IN THE SUPREME COURT OF FLORIDA

ERIK FORREST HALL

Petitioner,

vs.

CASE NO.: SC07-593
L.T. CASE NO.: 2D01-3082

STATE OF FLORIDA,

Respondent.
_____/

BRIEF OF PETITIONER ON JURISDICTION

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL OF FLORIDA

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LEGEND

The Petitioner, Erik Forrest Hall, was the defendant in the trial court and the appellant in the lower court, the Second District Court of Appeal. The Respondent State of Florida was the prosecution at trial and the appellee in the lower court. The parties will be referred to by name. The slip decision of the lower court is attached as an appendix, and will be referenced as "App. [page number]."

STATEMENT OF THE CASE AND FACTS

This case, recognized by the lower court to be a "tragic instance of manslaughter by single punch to the head[,]" App. 1, arose out of the following sequence of events: During Christmas of 1999, Erik Hall and his family were vacationing in Fort Myers Beach from Michigan, and Christopher Pobanz and friends were vacationing there from Illinois. App. 2. Hall and Pobanz, both large men, did not know each other. App. 1-2. Two nights after Christmas and accompanied by family, Mr. Hall was standing on the outside deck of a restaurant in Ft. Myers Beach. App. 2. Without warning, Pobanz, standing across the street with two of his companions, picked up a large rock and threw it into the deck of the restaurant. Id. The rock struck a female patron, dropping her to the ground. Id. Mr. Hall yelled from the restaurant deck to Pobanz and his friends to stop. Id. Instead they turned and ran. Mr. Hall and his brother-in-law gave chase. Id.

A sheriff's deputy testified that he observed the chase, joined in, ran after shouting police, that he would handle it, and was 15 to 20 feet behind. App. 2-3. Hall caught up with Pobanz in the parking lot of a nearby beachfront resort. App. 1. The deputy testified that Pobanz was facing a security guard. When Pobanz gestured in another direction with his hand, Hall “reared up” and struck Pobanz. After Hall “reared up” the deputy said "stop, police!" Pobanz did not appear to see the thrown fist. App. 3.

A resort security guard testified that he intercepted Hall and his brother-in-law as they entered the parking lot. One or both of them said they were going to "kill" the person who had thrown the rock. The security guard claimed he had told them he would call the sheriff's department to handle the matter. App. 3. According to the security guard, while Pobanz was gesturing to a nearby hotel

identifying where he was staying, Mr. Hall struck Pobanz with a single blow to the head, which Pobanz did not see coming. App. 3.

Mr. Hall and his brother-in-law both testified that when Mr. Hall approached, Pobanz raised his hands to strike Mr. Hall. App. 3-4. Mr. Hall and his brother-in-law denied speaking with the security guard. App. 3. Neither Mr. Hall nor his brother-in-law had any awareness of the sheriff's deputy until after the punch was thrown. Id.

It is undisputed that Mr. Hall punched Pobanz but a single time in the jaw area, and that upon Pobanz dropping to the ground, Hall immediately backed off, expressed regret and said that he hoped the individual would be okay. App. 4. In what was "a very unusual occurrence that resulted more from the placement of the blow than the amount of force used[,]" the single punch caused a flexing or extending of Pobanz's head which severed a vertebral artery, resulting in a fatal brain hemorrhage. Id.

Hall was charged in the alternative with manslaughter by act, procurement, or culpable negligence. App. 4. The jury was instructed on both manslaughter by act and by culpable negligence. It returned a general verdict of guilty. App. 4. Although this was a first and only offense, the severity of the sentence which was imposed, 9.25 years of imprisonment, was a function of the Criminal Punishment Code scoring for the offense and the death. App. 4.

On direct appeal, Mr. Hall argued *inter alia* that a conviction on manslaughter by act could not stand because the offense requires the essential element of intent to kill. App. 7. The lower court disposed of this claim by construing that intent-to-kill element of Taylor v. State, 444 So.2d 931, 933 (Fla. 1983), to be limited only to *attempted* manslaughter. App. 9. It held that the Taylor intent element "does not apply to the offense of manslaughter by act." App. 9. The court further held that the offense of manslaughter by act included

unintended deaths as well. App. 7-10. (This notwithstanding that Taylor delimited unintended deaths to culpable negligence manslaughter, for which there could be no attempt, 444 So. 2d at 934 & n.1.) Although denying certification of its decision as one of great public importance, the lower court acknowledged: "Of course, if our holding today is erroneous, this opinion will necessarily conflict with Taylor." Id.

