**Draft 3**

First, it must be determined whether the Manslaughter by Act jury instruction in Huss is erroneous. In Huss, the court used the post Montgomery. An interim instruction found to be erroneous just months after its issue. See re Amendments to standard jury instruction 7.7 75 50.3d 210,211-212(Fla, 2011). Where the amendment to the flawed instruction was, “to clarify that it requires an intentional act not constituting negligence, “and to further correct the flaw identified in Montgomery. See Daniel State, 121 50.3d 409,416 (Fla, 2013). Detailed analysis revealed that the Huss interim instruction mirrored the 1985 Manslaughter instruction found to be flawed in 1992.See re Amendments to standard jury Instructions 603 80.2d 1175 (Fla, 1992). Taylor V. State, 444 80.2d 931 (Fla, 1983). Here the Supreme CT. Added “intentional” to the instruction for precisely the same reason they made the same correction in 2011.

Having substantiated that the Manslaughter instruction used in Huss was flawed by the above study we now must consider if the error was “fundamental” as argued in Knight state 286 80.3d 147 (Fla.2019). In Knight, the majority recedes from precedent and holds to Brawn V. State, 124 80.2d 481 (Fla.1960) where “the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error” Id@ 484 and “the error of the trial judge necessarily and inescapably produced the ultimate jury verdict,” and the error permeated or saturated the trial with “basic invalidity”.

The difference between Huss and Knight is that in Huss, Huss testified and refuted all allegation and asserted that he did not commit the homicide and had nothing to do with the murder. In Licata state (1921), a plea of “not guilty” disputes the claim of an alleged telephone conversation he had with Jeremy Huss weeks before the homicide where Huss alleged expressed will toward his wife.

In Knight, Lebargas dissent reminds that “a charged offense and any necessary lesser included offenses are distinguish from one another by their elements, and incorrect jury instructions can significantly impair the jury’s ability to distinguish one offense from another.(Emphasis added) Knight state, 286 80….In this case, the trial court property determined that Manslaughter by intentional Act was a necessarily lesser included offense of 2nd degree murder.However,the incorrect instruction on Manslaughter [by Intentional Act] failed to include any reference to “intent” or “negligence” as required to prove the crime of Manslaughter by intentional Act. In Huss, the flawed instruction also omitted the qualifier, “it is not necessary for the State to prove the defendant had an intent to cause death, only an intent to commit an act that was not merely negligent, justified, or excusable and which caused death.”

Huss was entitled to a correct instruction on this lesser included offense, and the failure to property instruct the jury resulted in fundamental error. In Lomax state, the court concluded that the failure to instruct on a necessarily lesser-included offense “invades the province of the jury” and “successfully takes an important evidentiary matter from the proper province of the jury. Lomax state 395 50.2d 711(Fla.2001).

Now we determine that it is likely that the conviction was significantly added by error and the unlawful influence by the State. Following the disputed testimony from states hostile witness Jeremy Huss, the Judge commented, “it sounds like a confession [to me],” in violation of Canon rules and procedures. This comment alone undeniably provided a direct influence to the jurors. To further confuse the jury, during closing arguments, the prosecutor claimed that this was “a crime of passion,” where in the instruction a crime of passion may be justifiable or excusable homicide.

Finally, following the trial, a juror telephoned Joyce Huss and then wrote a letter to Huss trial attorney, (See Exhibit, Joyce Huss transcript).The juror questioned why the trial attorney did not provide available evidence in Huss defense and that the evidence would have produced an acquittal. The incomplete, inaccurate, ambiguous instruction for Manslaughter coupled with the misleading comment by the prosecutor and the unlawful, improper statement from the Judge likely influenced the jury to select a guilty verdict.

A final exacerbation occurred when the judge told the jury that must finish the final because he has another final beginning next week.

**Knight Argument**

In attempt to argue the merit of this fundamental error this court may fall to Knight State 286 So.3d, 147, fia 2019 where the fia supreme court held “that erroneous jury instruction for lesser included offense one step removed form offense of conviction can not be basis for fundamental error based on jury pardon doctrine “the court” receded from this court’s precedent where a finding of fundamental error was predicted on Florida’s jury pardon doctrine.

