IN THE SUPREME COURT OF FLORIDA

JESSIE CLAIRE ROBERTS,

PETITIONER,

V.

STATE OF FLORIDA,

RESPONDENT.

Case No. SC15-1320

ON DISCRETIONARY REVIEW

FROM THE FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S (AMENDED) ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Jessie Claire Roberts, was the defendant in the trial court and the appellant on direct appeal; this Brief will refer to Petitioner as such, Defendant, or by proper name. Respondent, the State of Florida, was the appellee on direct appeal and the prosecution in the trial court; this Brief will refer to Respondent as such, or the State.

The Record on Appeal consists of seven volumes and a supplement. Volumes I-VII will be referred to as "R" followed by the page number cited. The Supplemental Volume will be referred to as "SR". Appellant's Initial Brief on the Merits will be referred to as "IB", followed by the page number cited. Citations to Appellant's Initial Brief on Jurisdiction will be referred to as "Juris. IB," and the State's Jurisdictional Answer Brief will be referenced as "Juris. AB."

STATEMENT OF THE CASE AND FACTS

The State submits the following relevant facts in addition to those contained in Petitioner's Initial Brief:

The testimony at trial suggested that the victim, Howard, punched Defendant Roberts after Roberts revealed her firearm; however, Howard testified that she was backing away when Appellant shot her in the neck. (R.V 307-309). Howard confronted Defendant Roberts as to why Roberts had pulled out a firearm.

(R.V 330). No one threatened Roberts with any type of weapon during the incident. (R.V 330-31).

Defendant testified on cross-examination that she intended to shoot the victim:

> **Prosecutor:** Where was the gun pointed, in front of you or behind you?
> **Defendant**: Yes.
> **Prosecutor:** It was in front of you, right?
> **Defendant**: Yes.
> **Prosecutor:** And Catrina [the victim] was in front of you, correct?
> **Defendant**: Yes.
> **Prosecutor**: Okay. And then you pulled the trigger, correct?
> **Defendant**: Yes.
> **Prosecutor:** And that was your choice that you made to pull the trigger, correct?
> **Defendant**: Yes.
> **Prosecutor**: Okay. And when you shot [the firearm], obviously, it hit her in the neck, correct?
> **Defendant**: Yes.
> **Prosecutor:** And then you took off, you didn't stay there and try to give her any aid, correct?
> **Defendant:** Yes. (R.VII 493-4).

The trial court held a charge conference where Defendant Roberts' attorney asked only for jury instructions on the lesser included offenses of aggravated battery (R.VII 516) and aggravated assault (R.VII 519); both offenses were, at the

time subject to the 10-20-Life enhancements. The jury was instructed on aggravated battery and aggravated assault and asked to make a special finding regarding whether Roberts used, fired, or injured anyone with a firearm. (R.VII 620-21).

From the start, Defendant Roberts' closing argument stressed a theory of self defense: "We have Ms. Howard. She is a victim in this case. Yes, she was shot, by Ms. Roberts, but she was shot in self-defense." (R. VI 575). Roberts' attorney explained to the jury that Roberts was on edge because of an earlier attack on a city bus. (R.VI 577). Roberts' attorney argued that the victim, Ms. Howard, was not scared of Roberts even though Roberts had drawn her gun; despite the danger posed by Roberts' weapon, Howard approached Roberts aggressively. (R.VI 579-80). As to Defendant Roberts' state of mind, her attorney argued that Roberts "didn't know where she was aiming," but that she did not intend to hit the victim. "The only thing [Roberts] attempted to do was get somebody who was coming at her consistently away from her." (R.VI 583).

In closing arguments, Roberts' defense attorney argued that Roberts was not engaged in unlawful activity when she shot the victim: "Everybody testified that [the drug transaction had been] completed at that time. [Roberts] was walking away. She was leaving. So at the time that [Roberts] fired the shot, at Ms. Howard, she wasn't engaged in any unlawful activity." (R. VI 583).

The trial court gave the following instruction to the jury on the issue of unlawful activity, as it pertains to justifiable use of deadly force:

> If the defendant was not engaged in unlawful activity, and was attacked in any place where she had a right to be, she had no duty to retreat, and had the right to stand her ground and meet force with force, including deadly force, if she reasonably believed that it was necessary to do so, to prevent death or great bodily harm to herself... (R. VII 626)...However if you find that the defendant was engaged in unlawful activity, then you must consider if the defendant had a duty to retreat. The defendant cannot justify the use of force likely to cause death or great bodily harm, unless she used every reasonable means within her power and consistent with her own safety to avoid the danger, before resorting to that force. The fact that the defendant was wrongfully attacked, cannot justify her use of force likely to cause death or great bodily harm if, by retreating, she could have avoided the use of that force. However, if the defendant was placed in a position of harm, and it would have increased her own danger to retreat, then her use of force likely to cause death or great bodily harm was justifiable. Sale of narcotics and carrying a concealed firearm constitute unlawful activity. (R. 627-28).

The State would further ask this Court to take judicial notice of the record in Walton v. State, 208 So. 3d 60 (Fla. 2016), reh'g denied, SC13-1652, 2017 WL 203617 (Fla. Jan. 18, 2017). The Walton decision is discussed thoroughly in this Brief as well as Petitioner's Initial Brief, and Walton, like Roberts, is an attempted second-degree murder case where the defendant did not ask for (and the trial court did not give) an instruction on attempted manslaughter. See § 90.202(6), Fla. Stat.;

Kensler v. State, 890 So. 2d 282 n.1 (Fla. 1st DCA 2004) ("This Court is of course entitled to take judicial notice of its own records").

SUMMARY OF ARGUMENT

Issue I: Whether the trial court committed fundamental error in Defendant's murder trial by not giving an instruction on the lesser included offense of voluntary manslaughter when Defendant did not request an instruction on voluntary manslaughter: The omission of the attempted manslaughter instruction was not fundamental error because 1) the error did not cause the jury to reach its guilty verdict; 2) did not misadvise the jury or omit an element that was at issue; or 3) negate Roberts' only defense. Defendant Roberts focused on a self-defense theory, and chose as an alternative theory that her crime was either aggravated assault or battery. It is not likely that, given the instruction, the jury would have chosen to convict Roberts of attempted manslaughter. It is no more than conjecture for Roberts to argue that her conviction would not have occurred had she asked for and received the attempted manslaughter instruction. While Roberts' attorney's strategy of declining an attempted manslaughter instruction in favor of aggravated battery and aggravated assault instructions may be questionable, it is the proper subject of a 3.850 motion, not a review of the trial court's instructions for fundamental error.

The State recommends that this Court recede from the fundamental error holding in Walton v. State, 208 So. 3d 60 (Fla. 2016) for the reasons set forth in Justice Canady's dissenting opinion in both Walton and Haygood v. State, 109 So. 3d 735 (Fla. 2013). If this Court is not inclined to recede from Walton, it should not extend the holding in Walton to cases where the defendant has *chosen* multiple theories of defense—including other lesser included offenses—that do not encompass the one step removed, next lesser included offense. Such an extension of Walton would effectively place a burden on the trial court to inject into the jury instructions a defense not sought (or possibly even objected to) by the defendant.

