IN THE SUPREME COURT OF FLORIDA

MICHAEL J. MCCOY,

Petitioner,

VS. CASE NO. SC16-1316
LT NO. 1D14-49614

STATE OF FLORIDA,

Respondent.

_____/

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

PETITIONER'S INITIAL BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner **MICHAEL J. MCCOY** was the appellant in the First District Court of Appeal and the defendant in the trial court and will be referred to in this brief as Petitioner or by his proper name. Respondent, the State of Florida, was the prosecution below, and will be referred to herein as Respondent, prosecutor, or the state.

The record on appeal consists of eleven volumes, which will be referred to by the use of the symbol "V," followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND

Petitioner was charged in circuit court by Information filed February 24, 2014, with: Count I, second degree murder with a firearm; and Count II, attempted second degree murder with a firearm. (V1-6). Petitioner proceeded to trial on November 17, 2014. (V4, V5, V6, V7, V8). On November 19, 2014, the jury returned with verdicts of guilt to: Count I, manslaughter (a lesser) with the special finding that Petitioner actually possessed and discharged a firearm during the commission of the offense resulting in death or great bodily harm to the victim; and Count II, aggravated battery (a lesser) with the special finding that Petitioner actually possessed and discharged a firearm during the commission of the offense resulting in death or great bodily harm to the victim. (V8-530-531). On December 18, 2014, Petitioner was adjudicated guilty and sentenced as follows: Count I, twenty years in prison; Count II, twenty five years in prison, minimum/mandatory, under the 10-20-life statute, consecutive. (V3-213)(V1-101-107). A Notice of Appeal was timely filed. (V1-114). A Motion to Correct Sentencing Error was filed by Petitioner and granted by written order. (V10-219-226).

On appeal to the First District Court of Appeal, Petitioner argued that the jury instructions and the verdict form for Count II were erroneous because the instruction for aggravated battery (a second degree felony) was given after the instruction for

attempted manslaughter (a third degree felony) and the verdict form likewise listed aggravated battery after attempted manslaughter. (Initial Brief of Appellant, pages 23-30). The First District Court of Appeal, in an opinion dated June 1, 2016, affirmed Petitioner's convictions and sentences, relying on Graham v. State, 100 So. 3d 755 (Fla. 1st DCA 2012), and finding that an error in the listing of lesser-included offenses on a verdict form and in jury instructions is not fundamental error. The First District Court of Appeal certified conflict with Thomas v. State, 91 So. 3d 880 (Fla. 5th DCA 2012), in which the Fifth District Court reversed the defendant's conviction and sentence, holding that it was fundamental error to fail to list the lesser-included offenses in descending order of seriousness on the verdict form.

Petitioner filed a petition for discretionary review in this Court. The petition was granted and the Court accepted jurisdiction of this case on August 23, 2016.

STATEMENT OF FACTS

At 2:38 a.m. on February 5, 2014, Sergeant Jason Larson of the Bay County Sheriff's Office responded to a home in Fountain, Florida. (V4-25). He saw one person lying in a ditch in front of the home and two others behind vehicles near the home. (V4-26). Larson ordered Petitioner to the ground and handcuffed him. (V4-26). Petitioner told Larson that he did not mean to shoot Diane McCoy (hereinafter "D. McCoy"). (V4-27). Petitioner required assistance walking to and getting into the patrol vehicle. (V4-27,31). EMS arrived and took her by ambulance to the hospital. (V4-28).

Former deputy Shawn Seckel responded to the scene and helped Larson get Petitioner to the patrol car. (V4-34). Petitioner seemed to be in shock. (V4-36). He saw David Walker face down in a ditch near the mailbox. (V4-34). Walker had several gunshot wounds to the back of his torso. (V4-34). Seckel turned him over, cut off his shirt, and began CPR on Walker. (V4-34). Walker was not breathing and did not have a pulse, but his body was still warm. (V4-34).

Deputy Jeff Duggins also saw Walker face down in a ditch. (V4-43). After checking Walker's vital signs and making sure Petitioner was secured, he went inside and searched the home. (V4-40). When he located a teenaged female in a bedroom in the back southeast corner, he advised her to stay in her room. (V4-

40-41). In the master bedroom, Duggins saw a few rifles displayed above the headboard and a black handgun on the right nightstand. (V4-41). The slide of the gun was back, which meant that it was not ready to be fired and did not contain a clip or magazine. (V4-41).

Stephanie Wargo, a crime scene investigator for the Sheriff's Office, arrived on scene at 3:30 a.m. (V5-57). Photographs taken of the scene, a metal gun box, ammunition, and rifles above the headboard in the bedroom were admitted into evidence. (V5-59,71). Shell casings collected at the scene and the ammunition and gun box were admitted into evidence. (V5-66-69,73). Wargo testified that some of the shell casings were found five feet and nine feet from the truck bumper, from where Petitioner allegedly fired the weapon. (V5-79). The distance from the truck bumper to Walker's feet was twenty-three feet, although Wargo admitted this was an estimate, as the distance was measured days later, when Walker's body was no longer present. (V5-79,82). The distance from the truck bumper to the mailbox was twenty-eight feet. (V5-79). DNA swabs were collected from Walker, D. McCoy, and Petitioner. (V5-81). A cane with arm brace attached[1] was located next to the truck. (V5-82).