This argument does not apply to Huss. Knight was charged with “attempted first degree murder with a weapon” and provided the following eight lesser included offenses:

* Attempted 1st degree murder
* Attempted 2nd degree murder with a weapon (convicted of)\*
* Attempted 2nd degree murder
* Attempted voluntary manslaughter with a weapon (Instruction error)
* Attempted voluntary manslaughter
* Aggravated battery with a deadly weapon or great bodily be
* Felon battery with great bodily harm and battery

Justice Canady explained “In any case where the evidence supports the jury’s verdict of guilty on the charged offense and no error was made in the instruction regarding that offense, it is hard to fathom how an error is an instruction regarding a lesser included offense would properly be considered an error without which a “verdict of guilt could not have been obtained. “Canady’s argument is flawed because Knight was convicted of a “lesser included offense” not the charged offense.

The court emphasized that “the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. (See brown State 12450, 2, 484. The following errors occurred in the instant case that resulted in an unreasonable outcome prejudicing Huss and the Jury.

Huss was charged with 2nd degree murder and provided with the necessary lesser-included offense of manslaughter by act.

The first error was that the jury was provided erroneous instructions for “Manslaughter where the court failed to include what type of Manslaughter (1) by act (2) by culpable negligence (3) by procurement

The most glaring error is that manslaughter instruction completely “omitted” the elements required for the jury to determine what level or degree of homicide was proven. The jury is the finder of fact where they hear the evidence , find the facts, and apply the law to reach a proper and fair verdict. Mr. Huss was entitled to a proper instruction on manslaughter by act to enable the jury to determine what degree of homicide was proven. (See Hill V. State 124 So.3d 296).

To further exacerbate the prejudice , daring closing arguments, the prosecutor stated that the alleged homicide was a “crime of passion” which likely further confused and misled the jury. Crimes of passion fit within lawful homicide under the justifiable and excusable instruction. ( See instruction)

To make matters worse, following the hostile testimony of Jeremy Huss the judge made the comment, “Sound like a confession” after Jeremy had alleged comments that were made from Mr. Huss in an alleged telephone conversation they had.

The manslaughter instruction amitted the required elements of intent of negligence.

The manslaughter instruction did not include the statement that the state did not have to prove the defendent intended to kill the victim.

The prosecutor added confusion by stating that it was crime of passion.

The judge comment that “it sounds like a confession” is unlawful, prejudicial, influencing, against canon rule.

Mr Huss plea of “not guilty” places every element of the crime in dispute. (See Griffin v. State SC13-24-50,Mar 2015)

The ambiguity of the instruction, the comments by the prosecutor and judge, likely influenced the jury to find a conviction for 2nd degree murder because they had no further choices to compare. The trial was short circuited by a faculty instruction and concern from the court.

Further the analysis of the instruction in Huss reveals Taylor v. State, 444 Sc.2d 931(Fla 1983), standard Jury instruction 605 Sc.2d 1175(Fla 1992). In 1992 the FI Sup, Ct amended the manslaughter jury instruction to include “intentional [act]” which was approved at the discussing Taylor.

As far as back 1992 Florida’s Sup, ct recognized the need to include the element of intent in manslaughter jury instruction.

The argument in Knight essentially concludes that “if the jury returns a verdict of guilty on any one of the 9 offenses in the charges then it does not matter if all 8 of the other jury instructions are erroneous”.

This reasoning is unreasonable, unfair, unlawful, and is completely outside of precedent. Justice Labarga’s dissent in Knight clearly articulates the long standing precendent held in Florida for decades. He states, “A charged offence and any necessary lesser included offenses are distinguished from one another by their elements, and incorrect jury instructions can significantly impair the jury’s ability to distinguish one offence from another.

There is simply no way to speculate what the jury would have determined had they been provided a proper and correct instruction on Manslaughter on Intentional Act. Further no prove or evidence supported “depraved mind intent” as required for proof for 2nd degree murder but the jury had no other choice except for an ambigous faculty Manslaughter instruction that appeared more serious than 2nd degree murder.

The jury was essentially forced to choose their only option as the best guess so they could go home.