Issue II: Whether the trial court's instruction on the use of justifiable deadly force was fundamental error: Robert's self defense claim did not hinge on the "Stand Your Ground" principle of "no duty to retreat"; the erroneous instruction did not constitute fundamental error because it did not negate her sole theory of defense, and was not pertinent to what the jury had to consider to convict. The issue of ineffective assistance of counsel on the face of the record was not raised in the First District below as to Issue II, and is not preserved.

Issue III: The facts in Roberts' case were sufficient for a jury to find that Roberts' imminently dangerous actions evinced a depraved mind regardless of human life.

ARGUMENT

Issue I: Whether the trial court committed fundamental error in Defendant's murder trial by not giving an instruction on the lesser included offense of attempted voluntary manslaughter when Defendant did not request an instruction on attempted voluntary manslaughter.

Jurisdictional Criteria

Appellant contends that this Court has discretionary jurisdiction due to a conflict between the First District's decision in Roberts v. State, 168 So. 3d 252 (Fla. 1st DCA 2015) and this Court's decision in Jones v. State, 484 So. 2d 577 (Fla. 1986), State v. Montgomery, 39 So. 3d 252 (Fla. 2010), and Haygood v. State, 109 So. 3d 735, 741 (Fla. 2013). (Juris. IB 3).

Since the filing of the jurisdictional briefs in this case, this Court has issued an opinion in Walton v. State, 208 So. 3d 60 (Fla. 2016). In Walton, this Court held that it was fundamental error for a trial court not to give a jury instruction on attempted manslaughter by act as a one step removed, necessary lesser included offense of attempted second degree murder, even though Walton did not ask for such an instruction. Appellant's Initial Brief on the Merits suggests that the decision in Roberts conflicts with Walton. Walton's primary defense was mistaken

identity, however based on its holding in Montgomery, this Court held that it was fundamental error for the trial court not to give an unrequested jury instruction on attempted manslaughter, as Walton's intent (or lack of intent) was at issue. Walton, at 65. The Walton majority opinion implies that Walton was deprived of an obvious defense: that he lacked the intent to kill the police officers he shot at. There does not appear to be any strategic reason for Walton's attorney not to seek an instruction on attempted manslaughter, since such an instruction would not affect or confuse the jury as to his primary defense of mistaken identity.

Petitioner Roberts admitted on the stand that she intentionally shot the victim from 10 feet away, sending a bullet through the victim's hand, which in turn travelled through her neck; these facts would embarrass any attempted manslaughter argument. Petitioner Roberts instead focused on a self defense theory, and asked for jury instructions on aggravated battery and aggravated assault. It appears that, unlike the defendant in Walton, Roberts chose to pursue a theory where she intentionally shot at the victim, but either did so in self defense, or in an attempt to batter or assault the victim, but not kill her.

In the Merits section of this Brief, the State will argue that this Court should recede from its holding in Walton regarding fundamental error: it should not be incumbent on a trial judge to raise a defense and give an instruction when

the defendant has not pursued that defense or instruction. While the State maintains that the majority holding in Walton goes too far by requiring courts to inject alternate theories of defense into a trial by way of unrequested jury instructions, the facts of Roberts are sufficiently distinguishable from Walton to warrant this Court declining jurisdiction.

In Jones v. State, 484 So. 2d 577 (Fla. 1986), this Court held that in non-capital cases, "no personal waiver [of an instruction on lesser included offenses] is required in order to guarantee fundamental fairness...." Jones, at 579. The Jones decision declined to extend the "personal waiver" requirement established in Beck v. Alabama, 447 U.S. 625 (1980) to non-capital cases. Petitioner argues that the Roberts court wrongly interpreted Jones as holding that "no fundamental error can exist in a trial court's failure to instruct the jury on a lesser included offense in non-capital cases." (Juris. IB, 3). By its very language, the Jones decision stated that to extend the holding in Beck to non-capital cases would be an unacceptable erosion of the concept of fundamental error: "petitioner asks us to apply the label "fundamental error" to this case, thereby allowing this Court to stray from the long and unbroken lines of precedent conditioning a right to jury instructions on lesser included offenses *upon a request for such instructions*." Jones, 579 (emphasis supplied). The Roberts decision does have any holding contrary to this Court's ruling in Jones.

In Montgomery, this Court held that the standard instruction on manslaughter "by act" was erroneous because it advised the jury that one of the elements of manslaughter by act was the defendant's intent to cause the death of the victim. The Montgomery Court held that in a first degree murder case, such an error was fundamental: "we have held that the failure to provide a complete instruction on manslaughter may constitute fundamental error." Montgomery, at 258. This Court reasoned that to include an element of intent in the definition of manslaughter would essentially "blur the distinction between first-degree murder and manslaughter." Montgomery, at 256. Because the Roberts decision does not deal with an erroneous jury instruction (where the jury would be misled as to what the law is), it does not conflict with the Montgomery decision.

The facts of Haygood are also distinguishable from Roberts: in Haygood, the trial court, like the trial court in Montgomery, erroneously instructed the jury that manslaughter by act required the jury to find that the defendant *intended* to kill the victim. Haygood, at 738. The defendant in Haygood was charged with killing his girlfriend during a physical fight. The evidence showed that Haygood head-butted the victim, kicked her legs out from under her, choked here, and elbowed her in the chest. However, when the victim became unresponsive, Haygood immediately told the victim's mother to call an ambulance. Haygood attempted CPR until paramedics arrived. Haygood, at 737. This Court stated that the

evidence supported two theories of guilt: that Haygood intentionally killed his girlfriend without premeditation (second-degree murder), or alternatively, that Haygood unintentionally killed his girlfriend (manslaughter). Haygood, 741-42.

Based on its decision in State v. Montgomery, 39 So. 3d 252 (Fla. 2010), this Court found that the jury instruction in Haygood was fundamental error because the element of Haygood's intent was disputed, the instructions were "pertinent and material" to what the jury needed to consider to convict Haygood. This Court also held that the trial court's accurate instruction on *culpable* negligence did not remedy the erroneous instruction on manslaughter by act, since culpable negligence was impossible under the facts. Haygood, at 741-2. It should be noted that Haygood requested the jury instruction on manslaughter, and the court gave the standard (yet erroneous) manslaughter instruction that included an element of intent. In Roberts, defense counsel did not ask for an instruction on attempted manslaughter, and the facts of the case were such that it was apparent that Roberts' defense was not a lack of intent, but that she acted in self defense. Therefore, there is no conflict between Roberts and Haygood.

This Court should decline jurisdiction in Roberts as it does not conflict with any of the cases cited by Appellant in her Jurisdictional Initial Brief or Initial Brief on the Merits.

Standard of Review

Because Petitioner did not contemporaneously ask for (or object to the absence of) an attempted manslaughter instruction, this Court applies a fundamental error analysis. State v. Montgomery, 39 So. 3d 252, 258 (Fla. 2010):

> To justify not imposing the contemporaneous objection rule, 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. In other words, fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict. Montgomery, 39 So. 3d at 58 (quoting State v. Delva, 575 So. 2d 643, 645 (Fla. 1991) (internal quotations omitted)).