[1] Throughout the trial, the equipment Petitioner needed to walk was referred to as canes with arm braces, or crutches with forearm straps, or walking sticks. All referred to the same equipment.

Photographs of Petitioner, taken after the incident, were identified by the witness. (V5-84-86).

Paramedic Liane Harding responded to the scene and pronounced Walker dead. (V5-88). She cut D. McCoy's clothing, placed her on a back board, started IVs, dressed the two bullet wounds in her abdominal area, and got her ready for transport. (V5-89). D. McCoy was in and out of consciousness and Harding opined that her condition was "critical." (V5-89-90).

D. McCoy was separated from her husband, Petitioner, at the time of trial. (V5-91). She had known Petitioner for nine years and they had been married for seven. (V5-91). At the time of the incident she resided in a mobile home with Petitioner, D. McCoy's fourteen year old daughter, and Walker. (V5-92). She stated that Petitioner had back and neck problems, had four prior back surgeries and two or three neck surgeries, and was disabled. (V5-93,128). When they were first married he could walk without crutches but later needed walking crutches with forearm straps. (V5-94). Petitioner did not require a wheelchair at the time of the incident. (V5-94). Petitioner's disease was degenerative. (V5-129).

Towards the end of 2013, the McCoys' marital problems led them to reach an agreement to end the marriage. (V5-95). They decided to be separated, but live in the same home and sleep in the same bed, until after D. McCoy's daughter finished the school

year and D. McCoy received her tax refund. (V5-95). Then, the McCoys would divorce and D. McCoy and her daughter would move to Alabama. (V5-95). D. McCoy claimed that she and Petitioner slept in the same bed because the only heat in the home was from electric heaters. (V5-96).

D. McCoy stated that she met Walker when they attended classes together from 2010 to 2012. (V5-97). She rekindled their friendship when he contacted her on Facebook. (V5-98). They became very close and "cared deeply" for each other, but she claimed their intimacy did not extend beyond kissing and hugging. (V5-99, 102). When Walker had difficulties which caused him to have to leave his mother's home, Petitioner offered to have him move in with them. (V5-99). Walker had his own room and could continue to rent the room from Petitioner after D. McCoy moved to Alabama. (V5-99). Petitioner knew that Walker and D. McCoy were "good friends." (V5-99).

The first few days after Walker moved in, everything seemed fine between Petitioner and Walker. (V5-101). On the night of the incident, D. McCoy got home around 11:45 p.m. (V5-103). Petitioner and Walker sat at the kitchen table, and talked about welding. (V5-103-104). Walker was drinking a beer, and D. McCoy got one for herself. (V5-104). Petitioner did not drink. (V5-104). According to D. McCoy, Petitioner was talking so much that she and Walker started texting each other. (V5-104). Petitioner

noticed, got angry, left the table and went to the bedroom. (V5-104). D. McCoy followed and saw Petitioner retrieve her pistol box from under the bed. (V5-104). Petitioner was very angry and stated that he was going to shoot himself. (V5-105). He wanted to know what she and Walker had been texting to each other. (V5-105). D. McCoy told him that they were texting each other because he was talking so much they "couldn't get a word in edgewise." (V5-105). According to D. McCoy, the actual text messages involved a request by Walker that they meet outside after Petitioner had gone to bed. (V5-110). D. McCoy had responded that Petitioner would not go to bed until after she did so they could not meet. (V5-110).

As Petitioner tried to get the gun out of the box, D. McCoy attempted to get the gun from Petitioner. (V5-106). At first they were standing, but they fell on the floor with Petitioner on top of the gun, facedown, and D. McCoy on top of him. (V5-106). As D. McCoy tried to get her arm under Petitioner to retrieve the gun, Petitioner bit her quite hard on the arm and she got up. (V5-106,108). According to D. McCoy, the box was kept unlocked and the gun loaded. (V5-106). The box was broken during the struggle. (V5-107). There were rifles hanging above the headboard, but they were not loaded. (V5-107).

When D. McCoy got up, Petitioner pointed the gun at her and directed her to the living room. (V5-108). Walker had already

gone to his bedroom and the door was closed. (V5-109). Petitioner had D. McCoy sit in a chair directly opposite him while he held her at gunpoint for about fifteen minutes. (V5-111). Every time she tried to move, Petitioner pointed the gun in the direction of D. McCoy's daughter's room. (V5-111). Petitioner complained of being hot and directed D. McCoy to go outside with him. (V5-112). They sat on the tailgate of the red pickup truck, smoked cigarettes, and talked. (V5-112). Petitioner still had the gun, but it was in his pocket. (V5-112). D. McCoy did not believe he used his crutch to get outside but was not sure. (V5-112).