Following the trial, a jurer call Mr. Huss mother Jayce Huss would have been found not-guilty if the attorney would have presented available facts.

**Fundamental Error Analysis**

To establish fundamental error, the court relied on Brown v. State 124 Sc.2d 481(Fla 1980) holding “ the error must reach down in validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error”.

The “error of the trial judge necessarily and inescapable produced the ultimate verdict and that the error permeate(d) or saturate(d) the trial with basic invalidity”. ID.

The Manslaughter by Intentional Act was found to be erroneous, first in 1992, and again in 2011. See Taylor v. State, 444 Sc.2d 931 (Fia 1985), std Instr 603 Sc.2d 1175 (Fia 1992). In 1992 the Fia sup. court amended the manslaughter jury instruction to include “intentional[act]” after discussing Taylor Id. In 2011, the 2010 “interim instruction” used in Huss trial was amended, like the 1992 amendment to include “intentional” in the second element. In 2011, the amendment also included the qualifier that is “it is not necessary for the state to prove that defendant had an intent to cause death, only an intent to cause death, only an intent to commit an act that was not merely negligent, justified, or excusable and which caused death”. This was included “to clarify that it requires an intentional act not constituting negligence” and “to further correct the flaw indentified in Montogomery”.

In Knight, the court asserts that “ if the instruction for the offence of conviction is correct” then any and all errors in other instructions are not fundamental. First, we must analyze the position. According to Hill v. State 124 Sc.3d 296, 303-50(Fia 2d DCA 2013). The reason for properly instructing the jury on manslaughter is to enable the jury to determine what degree of crime, if any is proven, it is up to the jury to hear the evidence, find the facts, and apply the law to reach a proper and fair verdict. That process was short circuited by the faulty instruction, “id”. It is impossible to speculate what the jury would have found had it been properly instructed on the crime of manslaughter. “hay good v. state 109 so.3d.735.744 (fia, 2013). In hay good the supreme court also held that the manslaughter by act [instruction] was not cured by giving an instruction on manslaughter by culpable negligence’ Supra.

Homicide is a crime that includes certain types of “International” killings. The jury must be provided clear, correct and accurate tools to be able to compare and determine what type of intent is proven with the evidence provided. In Knight, the jury was provided with 8(eight) lesser included offenses, of which, the lesser included offense of attempted voluntary manslaughter with a weapon was erroneous. Knight’s jury had 9 offenses to compare.

In Huss, Huss asserted that he was not the perpetration and that he had nothing to do with the homicide thus disputing all of the elements, see Licata v. state 1921. The court failed to discuss or prove “depraved mind” intent as required to convict of 2nd degree murder. Further, during closing arguments, the prosecutor stated that the homicide was the “crime of passion” which could be justifiable or excusable. To further exacerbate the glaring error, the trial judge made the comment, “sounds like a confession”, following testimony from hostile witness Jeremy Huss. (See Records)

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The incomplete, faulty, ambiguous instruction provided to Huss Jary left them with only 2nd degree murder to choose from.

These errors, caused by the prosecutor, the judge, and court essentially forced the jury to a verdict of guilty for 2nd degree murder because they had no other option.

The inclusion of a lesser included offense is not based on the jury pardon doctrine and is not hinged on the right of the jury to issue a jury pardon despite the evidence. The judge has no discretion regarding “necessary lesser included offenses”, whereas they must be included and must be correct, Hill V. State 124 So 3d 294, 303-05 (fia, 2d DCA 2013).

A final point is following the trial a Jarar contacted MS. Huss (Mr. Huss Mother) via telephone. After their conversation the Jarar sent a letter to Mr. Huss trial attorney stating that Mr. Huss would have been found (not guilty) based on evidence that was available at trial. (See exhibit letter ), (see MS Huss affidavit).

The judge also commented to the jury that they must finish the trial “this week” because he has another trial starting next week. This is in total violation of due process. The jury was prejudiced and pressured by the state on all fronts.

A reasonable jurist would feel forced to find a guilty verdict of 2nd degree murder considering the confusing, misleading manslaughter instruction, the confusing statement made by the prosecutor and judge, and the unfair pressure put on the jury to hurry through their process.