This Court has consistently held that a trial court commits fundamental error in regard to its jury instructions when the error "reach[es] 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." Brown v. State, 124 So. 2d 481, 484 (Fla. 1960). This Court has held that fundamental error occurred when the jury instructions mislead the jury as to a *disputed* element of the crime. See Reed v. State, 837 So. 2d 366, 370 (Fla. 2002). Florida District Court have held that fundamental error occurs when an erroneous jury instruction negates the defendant's sole defense, thus depriving of the defendant of a fair trial. Grier v. State, 928 So. 2d 368, 370 (Fla. 3d DCA 2006); Cf. Martinez v. State, 933 So. 2d

1155, 1167 (Fla. 3d DCA 2006), aff'd but criticized, 981 So. 2d 449 (Fla. 2008) (where defendant put forth several theories, including self-defense, erroneous jury instruction did not constitute fundamental error.) The error in Roberts does not meet any of the above definitions of fundamental error. Only the holding in Walton suggests an extension of fundamental error that arguably could support Petitioner's position.

This Court has cautioned lower courts to apply the principle of fundamental error "very guardedly," and only in rare cases "where the interests of justice present a compelling demand for its application." Ray v. State, 403 So. 2d 956, 960 (Fla. 1981) (citation omitted).

Merits

At trial, Petitioner admitted that she intended to shoot the victim, and shot the victim in the neck from 10 feet away. The facts of Roberts were such that the jury's decision came down to whether or not Roberts was reasonably defending herself against the unarmed victim, or whether Roberts' lacked the elevated intent to kill the victim, thereby committing only an aggravated assault or battery. The jury had the option of finding Roberts guilty of aggravated assault, a lesser included offense. Aggravated assault *was* (under the statutes at the time) subject to the minimum sentencing provisions in section 775.087, Fla. Stat.—attempted

manslaughter was not subject to enhanced sentencing under section 775.087. See. § 775.087(2)(a)(1)(f) Fla. Stat. (2011). However, the choice in lesser included offenses was a tactic chosen by Roberts' defense attorney, not error on the part of the trial court. This Brief will discuss later why this Court's holding in Sanders v. State, 946 So. 2d 953 (Fla. 2006) forecloses even a claim of ineffective assistance of counsel in this case.

Appellant relies heavily on this Court's decision in Walton v. State, 208 So. 3d 60 (Fla. 2016), reh'g denied, SC13-1652, 2017 WL 203617 (Fla. Jan. 18, 2017), which held that it was fundamental error for a trial court not to give a jury instruction on attempted manslaughter by act as a necessary lesser included offense of attempted second degree murder. Because the omission of this instruction in Walton was fundamental error, it would not have mattered whether the defendant asked for the instruction or not. The record in Walton demonstrates that Walton did *not* ask for an instruction on attempted manslaughter by act.

This Court should recede from Walton insofar as it forces a trial court to inject a lesser included defense into the jury instructions even when a defendant does not seek an instruction on that offense. Walton expands the definition of fundamental error to the point that trial courts will be forced to advocate for the defendant. If left intact, defendants could argue that Walton supports the

proposition that fundamental error occurs every time trial court allows a defendant to waive *any* right or entitlement by his own silence. If this Court declines to recede from Walton on the issue of fundamental error, it should not extend Walton to situations where defendants, such as Roberts, have chosen a strategy of pursuing lesser included offenses *other* than the one step removed necessarily included offense. Furthermore, Petitioner seeks an interpretation of Walton that would prohibit trial courts from allowing defendants to pursue an all-or-nothing strategy, or even a strategy that attempts to maintain credibility with the jury by not clouding the focus of the defense with multiple alternative theories. Petitioner's reading of Walton restricts the defendant's right to choose how he defends himself at trial.

Unlike Roberts, Walton concerned a defendant whose only plausible defense (if the jury rejected his identity argument) was that he lacked the intent to commit attempted second-degree murder. In Walton, Two police officers approached Walton and his companion while the two men were committing an armed robbery. When one of the officers identified herself as a police officer and ordered one of the two men to drop his gun, Walton and his companion shot at the officers. Walton, at 62-3. The holding in Walton should be limited to cases where the defendant's only defense is a lack of "depraved mind" intent, and that defense is

not put before the jury, thus depriving the defendant of any legal defense at all, besides the factual defense of mistaken identity.

Unlike the defendant in Walton, Roberts chose to hedge her primary defense theory of justifiable use of deadly force by asking for instructions on aggravated battery and aggravated assault—a theory of defense that would admit Roberts' intent to shoot (or shoot at) the victim, but not kill her. This would allow the jury to return a verdict for a lesser crime: aggravated assault (if the jury did not make a specific finding that defendant fired a weapon). Again, this strategy of defense may have been questionable, but does not equate to the trial court committing fundamental error. This Court has even held that an attorney's failure to request a category one lesser included offense is not ineffective assistance of counsel. See Sanders v. State, 946 So. 2d 953 (Fla. 2006). Sanders held that in a robbery with a firearm trial, it was not ineffective assistance of counsel for an attorney to fail to request an instruction on robbery with a weapon. Sanders, at 960. The Sanders decision is important because the standard for ineffective assistance of counsel is lower than the high bar of fundamental error: this Court held in F.B. v. State, 852 So. 2d 226 (Fla. 2003) that (in non-capital cases) the failure of the State to prove a single essential element of the crime was *not* fundamental error, but this Court later held that the failure of defense counsel to move for a judgment of acquittal when the State failed to prove a single essential element *was* ineffective

assistance of counsel on the face of the record. See Monroe v. State, 191 So. 3d 395, 404 (Fla. 2016).

If Walton were to stand for the broad proposition that a court must *sua sponte* instruct a jury on the next lesser included offense in *all* cases, it would effectively overturn this Court's decision in McKinney v. State, 579 So. 2d 80 (Fla. 1991). In McKinney, the defendant was convicted of kidnapping, robbing, and murdering the victim. Witnesses saw McKinney dump the victim from his car into an alley; police found the victim with seven gunshot wounds, and the victim died shortly after. McKinney, at 81-82. As to the kidnapping charge, McKinney argued that the trial court erred in not giving an instruction on false imprisonment, even though McKinney never requested this instruction. False imprisonment is a category one necessarily lesser included offense of kidnapping, with the only differing element being the level of intent. State v. Sanborn, 533 So. 2d 1169, 1170 (Fla. 1988) ("[W]e find false imprisonment is a necessarily lesser included offense of the crime of kidnapping..."). This Court held that McKinney failed to preserve this issue by not requesting a jury instruction on false imprisonment: "McKinney's failure to request the instruction on false imprisonment and his failure to object to the trial court's failure to include it procedurally bar review of this claim." McKinney, at 84. In stark contrast to the holding in Walton, this Court held in McKinney that a defendant's silence waived any instruction on a category one

lesser included offense. See Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002). "This Court does not intentionally overrule itself sub silentio."

The majority opinion in Walton applies a definition of fundamental error taken from State v. Montgomery, 39 So. 3d 252 (2010) and reiterated in Griffin v. State, 160 So. 3d 63 (Fla. 2015): "'fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." Griffin, at 66 (quoting Montgomery, 39 So. 3d at 258; State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991)). This should not be taken to mean that fundamental error occurs *whenever* there omission in the jury instructions that *may* have had an effect on the verdict. See Martinez v. State, 981 So. 2d 449, 455 (Fla. 2008) ("We have never held that the failure to give an instruction or to give an erroneous instruction on an affirmative defense always constitutes fundamental error.") This Brief will argue that any omission in the jury instructions must be either preserved or so egregious that the jury's verdict could not be obtained without it, or at least be so harmful so as to deprive the defendant of a fair trial by negating his sole theory of defense, which the defendant has actively pursued.