Petitioner told D. McCoy that he wanted to stay married and D. McCoy agreed just to placate him. (V5-113). Petitioner also wanted Walker out of the house immediately, so D. McCoy headed toward the home to relay the message. (V5-113). Walker, who must have overheard the discussion, had his jacket on and met her at the steps. (V5-113). He said, "I don't need this, I am going to leave." (V5-113). Walker walked down the road, while Petitioner yelled at him, calling him names. (V5-114). Walker turned around when he was at the mailbox and said, "you wanted me gone M.F.-er, I am leaving." (V5-114). Walker did not make any aggressive moves toward Petitioner. (V5-117,119). Petitioner cursed at Walker again and shot him a number of times. (V5-114). D. McCoy yelled for Petitioner not to do it. (V5-114).

Petitioner turned and shot D. McCoy twice in the stomach. (V5-114). According to McCoy, she was standing about twenty-five to thirty feet away from Walker when he was shot. (V5-115).

After D. McCoy was shot she fell to the ground, took out her cell phone, and dialed 911. (V5-121). Petitioner walked into the home. (V5-121). When he came out, he had the house phone and dialed 911 as he knelt beside D. McCoy. (V5-122).

D. McCoy was in the hospital for one month as a result of her gunshot injuries. (V5-124). Her large and small intestines were damaged, requiring her to have a colostomy bag. (V5-124). She also had nerve and muscle damage, and a cracked vertebra. (V5-124). D. McCoy showed the jury the scars from her gunshot wounds. (V5-120).

According to D. McCoy, Petitioner had previously bragged that he could shoot someone and get away with it by claiming the person threatened Petitioner, because he was disabled. (V5-125). She also claimed that she and Petitioner had previously used the same gun for target practice on many occasions. (V5-125).

Shyanne Lomanek, D. McCoy's daughter, was fourteen at the time of the incident. (V5-163). She referred to Petitioner as "dad." (V5-165). The night of the incident she did not hear anything from when she went to bed until the deputy knocked on her door and told her to stay in her room. (V5-169). She had

heard Petitioner previously state that he could shoot anyone and get away with it because he was "crippled." (V5-170).

Robert Spencer was D. McCoy's father. (V5-174). He had also overheard Petitioner state that he could shoot someone because he was "crippled." (V5-176). Petitioner made this statement when the Trayvon Martin case was discussed in the home and in regard to Shyanne Lomanek's biological father, who the family believed had molested her but who was acquitted at trial. (V5-176-178).

David Spencer, D. McCoy's twenty-year old son, who was adopted by and lived with his grandparents, testified that he had also heard Petitioner state that he could use his disability to shoot someone and get away with it. (V5-183).

Elizabeth Richey, a firearms crime analyst with FDLE, analyzed the 9 millimeter gun used in this case. (V5-191). She described its condition as fair and in working order, with a six and one-half pound trigger pull. (V5-192). She opined that the six cartridges she examined all were fired from that gun. (V5-193). The gun could hold up to nine bullets, but Richey could not tell how many were in it when it was fired that night. (V5-195).

Deputy Wargo was recalled and testified that she attended Walker's autopsy. (V6-203). There were no projectiles in Walker's body. (V6-204). Deputies went back to the scene in an

attempt to locate additional projectiles, but were unsuccessful. (V6-204-205).

Investigator Craig Romans of the Bay County Sheriff's Office identified transcripts and recordings of the 911 calls made after the incident. (V6-213). The recordings were admitted into evidence and played for the jury. (V6-214-224). During one call, Petitioner admitted shooting two people who were cheating on him. (V6-216). Petitioner stated that he did not mean to shoot D. McCoy, but did mean to shoot Walker. (V6-222).

Two phone calls made by Petitioner from the jail were also admitted into evidence and played for the jury. (V6-225-241). On the first recording, Petitioner told a friend that his and D. McCoy's stories were "completely the same. I don't understand why she's saying they are not the same..." (V6-236). Petitioner also stated that D. McCoy "was coming at me" so he turned and shot her. (V6-238). He stated that he was going with the "stand your ground" defense. (V6-239). On the second recording, Petitioner stated that Walker pushed D. McCoy out of the way and was coming for Petitioner when he shot him. (V6-241).

The clothing Petitioner was wearing during the incident was tested for blood evidence. (V6-243). On his shirt was blood which had a major contributor of D. McCoy and a possible contributor of Petitioner. (V6-243). The blood on Petitioner's shorts was his own. (V6-243). No blood matched Walker. (V6-

244). Romans agreed that the photographs of Petitioner were accurate regarding the injuries he sustained. (V6-249).

Dr. Michael Hunter, the medical examiner, performed the autopsy on Walker. (V6-253). Walker had a .02 blood alcohol level. (V6-254). Autopsy photographs were admitted into evidence without objection. (V6-255). Walker had gunshot wounds that entered his rear right calf, his right chest, his upper left back, and his right forearm. (V6-257-262). The gunshot wound which perforated his heart was fatal. (V6-261). The cause of death was a gunshot wound of the chest. (V6-263). Hunter opined that Walker may have survived for 10 to 15 seconds and could have functioned and moved for that short period of time. (V6-263). Hunter stated that Walker could have even run across a street before dying. (V6-267). The manner of death was homicide. (V6-263). Hunter opined that the first shots were the ones that struck Walker in the front, and then he turned and was struck on the rear leg and left rear flank. (V6-264).