The en banc decision of the lower court was rendered on March 14, 2007.[1] This Court's review jurisdiction was timely invoked by notice filed on March 27, 2007.

SUMMARY OF ARGUMENT

The decision and opinion below is in express and direct conflict with this Court's decisions in Taylor v. State, 444 So. 2d 931 (Fla. 1983), and its antecedent, Williams v. State, 41 Fla. 295, 26 So. 184 (1899). Those precedents determined that intent to kill is an essential element of the crime of manslaughter by act, i.e., voluntary manslaughter. But the lower court herein holds that intent to kill is no element of manslaughter by act. It redefines the essential elements of such manslaughter to include intentional acts that result in unintentional deaths.

The court below read Taylor as a case merely determining the elements of the crime of attempted manslaughter and deciding whether such a crime existed. App. 9. The court got it exactly backwards. In Taylor (and its antecedent, Williams) this Court determined the elements of the crime of manslaughter itself in order to decide whether an attempted crime existed.

[1] The en banc decision replaced a panel decision of the lower court which had been rendered on November 29, 2006. 31 Fla. L. Weekly D2963. The en banc decision overruled two panel decisions to the extent those decisions had held manslaughter by act to require an intent to kill under Taylor. App. 9.

In limiting Taylor so as to eliminate the intent-to-kill mens rea of manslaughter by act, the opinion below substitutes a watered-down mens rea element under which any voluntary act (except culpable negligence) deserves punishment. The true intent of the act and the likelihood of the act resulting in death are made irrelevant.

The opinion below disrupts manslaughter law that has been in place more than a century. It disrupts that law crucially by destroying an essential element. And it upsets the standard jury instruction.

Given that manslaughter is not a rare crime, this opinion will be applied in many cases. This Court should recognize the express and direct conflict, exercise its discretionary jurisdiction, grant plenary review, and quash the decision below.

ARGUMENT

THE DECISION OF THE LOWER COURT, WHICH DISPENSES WITH INTENT TO KILL AS ANY ELEMENT OF THE OFFENSE OF MANSLAUGHTER BY ACT, EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN TAYLOR v. STATE AND WILLIAMS v. STATE WHICH HOLD SUCH INTENT IS AN ESSENTIAL ELEMENT OF THE OFFENSE

The lower court, in construing Taylor v. State, 444 So. 2d 931 (Fla. 1983), expressly rejected Appellant Hall's point that a conviction for manslaughter by act requires as an essential element an intent to kill. App. 9. The court stated: "Contrary to Hall's assertions, we do not read Taylor to hold that the crime of manslaughter by act is limited to intentional killings." App. 8. The court further concluded:

> As we read the court's holding in Taylor, it was limited to determining that there was a crime of attempted manslaughter and determining the elements of that crime. The court's holding that an intent to kill is an element of attempted manslaughter does not require a determination that an intent to kill is an element of manslaughter by

> act. An intent to kill is required to commit an attempted manslaughter because no person can attempt to cause an unintentional death. This logic does not apply to the offense of manslaughter by act. Of course, if our holding today is erroneous, this opinion will necessarily conflict with Taylor.
>
> ***
>
> In summary, we hold that a conviction for manslaughter by act does not require an intent to kill but only an intentional act that causes the death of the victim.

App. 10.

This holding is a misconstruction of Taylor and rewrites the intent element of manslaughter by act. Taylor arose in the context of a certified question as to whether attempted manslaughter was a cognizable offense in Florida. The analysis and express reasoning by which this Court derived its qualified affirmative answer in Taylor precludes the language, reasoning and result reached below. This Court looked, as a logically and analytically essential step in the process, to the completed offense, and to its long-extant recognition under the manslaughter statute of "the distinction found in common law between voluntary and involuntary manslaughter." 444 So. 2d at 933-34.