Chief Justice Perry's opinion in Walton would have been correct *if* Walton had requested a jury instruction. In cases like Montgomery, the defendant pursued a theory of defense and asked for a jury instruction on that defense. The trial court

then prejudiced that theory defense by giving an erroneous instruction. However, in cases like Walton and Roberts, the defendant presumably did not wish to pursue a defense involving a one step removed, next lesser included defense. There are myriad reasons why a defendant and his attorney might employ such a strategy, and a defendant's choice in trial tactics should never be considered fundamental error on the part of the trial court. Chief Justice Perry's *a fortiori* argument in Walton transforms the principle in Montgomery—that a trial judge cannot embarrass a defendant's defense with an erroneous instruction—into a hereto unrecognized duty for the trial court to depart from its role as a neutral magistrate and become an active part of the defense.

In Montgomery, the trial court gave what was at the time the standard jury instruction on manslaughter by act, which contained an incorrect definition of manslaughter, advising the jury that in order to be guilty of manslaughter, the defendant had to *intend* to kill the victim. Id, at 257. Montgomery stands for the proposition that if a court gives an instruction on manslaughter as a lesser included offense, then the defendant is "entitled to an accurate instruction on the lesser included offense of manslaughter." Id, at 258. Put simply, Montgomery is a case where the defendant exercised his right to have the instruction on the next lesser offense, and the trial court prejudiced that right by giving the jury a faulty instruction.

The reasoning in Montgomery stems from a concept mentioned in the first-degree murder case Pena v. State, 901 So. 2d 781 (Fla. 2005), where this Court discussed the "inherent pardon power" of a jury to convict a defendant of the next lower crime, instead of the crime charged in the information:

> "A jury must be given a fair opportunity to exercise its inherent "pardon" power by returning a verdict of guilty as to the next lower crime. If the jury is not properly instructed on the next lower crime, then it is impossible to determine whether, having been properly instructed, it would have found the defendant guilty of the next lesser offense." Montgomery, at 259 (quoting Pena at 787).

In the very next paragraph, the Montgomery court concludes that the above language should be interpreted to mean that a trial court commits fundamental error when it deprives a jury of this pardon power by giving an erroneous instruction on the next lower crime. Montgomery, at 259. The Pena decision, however, simply reiterated the holding in State v. Abreau, 363 So. 2d 1063 (Fla. 1978), holding that reversible error can only occur when the trial court *refuses* to advise the jury on a next immediate removed lesser included offense.

The U.S. Supreme Court holding in Beck v. Alabama, 447 U.S. 625 (1980), which held that in capital cases (which are different by nature from other cases), a jury should have an option between choosing either total acquittal or a guilty verdict carrying the death penalty. However, this jury pardon power is not a

matter of due process, but rather a "procedural safeguard." Beck, 636. The exercise of this pardon power is not a constitutional right of the defendant. See State v. Baker, 456 So. 2d 419 (Fla. 1984); See also Sanders, 946 So. 2d at 956-7 (a defendant cannot establish prejudice in a 3.850 claim of ineffective assistance of counsel where his attorney failed to ask for a necessary lesser included jury instruction and thereby seek a jury pardon; defendant had no right to a jury pardon, and jury pardons are contrary to the law.)

The Abreau decision disapproved of this Court's prior holding in Lomax v. State, 345 So. 2d 719, 721 (Fla. 1977), which held that in a robbery trial where the trial court refused to instruct the jury on two lesser included charges (assault with intent to commit robbery and attempted robbery), the harmless error doctrine could not apply. This Court held in State v. Abreau that it is per se reversible error for a trial court to *refuse* to instruct the jury on "the next immediate lesser-included offense (one step removed)"; however this ruling addressed a conflict between two cases where the trial courts *refused* to give a *requested* jury instruction. See State v. Abreau, 347 So. 2d 819 (Fla. 3d DCA 1978); Delaine v. State, 262 So. 2d 655 (Fla. 1972).

Citing State v. Terry, 336 So. 2d 65 (Fla. 1976), the Lomax decision used broad language that suggested any failure to instruct on a lesser-included offense

constituted per se reversible error. Lomax, 345 So. 2d at 721. The Abreau Court narrowed the holding in Lomax, stating that Lomax should not be read to apply the per se reversible error doctrine to the failure to instruct on "any lesser-included offense", but that per se reversible error only occurs when the requested lesser included offense was only one step removed. Abreau, at 1064.

The Abreau decision left intact a portion of Lomax, which held that because a jury has an inherent pardon power to find a defendant guilty of the next lesser included crime, it was per se reversible error for the trial court to *refuse* a defendant's *requested* jury instruction on attempted robbery, when the defendant was charged with robbery. Subsequent to its decision in Abreau, this Court held that in a robbery with a firearm trial, the trail court's refusal to give a *requested* instruction on robbery with a *weapon* was per se reversible error. Reddick v. State, 394 So. 2d 417, 417-418 (Fla. 1981). The holdings in Abreau and Reddick, however, should be limited to cases where the trial court refuses to give a *requested* jury instruction on the next lesser included offense. The facts in Roberts are quite different: the jury instruction was not requested at all; instead the defendant either neglected to seek the instruction, or intentionally avoided having the instruction read.

This Court held in Montgomery that "Because Montgomery's conviction for second-degree murder was only one step removed from the necessarily lesser included offense of manslaughter, under Pena, *fundamental error occurred in his case which was per se reversible* where the manslaughter instruction erroneously imposed upon the jury a requirement to find that Montgomery intended to kill [the victim]." Montgomery, at 259 (emphasis supplied). Roberts, unlike the defendant in Montgomery, did not even address the possibility of a jury instruction on attempted manslaughter; instead, Roberts opted for a theory of self-defense, or in the alternative, the lesser included crimes of aggravated battery or aggravated assault.

The holding in Montgomery regarding "fundamental error...which was per se reversible" should not apply to Roberts—or any case, since this language confuses the two doctrines of fundamental and per se revisable error. In Thomas v. State, 730 So. 2d 667 (Fla. 1998) this Court held that "The *per se* reversible error rule announced in Ivory [v. State, 351 So. 2d 26 (Fla. 1977)] is prophylactic in nature and must be invoked by contemporaneous objection at trial." Thomas, at 668. The Thomas decision states that because the defense counsel in that case accepted the procedure employed by the trial court, the defendant could not claim that the trial court committed per se reversible error when it responded to a jury question outside the presence of the defendant and his lawyer. Id, at 668-69. In

Rodas v. State, 967 So. 2d 444 (Fla. 4th DCA 2007), the Fourth District noted that "A per se reversible error is not necessarily a fundamental one," and that "A per se reversible error means that a reviewing court does not undertake harmless error analysis to decide if a prejudicial error occurred." Rodas, at 447.