A preliminary charge conference was held. (V6-270). Defense counsel requested a heat of passion instruction, which the state agreed to include. (V6-270-271). Defense counsel agreed to have the instruction read one time to apply to all charges. (V6-274). Upon further research, the parties agreed that the instruction applied only to the murder and attempted murder charges and not manslaughter or attempted manslaughter.

(V7-295). The trial court inquired of Petitioner regarding his decision to testify, informing Petitioner that he did not have to decide at that time. (V6-281-282).

Dr. Larry Wong was the trauma surgeon on-call when D. McCoy was admitted to the hospital. (V7-299). She was in a critical, hypotensive, minimally responsive state. (V7-299). He intubated her and performed an exploratory laparotomy. (V7-300). D. McCoy had multiple injuries to her small and large intestines, and was bleeding from the mesentery, or blood supply to the intestine. (V7-300). Wong repaired the small intestine and one injury to the large intestine. (V7-300). He also performed a colostomy. (V7-300). After surgery, additional injuries were discovered, including a fracture of her lumbar spine and an injury to her right urethra which caused urine to leak from her right kidney. (V7-301). A urological surgeon placed a stint to allow the urethra to heal. (V7-301). Had D. McCoy not received medical care, she would have died from her injuries. (V7-302). Wong could not testify as to the direction of the gunshot wounds. (V7-302). However, the entrance wounds were to the front of the abdomen. (V7-303).

The state rested its case. (V7-304). Defense counsel moved for a judgment of acquittal, which was denied. (V7-304-305). The court inquired of Petitioner again regarding his decision to testify. (V7-306).

The defense called Petitioner to testify. (V7-307). At the time of trial, Petitioner was confined to a wheelchair. (V7-307). Petitioner had four prior back surgeries and two prior neck surgeries. (V7-308). He had a degenerative bone disease in his back and had suffered seven broken vertebra in his neck. (V7-308). He was advised by medical professionals not to fall down or lift heavy objects. (V7-308). Falling could result in paralysis. (V7-308). He had slipped in the shower at jail and was bound to a wheelchair since. (V7-309). His back problems were ongoing for ten years and he had been on disability. (V7-309).

Petitioner agreed that he and D. McCoy had been separated at the time of the incident but were still living together and sharing a bedroom. (V7-312-313). Petitioner did not know Walker, but was aware that he and D. McCoy had established a friendship when they met in school. (V7-315). When D. McCoy found out that Walker needed a place to live, Petitioner asked her if Walker was her boyfriend or lover, as he did not want to move Walker in under those circumstances. (V7-316). D. McCoy assured Petitioner that Walker was just a friend. (V7-317).

Petitioner testified that he was suicidal about a week prior to the incident. (V7-317). Since he was losing his home and his wife he thought about killing himself with the 9 millimeter gun. (V7-317).

When Walker showed up at Petitioner's home a few days later, Walker was distressed about a car accident he had, which left him without a vehicle. (V7-319). Petitioner offered to sell Walker his red truck since Petitioner had difficulty driving it with his disability. (V7-319). Petitioner added Walker's name to their car insurance and Walker drove the red truck to work the next day. (V7-320).

The evening of the incident, Walker returned to the home at 6:00 p.m. (V7-322). Petitioner and Walker sat at the table by the fireplace and talked about welding, family, Walker continuing to be Petitioner's roommate after D. McCoy moved out, and the truck. (V7-324,374). Walker was concerned that his sister was going to send him to prison for violating his probation, as Walker had gotten into a fight with his sister. (V7-325). Walker was drinking beer. (V7-325). D. McCoy arrived home around midnight and Walker got her a beer. (V7-326). After she drank a beer with them at the table, D. McCoy changed into her night clothes, got another beer, and joined them again. (V7-327). Walker and D. McCoy started to talk to each other and Petitioner began to feel like "a third wheel." (V7-327). D. McCoy texted Walker and then she went to the bathroom. (V7-327). Petitioner asked Walker what D. McCoy had texted him, but Walker would not admit the text was from her. (V7-327). When D. McCoy came back, Petitioner asked her what she had texted to Walker.

(V7-327). She responded, "some stuff he needs to know." (V7-328). Then she complained that Petitioner would not let them get a "word in edgewise." (V7-328). Petitioner felt like he was being lied to and told D. McCoy that they needed to talk. (V7-328). Walker stated that he needed to go to bed and went to his bedroom. (V7-328).

When Petitioner and D. McCoy got to their bedroom, he asked her if he could see the text message she sent Walker. (V7-328). D. McCoy refused, stating that they were separated. (V7-329). Petitioner asked why they had engaged in sexual relations that morning and she stated "what about it?" (V7-329). Petitioner asked how long she had been seeing Walker. (V7-329). D. McCoy stated that they had been flirting with each other for about one month. (V7-329). Petitioner reminded her that she had promised she would not bring a boyfriend into his house. (V7-329). Petitioner told her that he felt like killing himself, rolled over the bed to the other side, and reached under the bed for the box that held the 9 millimeter gun. (V7-329). Petitioner knew the gun was loaded. (V7-329). When D. McCoy saw Petitioner grab the box she "started beating the crap out of" him. (V7-330). She hit Petitioner in the back of the neck, ripped the handle from the box, reached around Petitioner's neck and under his body. (V7-330). D. McCoy pulled at Petitioner's head and he felt something slide in his neck. (V70330). He told her that