The difference between an attempt and the completed act of manslaughter did not turn on a difference of intent, it turned only on whether death resulted:

> Here there may be an intent to take life accompanied by an assault with a deadly weapon to carry out that intent. If the intent does not rise to the degree of a premeditated design, the killing will not be murder, but manslaughter. If the act does not result in death, why will not the party be guilty of an assault with intent to commit a felony, to wit: manslaughter? We think he will be . . . .

Taylor, id. at 933, quoting Williams v. State, 41 Fla. 295, 299-300, 26 So. 184, 186 (1899). Plainly, "intent to take life" is an essential element of voluntary manslaughter, and the genuine distinction between such manslaughter and assault

with intent to commit manslaughter is only the fact that the intent did not culminate in the taking of life.

The opinion below is not only in express and direct conflict with Florida Supreme Court precedent but also contrary to logic. The opinion defines manslaughter by act to include the commission of "intentional acts that result in unintentional deaths." App. 4-5, 9. Thus it holds that the offense "does not require an intent to kill but only an intentional act that causes the death of the victim." App. 10. Logically, then, the intent element of the offense of manslaughter by act is now satisfied by acting "intentionally" in any way regardless of the purpose or true intent of the act and regardless of any homicidal mens rea. There is no nexus between intent and causation. They have become separate elements, both necessary but not intertwined.[2]

If the pronouncements of the Court of Appeal were the true law, though, neither Williams nor Taylor would have required an intent to kill. The element of an intentional act could have been decided with the watered-down intent element of the present case. Let us explain.

Williams considered the offense of assault with intent to commit manslaughter. It recognized that "no man can intentionally do an unintentional act." 41 Fla. at 298, 26 So. at 185. The solution to this concern could have been analysis based upon the requirement of any act whatsoever that was performed intentionally rather than negligently. But the Court clearly stated the intent in manslaughter by act as "an intent to take life." 41 Fla. at 299, 20 So. at 186. It is this element of manslaughter by act which the Court imported as "the gist of the

[2] The opinion below also reads the standard jury instruction for manslaughter by act to conform with its views. App. 10. However, if the words "intentionally caused the death of" the victim, Fla. Std. Jury Instr. (Crim.) 7.7, do not mean that the defendant intended to cause the death of the victim, then the jury instruction would actually have to be rewritten.

offense" which "must be alleged and proved" in order to constitute assault with intent to commit manslaughter. 41 Fla. at 301-02, 26 So. at 186-87.

In Taylor, the Court considered the inchoate offense of attempted manslaughter. It relied upon Williams and affirmed only upon finding sufficient proof that the defendant "intended to kill" the victim when he "intentionally fired the shotgun" at him. 444 So. 2d at 934.

Williams and Taylor are straightforward instances of a court looking to the elements of the ultimate offense to determine the elements of offenses that fall short of it. They establish intent to kill as an essential element of manslaughter by act and do not countenance what the opinion below did to dispense with that vital element.

The lower court has proceeded backwards and mistaken the well-established relationship between attempts and completed offenses. In concluding that an intent to kill is required for the attempt but not the completed act of voluntary manslaughter, it has disregarded the governing principle stated in Gentry v. State, 437 So. 2d. 1097, 1099 (Fla. 1983): "If the state is not required to show specific intent to successfully prosecute the completed crime, it will not be required to show specific intent to successfully prosecute an attempt to commit that crime."

The opinion below not only contradicts Taylor and Williams but also misunderstands Florida homicide law and misconceives the role of courts in interpreting legislation and long-standing caselaw. The quandaries perceived by the lower court are not real ones, and in any event are not justiciable ones.

The first expressed concern was that "[a]dding" an intent-to-kill element to manslaughter by act "would serve to elevate the crime above second-degree murder, which does not require a specific intent to cause death but only requires 'a depraved mind.'" App. 8-9. While there indeed may be situations where either second-degree murder or a voluntary manslaughter conviction could arise from a

particular set of facts,[3] there is an elemental distinction between second-degree murder and voluntary manslaughter. A provoked, impassioned or clouded mind (falling short of second degree murder's "depraved mind") coupled with an intentional (and otherwise unexcused) killing would constitute manslaughter, not second-degree murder. See, e.g., Borders v. State, 433 So. 2d 1325 (Fla. 3d DCA 1983).