In Haygood v. State, 109 So. 3d 735 (Fla. 2013) the defendant was convicted of second-degree murder after the trial court gave the incorrect (yet standard) instruction on manslaughter. Haygood, at 738. The Second District had previously held in Haygood, 54 So. 3d 1035, 1037 (Fla. 2d DCA 2011) that although the trial court had incorrectly instructed the jury on manslaughter by act, no fundamental error occurred because the trial court correctly instructed the jury on manslaughter by culpable negligence. Haygood, 109 So. 3d 738-39.

This court reversed the Second District's decision, holding that the erroneous instruction *was* fundamental error because "[t]he elements of the offense were disputed," and "the instructions were pertinent and material to what the jury must consider in order to convict Haygood of any of the offenses." Haygood, 109 So. 3d at 742. The Haygood Court reasoned that because the jury convicted Haygood of second degree murder instead of first degree murder, the jury presumably found that Haygood lacked the intent to kill. However, the jury was

deprived of considering manslaughter by act because of the faulty jury instruction which included an element of intent. Haygood, at 743.

In Haygood, the majority opinion rejected the notion that the jury pardon doctrine was the basis for its decision in Haygood or Montgomery. Haygood v. State, 109 So. 3d at 742. However, the basis for the Montgomery decision was the language in Pena that held the difference between a court refusing to give an instruction on the next lesser included crime versus a court refusing to instruct on a crime two or three steps removed was *because* of the jury's "inherent 'pardon' power." Montgomery, at 259 (quoting Pena, 901 So. 2d at 787). The Haygood majority decision simplifies the rule in Montgomery to state that if a defendant requests an instruction on a lesser included defense, then he has an inherent right to have the jury correctly and thoroughly instructed on that lesser included offense. Haygood, 742. However, even the broad holding in Haygood does not encompass cases like Roberts, where the defendant waived and abandoned any theory involving manslaughter.

The concurrence in Haygood argues that because the jury was incorrectly instructed that an element of intent was involved with manslaughter by act, "There is simply no way to know what verdict the jury would have returned had it been

properly instructed that manslaughter by act does not require an intent to kill." Haygood, 109 So. 3d at 745 (Pariente, J., concurring).

The reasoning behind the Haygood concurrence, at its core, is at odds with this Court's holding in State v. Weaver, 957 So. 2d 586 (Fla. 2007), which rejected an argument that if a jury instruction instructed a jury on two forms of battery, but the information and evidence presented only supported one form, then fundamental error had occurred, notwithstanding the failure of the defense to object. This Court expressly disapproved of the language in Dixon v. State, 823 So. 2d 792 (Fla. 2d DCA 2001), which found fundamental error where Dixon was charged with intentionally touching or striking an officer, but "the jury was instructed that it could convict Dixon if he either intentionally touched or struck the officer *or caused him bodily harm."* (emphasis original). The Dixon Court held that this was fundamental error because "*the jury's general verdict made it impossible to know whethe*r Dixon was convicted of the offense with which he was charged, i.e., intentional touching battery, or an offense with which he was not charged, i.e., bodily harm battery." Dixon, at 794 (emphasis supplied). The Weaver Court rejected the notion that "fundamental error" encompassed situations, like Dixon, where it is "impossible to know" what the jury would have decided absent the error. The State submits that while it may be impossible to know whether or not the jury would have found Roberts guilty of attempted manslaughter, this does not

constitute fundamental error because Roberts was not deprived of her chosen defense, and there is no evidence that the jury's verdict "could not have been obtained without the assistance of the alleged error." State v. Delva, 575 So. 2d 643, 645 (Fla. 1991).

The dissent in Haygood pointed out that this Court held in State v. Wimberly, 498 So. 2d 929 (Fla. 1986) that "The requirement that a trial judge must give a requested instruction on a necessarily lesser included offense is bottomed upon a recognition of the jury's right to exercise its "'pardon power."' Wimberly, at 932 (quoting State v. Baker, 456 So. 2d 419, 422 (Fla. 1984)). The Haywood dissent is in line with this Court's decision in Jones, which points out that the reason there is a different rule regarding waiver of lesser included offenses in capital and non-capital cases is that capital juries may feel compelled to convict a defendant, but not want to convict a defendant of crime that carried a death sentence. A next lesser included offense gives the capital jury a "third option" between a possible death sentence, and acquittal. Jones, at 579 (citing Harris v. State, 438 So. 2d 787 (Fla. 1983), cert denied, 466 U.S. 963 (1984); Beck v. Alabama, 447 U.S. 625 (1980).

The central concept behind Beck *is* jury pardoning in capital cases, where the jury may be reluctant because of some doubt as to some element of an

otherwise egregious crime, and wish to spare the convict the defendant, but spare him the death penalty:

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction....Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments. Beck, 447 U.S. at 637.

Regardless of whether the right to receive a proper instruction on a next lesser included crime is based upon the "pardon power" or some other principle of judicial fairness, the decisions in Abreau, Pena, Montgomery, and Haygood all agree that fundamental error occurs after the defendant requests the instruction, but then allows (or neglects to object to) the court giving an incorrect definition of the next lesser included crime to the jury.

In Roberts and Walton, there was no request for the instruction at all. Citing Williams v. State, 123 So. 3d 23, 27 (2013) (another case involving an

erroneous instruction on a *requested* lesser included offense), the Walton majority decision held that "If giving an incorrect instruction on a necessarily lesser included offense constitutes fundamental error, then *a fortiori* giving no instruction at all likewise constitutes fundamental error." Walton, 208 So. 3d at 65. This rationale does not take into account whether a defendant might employ a strategy that is served by opting out of an instruction on attempted manslaughter. Arguably, the defense attorney in Roberts employed a questionable strategy: opting for an instruction on aggravated battery (a second degree felony with a punishment equal to *attempted* second-degree murder) and aggravated assault—a third degree felony that was (at the time of the offense), subject to the enhanced sentencing provisions of section 775.087. Asking for an instruction on attempted manslaughter would have been wise, since attempted manslaughter was a third degree felony not subject to the 10-20-Life enhancement; however, the proper method of review in this case would be a 3.850 ineffective assistance of counsel claim, not a direct appeal arguing the trial court committed fundamental error.

In Silver v. State, 149 So. 3d 54 (Fla. 4th DCA 2014), the Fourth District held that, where the defendant was charged with first-degree murder, but convicted of attempted second-degree murder, it *was not* fundamental error for a trial court to omit the jury instruction on a lesser included offense of attempted voluntary manslaughter. While much of the rationale behind Silver is not applicable to

Roberts (the jury in Silver was instructed on the next lesser included crime of attempted first-degree murder: attempted second-degree murder), the Silver court pointed out that the defense chose not to pursue attempted voluntary manslaughter as part of their strategy:

> Defense counsel did not request an instruction on attempted voluntary manslaughter, and in fact was a participant in modifying the initial instructions and deleting the instruction on attempted voluntary manslaughter. Thus, no such instruction was given. To hold that such an omission constitutes fundamental error would "stray from the long and unbroken lines of precedent conditioning a right to jury instructions on lesser included offenses upon a request for such instructions." Silver, 149 So. 3d at 58–59 (citing Jones, 484 So. 2d at 579).

Like the defendant in Silver, Petitioner Roberts pursued a theory of intentional, but justified use of deadly force. The jury was given an alternative choice of aggravated battery—although this would, like attempted second-degree murder, be a second degree felony. However, the jury was also instructed on aggravated assault, which was a true lesser included offense because it was a third degree felony, which under the Florida Statutes at the time of the offense would possibly be subject to the sentencing provisions under section 784.021 Fla. Stat. (2011).