she was hurting him and pulled her arm and bit it. (V7-331). D. McCoy jerked her arm away. (V7-331). Petitioner got the gun out of the box, cocked it, and told her "please just let me shoot myself." (V7-331). D. McCoy told him it was fine if he committed suicide, just not in front of her daughter. (V7-331). Petitioner got angry and told her that he was not going to kill himself, but wanted D. McCoy and Walker out of his house. (V7-331). D. McCoy said that she had no where to go until she got her tax refund. (V7-331). Petitioner told her she could stay two weeks until her refund came, for her daughter's sake, but that he wanted Walker out that night. (V7-331).

Petitioner told her that they should leave the bedroom since there were so many weapons in there and he was afraid she would attack him. (V7-331). Petitioner did not point the gun at D. McCoy. (V7-332). He had the gun in his hand, and because of his awkward gait with the cane, the gun swung around as he walked. (V7-332). However, he did not point the gun at her or threaten her with it. (V7-332). Petitioner had the safety on so that if he fell the gun would not go off. (V7-332). Petitioner sat at the table again for about fifteen minutes, while D. McCoy paced back and forth and tried to climb onto the fireplace. (V7-333). Petitioner did not threaten her or her daughter with the gun. (V7-333). When D. McCoy headed toward the door, Petitioner told her to take Walker with her. (V7-334). Petitioner asked about

the text message and told D. McCoy he would go to Verizon and get the information himself. (V7-334).

Petitioner went outside alone, while D. McCoy headed toward Walker's room. (V7-334). When Petitioner got to the truck, D. McCoy was at the door and asked if they could talk. (V7-335). Petitioner told her to come outside. (V7-335). She put the tailgate down on his truck and they sat on the tailgate, smoked cigarettes, and talked. (V7-335). Petitioner placed his cane against the side of the truck. (V7-335).

D. McCoy apologized for having a "flirt buddy" for the last month. (V7-336). Petitioner told her that they were separated so that was not wrong. (V7-336). However, moving her "flirt buddy" in his house was wrong. (V7-336). Petitioner reiterated that Walker needed to leave. (V7-336). Then, D. McCoy told Petitioner that she and Walker had actually been together for the last two years and that she had wanted a divorce for all of that time. (V7-337). Petitioner was very angry to learn about the two-year affair. (V7-337). Petitioner asked her why she had sexual relations with him that morning if she wanted a divorce for the last two years. (V7-338). She replied that she had relations with Petitioner because he had been so nice to Walker. (V7-338).

Walker must have overheard the conversation because he made a noise at that time. (V7-338). D. McCoy told Petitioner that

she would take care of Walker. (V7-338). Just then Walker came out of the home and D. McCoy went over to him. (V7-339-340). Walker was upset with D. McCoy about her having two men or two boyfriends that she was "fooling around" with. (V7-340). As he walked down the driveway, D. McCoy tried to calm him down and walked out to the mailbox with him. (V7-340). When they got to the road, Petitioner yelled, "don't come in my house, don't come back to my house, mother fucker." (V7-341). Walker yelled back, "I wouldn't come back to your house if you paid me." (V7-341). D. McCoy told Petitioner to leave Walker alone because he was leaving just as Petitioner wanted. (V70341). Petitioner agreed, put out his cigarette, and did not say another word. (V7-342). D. McCoy headed back toward Petitioner and knocked his cane over. (V7-343). D. McCoy sat down and told Petitioner that Walker was concerned about not having a vehicle, which could result in him violating his probation. (V7-343). Petitioner got annoyed and yelled, "mother fucker, I am going to put your ass in jail five years," thinking that with all of the guns in Petitioner's home, Walker's probation could be violated just for living there. (V7-343). Walker responded that he was not going to jail for "trumped up charges." (V7-344). Petitioner said, "oh, hell, yeah, you are because I am going to call the cops." (V7-344). Walker headed back toward Petitioner. (V7-344). D.

McCoy was telling Petitioner to leave Walker alone and let him go. (V7-344). D. McCoy headed over to stop Walker. (V7-344).

D. McCoy told Walker that she could handle Petitioner. (V7-345). Walker said, "fuck [Petitioner]." (V7-345). Petitioner said, "Fuck you, David." (V7-345). Walker pushed D. McCoy as he headed toward Petitioner. (V7-345). Petitioner told him not to push D. McCoy. (V7-345). Walker asked what Petitioner was going to do about it. (V7-345). Petitioner pulled out the gun, took it off safety, cocked it, and said, "I will shoot your fucking ass, man, don't push my wife on my property, I'll shoot your ass." (V7-346). Walker said, "you ain't going to do shit," and pushed D. McCoy again. (V7-346). Petitioner again told him to stop, and Walker pushed her again as he headed back towards Petitioner's yard. (V7-346). As Walker and D. McCoy pushed each other, Petitioner fired the gun. (V7-348). He thought that he must have hit D. McCoy by mistake because she went down. (V7-348). When Walker saw that, he roared madly and started coming at Petitioner. (V7-348). Petitioner shot four times at Walker. (V7-348).