If the lower court were correct in its observation about second-degree murder, its "solution" would prove far too much. Taylor v. State requires as an essential element intent to kill for the offense of attempted voluntary manslaughter. 444 So. 2d at 933-34. However, the offense of attempted second-degree murder, which has been held an existent offense, is a general intent one only. See State v. Brady, 745 So. 2d 954 (Fla. 1999). Thus, attempted voluntary manslaughter (Taylor) has a higher intent element than attempted second-degree murder (Brady). This is a legal fact of life. Any asymmetry which might inhere is a legislative, not a judicial, area of concern. See, e.g., Lamont v. State, 610 So. 2d 435 (Fla. 1992) (fact that more serious felony offenses may be punishable less severely than lesser felonies does not warrant a judicial rewriting of penal statutes, for such statutes must be strictly construed; holding that life felonies were not, under the then-existing statutory scheme, subject to habitual offender enhancement although lesser degrees of felonies were subject to such enhancement).

Next, the lower court's belief that "a requirement [of intent to kill] would make the crime of manslaughter by act virtually indistinguishable from first-degree premeditated murder, which requires only a conscious intent to kill[,]" App. 9, is flatly incorrect. What this overlooks, and necessarily constitutes conflict in its own right with, is this historic and oft-quoted principle of the caselaw: Premeditation

[3] This can occur because of the "residual offense" nature of manslaughter. See, e.g., State v. Lucas, 645 So. 2d 425, 427 (Fla. 1994), and cases cited therein.

for first-degree murder, an essential element of that offense, exists "if the purpose or intention to kill is definitely framed in the mind of the killer and he proceeds to act in the execution of such thought or design[.]" Forehand v. State, 171 So. 241, 242-43 (Fla. 1936). For an act of killing to reduce to voluntary manslaughter, "'there must be an adequate or sufficient provocation to excite the anger or arouse the sudden impulse to kill in order to exclude premeditation and previously formed design.'" Forehand, id. at 243, quoting Rivers v State, 78 So. 343, 345 (Fla. 1918). Thus, even though they share an essential element of intent to kill, there is a huge divide between first-degree murder and voluntary manslaughter.

Finally, the lower court worries that "if the crime of manslaughter by act did not include intentional acts that result in unintentional deaths, then there would be no applicable offense for such crimes." App. 9. The court does recognize the possibility of an aggravated battery charge, but refuses to accept that death constitutes great bodily harm and overlooks its own decision in Michaels v. Swanson, 403 So. 2d 1023 (Fla. 2d DCA 1981). Id. The court also overlooks the table of lesser included offenses. See Fla. Std. Jury Instr. (Crim.) 7.7. And, most respectfully, the court forgets that it is the business of the legislature to fill lacunae in the law.

The manslaughter statute has been substantively unchanged for over a century, see Taylor, 444 So. 2d at 933 n.1; Rodriguez v. State, 443 So. 2d 286, 289-90 & n.8 (Fla. 3d DCA 1983), and has both a defined scope and well established elements.[4] The lower court's decision displaces that case law and creates a new, enlarged, and unanchored category of manslaughter. Moreover, the decisions of a district court of appeal, if not identifiably in conflict with a decision

[4] In addition to Taylor's own reliance on the 1899 Williams case, see Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985): "[T]he Taylor decision was no fundamental departure in this area of the law; it was based upon reasoning derived from legal precedents."

or decisions of other district courts of appeal, constitute the law of Florida throughout the state. Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992).

It is respectfully submitted that the lower court's decision stands in express and direct conflict with Taylor and its antecedent, Williams, draws the standard jury instruction into doubt, and disregards settled principles of statutory construction. Given the conflict and the importance of the matter, this Court should take jurisdiction, direct full briefing, and authoritatively adjudicate the matter.

CONCLUSION

Based on the foregoing argument and authorities cited, this Court should accept jurisdiction on the basis of express and direct conflict with the decisions of this Court, should direct plenary briefing on the merits, and should thereafter quash the decision of the Second District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail to Diana K. Bock, Assistant Attorney General, and C. Suzanne Bechard, Assistant Attorney General, Criminal Appeals Division, Office of the Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013, this ___ day of April, 2007.

By:_____
Joseph Beeler

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this computer-generated filing is Times New Roman 14-point.

By:_____
Joseph Beeler

APPENDIX