The dissent in Walton points out that evidence in that case did not support a verdict of attempted manslaughter, and therefore the omission of an instruction on attempted manslaughter could not fit the traditional definition of "fundamental error": "an error without which 'a verdict of guilt could not have been obtained.'" Walton, at 70 (Canady, J., dissenting). In Roberts, there is no reason to believe that the verdict would have been different if the jury had been given an instruction on a lesser included offense that wasn't even argued (or suggested) by defense counsel.

In Walton, there is no indication that self-defense was an issue: Walton and his accomplice were robbing a victim, and when interrupted by the police, they fired at the officers. Thus, the only defense available to Walton was attempted manslaughter—negating the "depraved mind" intent required for second degree murder, while acknowledging that shooting at the officers could not be a justifiable use of force. By not seeking this instruction, Walton's attorney effectively deprived him of the only defense he could have pursued besides mistaken identity—a defense that was complicated by the police's conduct in a lineup procedure. The trial strategy employed in Walton was much more questionable than in Roberts: if the jury did not accept Walton's misidentification argument, then they were going to convict him of the highest offense. There was no real strategic reason in Walton to not mention in the jury instructions (and the verdict form) the next lesser

included offense. It would have given the jury something to consider if they rejected Walton's primary defense: that he wasn't the shooter.

Petitioner Roberts' defense was the opposite of Walton's: It was clear Roberts shot the victim, but Roberts argued justifiable use of force, with a secondary theory that she fired *at* the victim in order to repel a perceived attack. However, unlike the defendant in Walton, Roberts also pursued another theory of aggravated assault. Therefore, if the jury rejected Roberts' primary defense of justifiable use of force, she still presented the issue of her intent. It is possible that Roberts felt that the jury may have difficulty understanding or applying the concept of *attempted* manslaughter, and chose to go with more concrete concepts such as assault or battery. Court's have even struggled with the concept of attempted manslaughter. See Rodriguez v. State, 443 So. 2d 286 (Fla. 3d DCA 1983). The trial court Roberts did not commit fundamental error by not raising the issue of attempted manslaughter.

A defendant can waive otherwise "mandatory" jury instructions by failing to ask for them: In Teal v. State, 658 So. 2d 603 (Fla. 4th DCA 1995), the Fourth District held that a defendant, who did not request a instruction that he could not be found guilty of felony murder if the killing was not committed in the course of the felony, could not raise the issue for the first time on direct appeal. Although the

Fourth District noted that Teal was entitled to an "independent act instruction", the Teal court held that the defendant failed to preserve the issue: "[H]ere... defendant's trial counsel failed to *request* an "independent act" instruction, and did not *object* to it not being given, [therefore] he cannot raise the issue for the first time on direct appeal." Teal 658 So. 2d at 604 (emphasis original) (citing Amrhein v. State, 622 So. 2d 172 (Fla. 2d DCA 1993)).

In Simpkin v. State, 363 So. 2d 45 (Fla. 3d DCA 1978), a defendant argued that the trial court committed fundamental error by failing to define dwelling as opposed to a structure. Defendant was caught in the act of removing goods from the victim's house. Id, at 46. The Third district noted that under the 1975 statutes, burglary of a dwelling was classified as a second degree felony, while burglary of a structure was only a third degree felony. The Third district found that by not asking the court to define "dwelling" more specifically, defendant waived his opportunity to have the jury consider burglary of a structure: "[I]t is clear that the failure to give an unobjected to, or not requested, jury charge is not ordinarily fundamental error." Simpkin v. State, 363 So. 2d 45, 47 (Fla. 3d DCA 1978) (citing Williams v. State, 346 So. 2d 554, 556 (Fla. 3d DCA 1977)).

Subsequent to the Third District's holding in Simpkin, the Fifth District held that burglary of a structure is a necessarily included, "one-step-removed"

offense from burglary of a dwelling. See Bethea v. State, 767 So. 2d 630, 630-31 (Fla. 5th DCA 2000) (holding that, in a burglary of a dwelling trial, defense counsel was ineffective for failing to ensure that burglary of a structure appeared on the verdict form, as burglary of a structure was a "necessarily lesser included offense") accord McKiver v. State, 55 So. 3d 646, 650 (Fla. 1st DCA 2011) ("With respect to the offense of burglary of a dwelling, simple burglary is a necessary lesser-included offense and is one step removed...").

When the holdings in Simpkin, Bethea, and McKiver are read together, they suggest that a defendant in a burglary of a dwelling case can waive instruction on the one step removed lesser-included offense of burglary of a structure by simply not requesting the instruction, and that this waive should not be disturbed on appeal. This is precisely the situation in Roberts: Defendant Roberts declined to pursue an instruction on attempted manslaughter, in favor of other theories of defense. It is the defendant's responsibility to seek a jury instruction, not the trial court's duty to inject a defense into the trial that the defendant either neglects or declines to pursue.

The holding in Montgomery appears to conflate *per se* reversible error with fundamental error; the two concepts are very distinct. Per se reversible error occurs when a defendant exercises his right to have a jury instruction on a next lesser included offense, and the court refuses. This effectively deprives a defendant of his

chosen defense. Fundamental error only occurs when the trial court does something that affects the trial so severely that the entire outcome is called into question.

In Roberts, the jury rejected Roberts chosen lesser included offense of aggravated assault, which carried a greater potential punishment at the time than attempted manslaughter. From the perspective of a jury pardon, if the jury was unwilling to compromise and convict Roberts of a third degree felony subject to 10-20-Life enhancement, then the jury would not have considered convicting her of a third degree felony *without* any potential minimum mandatory sentence.

Petitioner seeks an extension of the holding in Walton that could also create great difficulty in situations where the defense strategy is an "all or nothing" approach where a defendant attempts to maintain credibility with the jury by sticking to one solid theory of defense. The ruling that Petitioner Roberts seeks would effectively force a judge to inject a defense into a trial—possibly a defense that the Defendant does not even want. This could potentially confuse or prejudice a jury, who might prefer a defendant who sticks to one theory of defense. A further consequence of expanding Walton is that defense attorneys will be encouraged to remain silent and not request necessary lesser included instructions: if the defendant is not acquitted at trial, a new trial is guaranteed if the court fails to sua sponte inject the issue of the lesser included.

Issue II: Whether the trial court's instruction on the use of justifiable deadly force was fundamental error, or in the alternative, constituted ineffective assistance of counsel on the face of the record:

Standard of Review

The standard of review for an erroneous jury instruction, without objection, is fundamental error. State v. Weaver, 957 So. 2d 586, 588 (Fla. 2007) (failure to object to a jury instruction at trial fails to preserve the issue for any type of appellate review other than fundamental error.) (citations omitted). "Where the challenged jury instruction involves an affirmative defense, as opposed to an element of the crime, fundamental error only occurs where a jury instruction is 'so flawed as to deprive defendants claiming the defense ... of a fair trial.'" Martinez v. State, 981 So. 2d 449, 455 (Fla. 2008) (quoting Smith v. State, 521 So. 2d 106, 108 (Fla. 1988).