Then, D. McCoy came over to Petitioner and told Petitioner that he had shot Walker. (V7-350). Petitioner told her that Walker was coming at him so he had no choice and he also shot Walker to help her. (V7-350). D. McCoy said, "you shot me, mother fuck." (V7-350). Petitioner told her that he was sorry

and that it was an accident. (V7-350). D. McCoy tried to grab the gun out of his hand, but he pulled it away, telling her that he did not trust her anymore. (V7-350). Petitioner told D. McCoy to put her hands up, but she refused, even when Petitioner pointed the gun at her. (V7-350). D. McCoy started "beating" and "hitting" Petitioner, asking "why, why, why." (V7-350). D. McCoy gouged at Petitioner's eye, resulting in injury. (V7-353). Photos of Petitioner's injuries to his eye and body were admitted into evidence. (V7-354). Petitioner told her to stop or he would shoot her. (V7-350). Petitioner pushed her off of him and she came back at him. (V7-350). So, he shot her once in the stomach, to prevent her from continuing to harm him. (V7-350).

Petitioner went to D. McCoy, pulled up her shirt, and saw the wound. (V7-351). He told her he would get help and went in the home, where he put down the gun and got the house phone. (V7-351). Then he called 911. (V7-354). When the police came, Petitioner was put in a patrol car. (V7-355).

Petitioner explained that he was trying to get back at Walker for the affair by threatening to have him put in prison. (V7-351). However, he did not shoot him for that reason. (V7-351). Petitioner shot Walker because Petitioner believed Walker was coming to beat him up which could result in Petitioner's paralysis. (V7-352). Petitioner stated,

> I didn't think he was going to kill me. I thought he was going to cripple me worse than I already am.

> Diane, on the other hand, I swear to you, she was going to kill me, she would have got that gun and I would've been dead on the back of that truck... The first shot was an accident. The next shot was not an accident. She was trying to get me from shooting her.

(V7-352).

When Petitioner tried to tell the officers what had happened, he was in shock and could not remember everything clearly. (V7-356). Petitioner was Baker Acted and taken to the hospital. (V7-357). Petitioner stated that his memory problems persisted, as he was very distressed for about three months. (V7-359).

Petitioner stated that he never made previous comments about getting away with shooting someone because of his disability. (V7-362). He stated that D. McCoy's family was lying because they were angry at him for shooting her. (V7-362).

The defense rested. (V7-438). The charge conference was continued. (V7-439-443). The state and defense presented their closing arguments. (V8-452-491). The jury was charged and retired to deliberate. (V8-491-519). The jury returned with verdicts of guilty to the lesser-included offenses of manslaughter and aggravated battery, with the special findings that Petitioner possessed and discharged a firearm which resulted in death or great bodily harm to the victims. (V8-530-531).

SUMMARY OF ARGUMENT

ISSUE

The jury instructions and the verdict form for Count II were erroneous because the aggravated battery option was given and listed after the attempted manslaughter option. Florida law requires that lesser offenses be listed on a verdict form in descending order by degree of offense. Aggravated battery is a second-degree felony and should have been listed above attempted manslaughter, which is a third-degree felony. Compounding the error in this case was the twenty-five year minimum mandatory prison sentence pursuant to the 10-20-life statute required for the aggravated battery conviction. The jury was misled by the erroneous order of the jury instructions and verdict form. While the jury chose what appeared to be the "lesser" of options for Count II, it was higher in both degree and punishment. Petitioner asserts that this error is fundamental and a new trial is warranted.

ARGUMENT

ISSUE

The jury instructions and the verdict form for Count II were erroneous because the instruction for aggravated battery (a second degree felony) was given after the instruction for attempted manslaughter (a third degree felony) and the verdict form likewise listed aggravated battery after attempted manslaughter.

In affirming Petitioner's convictions and sentences, the First District Court of Appeal stated,

> An error in the trial court's listing of lesser-included offenses on a verdict form and in jury instructions is not fundamental error in this district. See Graham v. State, 100 So. 3d 755 (Fla. 1st DCA 2012).

The court discussed the Fifth District Court of Appeal's decision in Thomas v. State, 91 So. 3d 880 (Fla. 5th DCA 2012), in which the District Court reversed Thomas' aggravated battery conviction and sentence, holding that the failure to list lesser-included offenses in descending order of seriousness on the verdict form was fundamental error. However, the First District, without providing any reasoning in support of its holding, affirmed Petitioner's judgment and sentence, finding that "the jury was accurately instructed and the evidence supports McCoy's convictions obtained," but certified conflict with Thomas v. State, 91 So. 3d 880 (Fla. 5th DCA 2012).

Petitioner asserts that, in regard to Count II, it was error to charge the jury on aggravated battery after attempted manslaughter and that it was likewise error to list the charges in that same order on the verdict form. While defense counsel did not object to the order in which the jury instructions were read, nor to the order in which the charges appeared on the verdict form, Petitioner submits that the error in this case is fundamental, and urges this Court to approve the holding in Thomas and quash the holding of the First District Court in this case and remand for a new trial. See Thomas at 882; See also, Williams v. State, 123 So.3d 23, 28 (Fla. 2013); Hills v. State, 994 So. 2d 412, 413 (Fla. 3d DCA 2008).

