counsel briefed this issue the Second District in all likelihood would have initially denied relief. *See, e.g.*, *Daniels v. State*, 72 So. 3d 227 (Fla. 2d DCA 2011) *decision quashed,* 121 So. 3d 409 (Fla. 2013); *Haygood v. State*, 54 So. 3d 1035 (Fla. 2d DCA 2011) *decision quashed,* 109 So. 3d 735 (Fla. 2013); *Griffin v. State*, 128 So. 3d 88 (Fla. 2d DCA 2013), *decision quashed,* 160 So. 3d 63 (Fla. 2015).

However, the decisions in *Daniels v. State*, 121 So. 3d 409 (Fla. 2013), *Haygood v. State*, 109 So. 3d 735 (Fla. 2013), and *Griffin v. State*, 160 So. 3d 63 (Fla. 2015), make it clear that had the issue been raised by appellate counsel, Mr. Brown would have ultimately been afforded relief as part of the direct appeal process – albeit through this Court. *See, Horne*, 128 So. 3d at 956 (Petitioner would have initially been denied relief on his *Montgomery* claim had it been raised, but because it was clear he would have ultimately been afforded relief as part of the direct appeal process had the issue been raised, appellate counsel performed ineffectively by failing to raise the issue). Accordingly, Mr. Brown's appellate counsel performed ineffectively by failing to argue on appeal that the manslaughter by act jury instruction utilized in his case was fundamentally erroneous, and that he was thereby entitled to a new trial. *See*, *Montgomery*, 39 So.3d 252; *Daniels*, 121 So. 3d 409; *Haygood*, 109 So. 3d 735; *Griffin*, 160 So. 3d 63; *Stinson*, 69 So. 3d 291; *Ward*, 12 So. 3d 920; *Horne*, 128 So. 3d at 956.

Consequently, because a new appeal would be redundant, this Court should quash the Second District's decision, and remand his case with directions that the Second District grant Mr. Brown's Petition for Writ of Habeas Corpus, vacate the affirmance of his Direct Appeal, and remand his case to the circuit for a new trial. *See, Montgomery*, 39 So.3d 252; *Daniels*, 121 So. 3d 409; *Haygood*, 109 So. 3d 735; *Griffin*, 160 So. 3d 63; *Stinson*, 69 So. 3d 291; *Ward*, 12 So. 3d 920; *Dowe v. State*,

162 So. 3d 35; *Horne*, 128 So. 3d at 957; *see also*, *Banek v. State*, 75 So. 3d 762 (Fla. 2d DCA 2011) (Appellate Counsel ineffective for failing to raise issue of fundamental error in attempted manslaughter by act jury instruction); *Betts v. State*, 100 So. 3d 78 (Fla. 2d DCA 2011) (Appellate counsel ineffective for failing to argue that the then-standard jury instruction given on attempted voluntary manslaughter was fundamentally erroneous); *Ferrer v. State*, 69 So. 3d 360 (Fla. 2d DCA 2011) (Appellate counsel ineffective for failing to argue that the then-standard manslaughter by act instruction was fundamentally erroneous because it imposed an additional element of an intent to kill); *Pollock v. State*, 64 So. 3d 695 (Fla. 2d DCA 2011) (Appellate counsel ineffective for failing to argue that the trial court fundamentally erred by giving the then standard instruction for manslaughter by act); *Del Valle v. State*, 52 So. 3d 16 (Fla. 2d DCA 2010) (Appellate counsel was ineffective for failing to argue that the then standard jury instruction for manslaughter by act constituted fundamental error); *Coleman v. State*, 110 So. 3d 971 (Fla. 2d DCA 2013) (Appellate counsel was ineffective for failing to argue that the standard instruction for attempted manslaughter by act constituted fundamental error); *Cummings v. State*, 103 So. 3d 1048 (Fla. 2d DCA 2013) (Appellate counsel was ineffective in failing to argue that the manslaughter by act instruction given as a necessarily lesser included offense of second-degree murder with a firearm constituted fundamental error); *Deravil v. State*, 98 So. 3d 1172 (Fla. 2d DCA 2012)

(Appellate counsel ineffective for failing to argue that attempted manslaughter by act instruction constituted fundamental error); *Curry v. State*, 64 So. 3d 152 (Fla. 2d DCA 2011) (Appellate counsel was ineffective for failing to argue that the then standard jury instruction for manslaughter by act in second-degree murder trial constituted fundamental error); *McClendon v. State*, 93 So. 3d 1131 (Fla. 2d DCA 2012) (Appellate counsel was ineffective in failing to argue that the standard jury instruction for attempted manslaughter by act that was provided to the jury constituted fundamental error because it improperly imposed an additional element of an intent to kill); *Arnold v. State*, 93 So. 3d 1094 (Fla. 2d DCA 2012) (Appellate counsel ineffective for failing to argue that attempted manslaughter by act jury instruction was fundamentally erroneous); *Weber v. State*, 89 So. 3d 973 (Fla. 2d DCA 2012) (Appellate counsel ineffective for failing to argue that the standard jury instruction for attempted manslaughter by act constituted fundamental error because it imposed an additional element of intent to kill).

D. The Second District's opinion should be quashed.

For the foregoing reasons, this Court should reaffirm its decision in *Montgomery*, approve the decisions in *Stinson*, *Ward*, and *Dowe*, and find that in a murder trial the issue of intent remains in dispute notwithstanding the raising of a claim of self-defense, and, as such, the giving of the flawed manslaughter instruction constitutes fundamental error, unless the issue of intent is otherwise expressly

conceded by the defendant. This Court should further reaffirm *Griffin*, and find that expressly disputing the identity of the perpetrator does not concede any of the elements of the crime as pertaining to the defendant, notwithstanding the fact that the defendant claims the perpetrator acted in self-defense, and, as such, the giving of the flawed manslaughter instruction constitutes fundamental error, unless the issue of intent is otherwise expressly conceded by the defendant. Furthermore, this Court should find the Second District's decision to be in conflict with *Montgomery*, *Stinson*, *Ward*, *Dowe*, and *Griffin*, quash the Second District's decision, and remand Mr. Brown's case with directions that the Second District grant his Petition for Writ of Habeas Corpus, vacate the affirmance of his Direct Appeal, and remand his case to the circuit court for a new trial.

CONCLUSION

Based upon the argument and citation to authority presented above, this Court should approve the decisions in *Montgomery*, *Stinson*, *Ward*, *Dowe*, and *Griffin*, quash the Second District's decision, and remand Mr. Brown's case with directions that the Second District grant his Petition for Writ of Habeas Corpus, vacate the affirmance of his Direct Appeal, and remand his case to the circuit court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Brief was emailed via the Florida Courts eFiling portal to the Attorney General's Office at crimapptpa@myfloridalegal.com on this 6th day of April, 2018.

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CERTIFICATION OF COMPLIANCE

I hereby certify that this document was generated by computer using Microsoft Word with Times New Roman 14-point font in compliance with Fla. R. App. P. 9.210(a)(2).

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