Merits

The First District held in Roberts that the jury instruction given regarding Petitioner Roberts' self-defense claim was flawed, but did not constitute fundamental error. The Roberts jury was instructed that Roberts had a duty to

retreat if she was engaged in unlawful activity, unless retreat would be unreasonably dangerous. Roberts, 168 So. 3d at 259. The Roberts court noted that in Garrett v. State, 148 So. 3d 466, 471 (Fla. 1st DCA 2014), the First District held that the same erroneous jury instruction did not constitute fundamental error because the jury was not precluded from considering Garrett's self defense claim, regardless of whether Garrett was engaged in unlawful activity. Roberts, at 261, citing Garrett, at 471.

Petitioner Roberts contends that this jury instruction error prejudiced her only defense: justifiable use of deadly force. (IB. 24). Petitioner cites several cases to support the proposition that fundamental error occurs whenever a jury instruction deprives a defendant of his sole or primary theory of defense: Smith v. State, 521 So. 2d 106, 108 (Fla. 1988) (former standard jury instruction on insanity, while incorrect, did *not* constitute fundamental error); Martinez v. State, 981 So. 2d 449, 455-456 (Fla. 2008); and Carter v. State, 469 So. 2d 194, 196 (Fla. 2nd DCA 1985) ([W]here...a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant.")

However, Petitioner Roberts argued two defenses at trial: that she was justified in using deadly force, and that she "didn't know where she was aiming," but that she did not intend to hit the victim. (R.VI 583). Roberts did not have a "sole theory of defense." Furthermore, Roberts' self defense theory was not dependant on the Stand Your Ground principle that she had no duty to retreat: Roberts contended that she had already disengaged from the marijuana transaction and was trying to go back to the bus stop when she felt the victim was threatening Roberts with imminent death or bodily injury.

In Roberts, the jury was in instructed that Roberts would not have been justified in using force if she was engaged in unlawful activity, and could have retreated, unless retreating would put her in a position of imminent danger of death or great bodily harm. (R.II 221-22). The Garrett court held that this same erroneous instruction (nullified by the Stand Your Ground provisions of section 776.012) did not constitute fundamental error because the jury could have found that it would have been futile for Garrett to retreat if he faced imminent danger. Garret, at 471-72. The Garret court further held "That the jury ultimately rejected Garrett's claim of self-defense does not mean that the challenged instruction constituted fundamental error." Id, at 472.

Petitioner cites Richards v. State, 39 So. 3d 431 (Fla. 2nd DCA 2010), where the Second District found that the outdated instruction on the common law duty to retreat (given without defense objection) was fundamental error where it negated defendant's "sole defense." Richards, at 434. Richards is inapplicable to the facts of Roberts, as the error in Roberts is not that the trial court gave an outdated instruction, but gave an instruction that was a mixture of two effective statutes with contradictory provisions.

In Dorsey v. State, 149 So. 3d 144 (Fla. 4th DCA 2014) ("Dorsey II"), the Fourth District held that where the defendant's sole affirmative defense was stand-your-ground self defense, the trial court committed fundamental error by instructing the jury that defendant had a duty to retreat if he was engaged in unlawful activity, and then instructed the jury that "a felon in possession of a firearm constitutes unlawful activity." Dorsey II, at 145-147. In Dorsey II, the defendant was sitting on the hood of his vehicle with a firearm when he was punched by one of the victims, who had surrounded him and were confronting him. One of the victims punched Dorsey and knocked him back against his SUV; this compelled Dorsey to shoot the man who punched him and another potential assailant. Dorsey v. State, 74 So. 3d 521, 523 (Fla. 4th DCA 2011) ("Dorsey I").

In Dorsey I, the defendant successfully argued that he should have received a special jury instruction on the duty to retreat, and the Dorsey I court remanded

the case for a new trial, while acknowledging (incorrectly) that a defendant had a duty to retreat when engaged in unlawful activity, such as a felon in possession of a firearm. Dorsey I, at 527-28. The facts of Dorsey were such that the issue of "imminence" was not disputed: a witness testified that a confrontation between the victims seemed "imminent" and that the victims were making strident efforts to start a fight with the victim. Dorsey I, at 523.

Noting that the Fourth District had ruled in Hill v. State, 143 So. 3d 981, 985 (Fla. 4th DCA) that a felon in possession of a firearm could still argue that he had no duty to retreat under the Stand Your Ground law, the Dorsey II court reversed Dorsey's second conviction and remanded for new trial because the duty to retreat instruction was not necessary, and it negated Dorsey's sole defense at trial. Dorsey II, at 147. The dissent in this Court's dismissal of review in Garret v. State, 192 So. 3d 470 (Fla. 2016) suggests that the First District's holding in Garrett v. State, 148 So. 3d 466 (Fla. 1st DCA 2014) directly conflicts with Dorsey II and Rios v. State, 143 So. 3d 1167, 1170 (Fla. 4th DCA 2014). Garrett, 192 So. 3d 470 (Pariente, J., dissenting).

Like the decision in Richards, the holding in Rios stemmed from the trial court giving the pre-2005 common law duty to retreat that applied to all self defense cases (outside the castle doctrine) before the enactment of the Stand Your

Ground legislation. Rios, 143 So. 3d at 1169. Thus the error in Rios was quite different from the error in Dorsey, Garrett, and Roberts. Despite the differences between the instruction given in Rios and Dorsey, the Dorsey court relied upon Rios to find fundamental error where the jury was instructed regarding the "duty to retreat if engaged in unlawful activity instruction" despite the provisions of section 776.012(1) Fla. Stat. (2012), which required no duty to retreat even if the defendant was engaged in unlawful activity. Dorsey II, at 145-46. The Dorsey II court interpreted Rios as holding that fundamental error occurs when the "duty to retreat" instruction is mentioned unnecessarily, and eliminates the Defendant's sole affirmative defense. Dorsey, at 147.

Unlike the Defendant in Dorsey, the defendant in Garrett made a self defense claim that was dependant on whether Garrett faced a threat of imminent death or great bodily harm. The defendant in Garrett had a much stronger self-defense claim than Petitioner Roberts: Garrett argued that his victim, Ford, had pointed a rifle at him, and that Garrett had killed Ford with his own pistol in self defense. A rifle was found in the yard where the two men had been arguing earlier. Garrett, at 467-68. The Garrett court noted that because Garrett presented some evidence to support his claim of justifiable use of force to prevent imminent death or great bodily harm, he was entitled to an instruction under the provisions of section 776.012(1), Fla. Stat. (as it appeared at the time), and that the trial court

should not have instructed the jury about "unlawful activity" and the duty to retreat mentioned in section 776.013, Fla. Stat., which applies to home protection. The Garrett court held that no fundamental error occurred because the jury instruction given did not affect the jury's responsibility to determine whether the threat Garret faced was *imminent*: if the jury believed that the threat was imminent, then retreat would be futile, and the jury had been instructed that, even if he was engaged in unlawful activity, Garrett had no duty to retreat if such a retreat was futile. Garrett, at 472-73.