The law requires that lesser offenses on a verdict form, and the jury instructions for those lesser offenses, must be given in order from the most serious to the least serious. See Sanders v. State, 944 So. 2d 203, 207 (Fla. 2006). According to this Honorable Court:

> Finally, we clarify how lesser included offenses relate to reclassification and enhancement statutes when fashioning a verdict form. While reclassification and enhancement statutes have made it difficult for trial courts to prepare appropriate verdict forms, the basic premise of what constitutes a proper lesser included offense has not changed. Trial courts should continue to rely primarily and ultimately upon the applicable statutory provisions for the charged crime when they are determining lesser included offenses. However, the Florida Standard Jury Instructions in Criminal Cases contain a schedule that assists in this task. **The charged crime should be followed on the verdict form by the determined lesser included offenses in descending**

> **order by degree of offense.** After the court has examined the requisite statute and the relevant criminal jury instructions for the charged crime, the court should consider any reclassification or enhancement statute brought into play by the charging document and evidence at trial. Any factor required to be found by the jury for reclassification or enhancement purposes may then be placed in a separate interrogatory at the appropriate place.

Id. at 207 (emphasis added).

In Thomas v. State, 91 So.3d 880, 882 (Fla. 5th DCA 2012), where the charges were not properly ordered on the verdict form or in the jury instructions, the Court stated:

> The error was not harmless because, based on the order in which the charges were set forth in the instructions and verdict form, **the jury could reasonably have concluded that the offenses were presented in descending order of seriousness** ... As such, "it is impossible to determine whether the jury, if given the opportunity, would have 'pardoned' the defendant," State v. Abreau, 363 So.2d 1063, 1064 (Fla. 1978)...

Id. at 882 (emphasis added).

Courts have found reversible error when a jury instruction is confusing or misleading. See Butler v. State, 493 So.2d 451, 452 (Fla. 1986); Mogavero v. State, 744 So.2d 1048, 1050 (Fla. 4th DCA 1999). The test is not whether the jury was actually misled, but "whether the jury might reasonably have been misled." Mogavero at 1050 (citation omitted). This Honorable Court has also found fundamental error when erroneous jury instructions prevent the jury from properly determining the application of lesser offenses. See Montgomery v. State, 39 So.3d 252, 258-260 (Fla. 2010). Courts have also found fundamental error when there

is a defect on the verdict form. See, e.g., Hills v. State, 994 So. 2d 412, 413 (Fla. 3d DCA 2008). As the Court in Hill stated, after finding an error in the verdict form, "we are not certain that the jury understood its options..." Id. at 413.

In the case at bar, as to Count II, Petitioner was charged in the Information with attempted second-degree murder. (V1-6). During the charge conference, defense counsel did not object to the lesser included offenses of attempted manslaughter (Category I) and aggravated battery (Category II). (V6-275-278). When instructing the jury, the trial court informed the jury it should consider the following lesser offenses of the attempted second-degree murder charge, in the following order: attempted manslaughter and aggravated battery.[2] (V1-71-80)(V8-500-509). The trial court stated:

> As to Count II, Attempted Murder in the Second Degree includes the lesser crimes of Attempted Manslaughter, and Aggravated Battery, all of which are unlawful.

(1-71)(V8-500-501). The verdict form also listed these lesser offenses, in the same order. (V1-92)

Attempted manslaughter is a third-degree felony, with a maximum sentence of five years in prison. See § 782.07(1), Fla. Stat.; § 777.04(4)(d), Fla. Stat.; § 775.082(3)(d), Fla. Stat. Aggravated battery, however, is a second-degree felony, with a

[2] It appears from the record that the written jury instructions were prepared by the State Attorney's Office. (V6-270).

maximum sentence of fifteen years in prison. See § 784.045(2), Fla. Stat.; § 775.082(3)(c), Fla. Stat. Further compounding the situation in the case at bar is the fact that the aggravated battery charge was subject to the 10-20-life statute, and thus, in this case, carried a minimum mandatory penalty of twenty-five years in prison. § 775.087, Fla. Stat.

Thus, in this case, Petitioner's aggravated battery conviction subjected him to a mandatory minimum sentence of twenty five years in prison rather than the maximum fifteen years in prison for a second degree felony. Additionally, that sentence, pursuant to the 10-20-life statute, was required to be imposed consecutively to the sentence he received in Count I. In this case, Petitioner actually received a greater sentence (twenty-five years minimum mandatory in prison) for the aggravated battery in Count II (where the victim survived) than the reclassified manslaughter conviction in Count I (where the victim died and Petitioner was sentenced to twenty years). However, if the jury had been properly instructed, and provided the proper verdict form, Petitioner could have been convicted of attempted manslaughter in Count II, and when reclassified, the maximum sentence he could have received would have been fifteen years in prison for Count II. Additionally, the trial court would have had the discretion to impose that sentence concurrently to Count I.