The Garrett court cited Hardison v. State, 138 So. 3d 1130 (Fla. 1st DCA 2014), where the First District held that the "duty to retreat if engaged unlawful activity" instruction was not fundamental error where defendant was a felon in possession of a firearm. The defendant in Hardison argued that the instruction given by the trial court effectively limited self defense to those not engaged in unlawful activity. Hardison, at 1132. In Hardison, the defendant requested, and the trial court gave an instruction on certain circumstances where a felon could possess a firearm based on the holding in Marrero v. State, 516 So. 2d 1052 (Fla. 3d DCA 1987). These circumstances included situations where the firearm was necessary to prevent *imminent* death or great bodily harm. Id, at 1134. The Hardison court stated that fundamental error might have occurred if Marrero language had not been present, and the jury had been instructed that it should reject Hardison's claim

of self defense solely because he was a convicted felon in possession of a fire arm. However, the Hardison court reasoned that no fundamental error occurred because the *complete* instruction did not deprive Hardison of his defense, as the instruction did not allow the jury to decide Hardison's defense solely on the issue of him being a felon in possession of a firearm. Hardison, at 1134-35. (we find the jury was sufficiently instructed that, absent a reasonable belief he was under threat of imminent death or great bodily harm, or imminent commission of a forcible felony, Hardison's use of deadly force in self-defense was not justified.)

The Roberts court pointed out that Robert's self defense claim did not hinge on the "Stand Your Ground" principle of "no duty to retreat" Roberts testified that when the victim punched her, Roberts was already withdrawing from the argument, heading back towards a bus stop where she was prior to meeting with the victim. Roberts, at 262. Furthermore, Roberts shot an unarmed victim from 10 feet away, and was in a position where the use of deadly force was unreasonable. Roberts' claim of reasonable use of deadly force was far less compelling than the one in Garrett, and the "duty to retreat" instruction in Roberts was not pertinent to what the jury had to decide to convict: whether Roberts *reasonably* believed she was threatened with *imminent* death or great bodily harm.

Petitioner's claim of ineffective assistance of counsel on the face of the record (IB 32-3) should be denied as to Issue II as it was not raised as to Issue II below; Petitioner previously only raised the issue of ineffective assistance of counsel as to Issue III, alleging that trial counsel was ineffective for making an inadequate Motion for Judgment of acquittal. It is rare that a district court will entertain a claim of ineffective assistance of counsel on direct appeal. See Ellerbee v. State, 87 So. 3d 730, 739 (Fla. 2012) ("With rare exception, ineffective assistance of counsel claims are not cognizable on direct appeal.") (citations omitted).

Petitioner Roberts' subverts her own claim of ineffective assistance of counsel by asking that "To the extent that this Court agrees that the error did not amount to fundamental error and that her trial counsel ought to have objected on the grounds advanced herein, Petitioner respectfully alleges ineffective assistance of trial counsel on the face of the record." (IB 32-3). To show that counsel was ineffective on the "face of the record", the appellant must show that his counsel's deficiency was so prejudicial as to constitute fundamental error. See Latson v. State, 193 So. 3d 1070, 1074 (Fla. 1st DCA 2016) (Winkokur, J. concurring). If this Court finds that the jury instruction on justifiable use of force was not fundamental error, then Petitioner's ineffective assistance of counsel on the face of the record argument is automatically without merit. An appellate court should only

reverse for ineffective assistance of counsel when the ineffectiveness is apparent from the face of the record and the ineffectiveness is so clear that remanding the case for a 3.850 motion would be a "waste of time." Monroe v. State, 191 So. 3d 395, 403 (Fla. 2016) (citations omitted).

ISSUE III: Whether the trial court committed reversible error by denying Defendant's motion for a judgment of acquittal as to Count 1: attempted second degree murder.

Standard of Review

A trial court's order on a motion for judgment of acquittal is a question of law, and therefore reviewed on appeal de novo. See Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002). "If the evidence is sufficient to support the elements of the alleged crime, the trial court has no discretion to acquit the defendant by taking the case from the jury. Conversely, if the evidence is not sufficient to support the elements of the alleged crime, the trial court cannot simply decide to submit the case to the jury anyway..." Jones v. State, 790 So. 2d 1194, 1196-97 (Fla. 1st DCA 2001).

Merits

The First District in Roberts did not address Petitioner's claim that her judgment of acquittal should have been granted. The essence of Petitioner's claim is that the State did not prove the mens rea required to convict Roberts of second degree murder; Petitioner argues that her actions did not evince a depraved mind regardless of human life. (IB 16).

The First District has held that the "depraved mind" element is not limited in its meaning to hatred, ill will, and malevolence, but "'denotes a wicked and corrupt disregard of the lives and safety of others ... a failure to appreciate social duty.'" Larsen v. State, 485 So. 2d at 1374 (quoting 40 Am. Jur. 2d, Homicide, Section 50). In Gibbs v. State, 904 So. 2d 432 (Fla. 4th DCA 2005), the Fourth District noted that district courts have frequently held "that pointing a loaded gun at the head of the victim and then firing" is "an act 'imminently dangerous to another and evincing a depraved min regardless of human life.'" Gibbs, at 435 (citing Keltner v. State, 650 So. 2d 1066, 1067 (Fla. 2d DCA 1995); Presley v. State, 499 So. 2d 64 (Fla. 1st DCA 1986); Dellinger v. State, 495 So. 2d 197 (Fla. 5th DCA 1986); Edwards v. State, 302 So. 2d 479, 480-81 (Fla. 3d DCA 1974); Hines v. State, 227 So. 2d 334, 335-36 (Fla. 1st DCA 1969)).

Contrary to Petitioner Robert's argument, her conduct was not indicative of an "impulsive overreaction to an attack": Roberts testified that she intentionally shot the unarmed victim, and had decided to withdraw to the bus stop before doing so. Furthermore, Roberts had retrieved the gun and displayed it before shooting the victim, giving Roberts sufficient time to develop the mens rea required for attempted second degree murder.

CONCLUSION

The State submits that his Court should deny jurisdiction because the holding in Roberts does not expressly conflict with Montgomery, Haygood, Jones, or Walton. If this Court is inclined to decide the case on the merits, the State would urge that while Roberts' counsel may have been deficient by not requesting a jury instruction on attempted manslaughter, the court did not commit fundamental error by not giving an instruction that was not requested, was not well supported by the facts, and did not pertain to the defenses chosen by Defendant Roberts.

The duty to retreat mentioned in the Roberts jury instructions did not deprive Roberts of her sole defense, nor did it mislead the jury into thinking it should decide the issue of self defense solely on the fact that Roberts was engaged in a drug transaction or had the gun concealed before she drew it and pointed it at the victim. Roberts' attorney argued in closing that the unlawful activity had ended, Roberts was withdrawing to a bus stop, and that Roberts fired at the victim to repel an attack. Lastly, district courts have frequently held that intentionally shooting at another person's head demonstrates the depraved mind *mens rea* required to support a conviction for second-degree murder.

If this Court accepts jurisdiction on the merits, the State requests that this Honorable Court affirm the First District's decision in Roberts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy this Answer Brief has been furnished by electronic mail to the following: Assistant Public Defender MARIA INES SUBER at ines.suber@flpd2.com on May 1, 2017.

CERTIFICATE OF COMPLIANCE

I certify that this document was computer generated using Times New Roman 14 point font, in accordance with Fla. R. App. P. 9.210 (a) (2).

Respectfully submitted and
certified,

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