Jurors are not familiar with the sentences that can be imposed and assume that an offense appearing below other offenses on a verdict form will be a lesser offense in all ways - of a lesser degree, and carrying a lesser penalty. In this case, as to Count II, this was to the contrary. Aggravated battery was not of a lesser degree than attempted manslaughter, and it did not carry a lesser penalty.

In this case, the court instructed the jury:

> If you return a verdict of guilty, it should be for the highest offense which has been proven beyond a reasonable doubt.

(V1-88)(V8-514). Such a statement by the court implies that the offenses are listed from "highest" to "lowest." In fact, the phrase "highest offense" implies that the highest offense is listed at the top, with the lower offenses being listed in descending order from greatest to least. On the verdict form, the aggravated battery was the last option before the not guilty option and appeared to be the "lowest" offense. However, that offense was not legally the "lowest" offense, because it is higher in degree and punishment than attempted manslaughter.

Based on the order of the jury instructions and charges on the verdict form, it is reasonable to assume that the jurors in this case believed that aggravated battery was the least of the two lesser crimes under attempted second degree murder and that it carried a lesser punishment than attempted manslaughter.

Contrary to this assumption, as explained above, aggravated battery is a second-degree felony and attempted manslaughter is a third-degree felony. Hence, the jury instructions and the verdict form were erroneous because the aggravated battery option was given after the attempted manslaughter option. Thus, Petitioner asserts that a new trial is warranted.

Petitioner further notes that there is another avenue in which this Court may grant Petitioner relief, should this Court find that failure to list lesser-included offenses in descending order of seriousness in jury instructions and on the verdict form is not fundamental error. This Court may find that trial counsel provided ineffective assistance of counsel on the face of the record.

In Monroe v. State, 191 So.3d 395 (Fla. 2016), this Honorable Court reviewed the decision of the First District Court of Appeal in Monroe v. State, 148 So.3d 850 (Fla. 1st DCA 2014). The First District Court had affirmed Monroe's sentences but certified a question of great public importance:

> Do F.B. v. State, 852 So.2d 226 (Fla. 2003), and Young v. State, 141 So.3d 161 (Fla.2013), require preservation of an evidentiary deficiency where the state proved only a lesser included offense and the sentence required for the greater offense would be unconstitutional as applied to the lesser offense?

Monroe, 191 So.3d at 397. This Court answered the certified question in the affirmative, that preservation of the issue was required, but found that Monroe's trial counsel provided

ineffective assistance of counsel and remanded the case. Id. at 404.

The issue of the evidentiary deficiency, having not been preserved in the trial court, was raised as fundamental error on appeal. Monroe, 148 So.3d at 858. Ineffective assistance of counsel on the face of the record was not raised or argued in the First District Court of Appeal, nor in Monroe's Initial Brief on the Merits in this Honorable Court. However, this Court, sua sponte, considered the issue of ineffective assistance of counsel on the face of the record.

In its opinion, this Court cited Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and noted that

> An attorney renders ineffective assistance of counsel through conduct that exceeds the bounds of reasonable professional assistance, without which, there is a reasonable probability that the client would have enjoyed a different result.

Monroe, 191 So.3d at 403. This Court further stated that

> The failure to properly preserve an otherwise clear error may constitute ineffective assistance of counsel cognizable on direct appeal.

Id. In Monroe's case, his trial counsel failed to move for judgment of acquittal on the greater offenses. Id. This Court found that "patently unreasonable." Id. This Court further found that the prejudice to Monroe was "most obvious" because

Monroe was sentenced to mandatory life in prison[3] and because the failure to preserve the error resulted in it being reviewed as fundamental error and not under a de novo standard in the First District Court of Appeal. Id. at 403-404. Further, this Court reasoned that

> Finally, it would be a waste of judicial resources to wait until Monroe seeks postconviction relief for ineffective assistance of counsel when the unreasonableness of the actions of trial counsel and the prejudice to Monroe are indisputable from the face of the record before us.

Id. at 404. Likewise, Petitioner asserts that the unreasonableness of trial counsel's failure to object in this case to the jury instructions and verdict form and the prejudice to Petitioner are indisputable on the face of the record. Should this Court hold that failure to list lesser-included offenses in descending order of seriousness in jury instructions and on the verdict form is not fundamental error, in the interest of judicial economy this Court could find that trial counsel was ineffective on the face of the record for failing to object to the erroneous jury instruction and verdict form and remand this case for a new trial.

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[3] According to the First District Court of Appeal, "The difference between preservation and silence in this case meant the difference between a mandatory life sentence without parole and the availability of a term of years." Monroe, 148 So.3d at 861.

CONCLUSION

Based on the foregoing argument and authority presented in this Initial Brief on the Merits, Petitioner respectfully requests that this Court remand for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail, by agreement of the parties, to Trisha Meggs Pate, Office of the Attorney General, at crimapptlh@myfloridalegal.com, and a true and correct copy has been sent via US Mail to Michael McCoy, DOC # Q 29802, Northwest Florida Reception Center-Annex, 4455 Sam Mitchell Drive, Chipley, Florida, 32428, on this 11th day of October, 2016.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210, this brief was typed in Courier New 12 Point.

Respectfully submitted,

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