IN THE SUPREME COURT OF FLORIDA

No. SC18-309

ARNOLD JEROME KNIGHT,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

_____

On Discretionary Review from the District Court of Appeal,
First District of Florida
(No. 1D14–2382)

_____

INITIAL BRIEF OF AMICUS CURIAE FLORIDA PUBLIC DEFENDER ASSOCIATION ON BEHALF OF PETITIONER KNIGHT

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STATEMENT OF IDENTITY AND INTEREST

The Florida Public Defender Association, Inc., ("FPDA") consists of elected public defenders who supervise hundreds of assistant public defenders and support staff. As appointed counsel for thousands of indigent criminal defendants annually, FPDA members and staff have tremendous practical experience with clients in criminal cases. All FPDA members are deeply committed to promoting the interests of fairness and justice in the criminal law process. The FPDA has a particular interest in the petitioner's case because the outcome will have a significant impact on similar cases regarding jury instructions in which FPDA members represent defendants both at trial and on appeal.

SUMMARY OF THE ARGUMENT

The lower court held that fundamental error cannot apply when an erroneous instruction is given after a charge conference. This ruling would essentially – contrary to this Court's rulings – eliminate application of fundamental error in jury instructions. Fundamental error is a fail-safe to ensure that jurors can fulfill their constitutional duty to correctly apply the law to the facts. So far as there is an exception for invited error, it cannot apply just because the defense acquiesces in an erroneous instruction given after the charge conference.

The lower court focused on the idea that the well-established rule of fundamental error acts as a perverse incen-

tive for defense counsel. Its view of defense counsel is unrealistic. And its view is unbalanced: it did not consider incentives for trial courts and prosecutors. Indeed, it creates a perverse incentive for prosecutors. If prosecutors and judges are incentivized to vigilance about jury instructions there can be no defense gamesmanship as envisaged by the lower court.

ARGUMENT

THE "INVITED ERROR" ANALYSIS OF THE LOWER COURT IS FLAWED AND CONTRARY TO LAW.

A. *The lower court would basically end the fundamental error rule for errors as to jury instructions*.

This Court has often held that fundamental error may occur in jury instructions. *See, e.g., State v. Montgomery*, 39 So. 3d 252 (Fla. 2010). There can be no doubt about the fact that the instructions in such cases occurred after a charge conference in which defense counsel participates. This is because, except in the rarest cases – where a judge spontaneously extemporizes – jury instructions are given only after such a charge conference.

Yet the First District held that fundamental error cannot occur when, as at bar, a defense attorney participates in a charge conference which produces an erroneous instruction.

This would reverse well-settled case law of this Court and the other district courts of appeal. It would damage the criminal law process in our courts, as discussed below.

B. *Jurors cannot do their job of applying the law to the facts when the law given to them is incorrect.*

"The right to have a jury make the ultimate determination of guilt has an impressive pedigree." *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (opinion of Scalia, J., for the Court).

Jurors fulfill their constitutional task by applying the law to the facts. When the law given them is flawed as what they must decide, there is a fundamental malfunction. *See Montgomery*.

Hence, *Gaudin* held that the Due Process and Jury Clauses were violated by an incorrect jury instruction on a charge of making false statements on loan documents.

The jurors are the people with the greatest need for accurate instructions. Yet they have no control over this vital component of their work. They depend on the lawyers and, most importantly, the judge to whom they look for instruction.

Accordingly, this Court has long held that fundamental error may occur in the jury instructions of a criminal case. *See Cohen v. State*, 125 So. 2d 560 (Fla. 1960). Likewise, this Court long ago wrote that failure to instruct fully on all degrees of homicide may constitute fundamental error even without objection by the defense. *Pait v. State*, 112 So. 2d 380, 386 (Fla. 1959).

C. *Failure to object is not invited error.*

Fundamental error acts as a fail-safe to ensure that the jurors can apply the <u>correct</u> law to the facts. So far as there

is an exception for invited error, it cannot apply just because the defense acquiesces in an erroneous instruction given after the charge conference.

1. Invited error

The question of invited error comes into play when a party strategically induces a trial court into making an error and then complains about that error in the appellate court.

The rule was acknowledged by this Court over a hundred years ago in *Bacon v. Green*, 18 So. 870 (Fla. 1895).

The Bacon brothers entered a contract to print copies of abstract books for Green. Difficulties arose. Green sued. One defendant (Mark R. Bacon) contended that he had not entered into the agreement with Green. In pursuit of this strategy, he testified that he was not a party to the contract. This testimony was allowed by the judge over objection and contrary to the parole evidence rule. Green then testified in rebuttal that Mark was in fact a party. On appeal, Bacon argued that the trial court had erred in giving an instruction relating to the parole evidence.

This Court ruled there was no basis for reversal since Bacon himself had invited the error when he was permitted over objection to give testimony contrary to the rule. *Id*. at 876.

This rule was also invoked as to jury instructions in *Atl. Coast Line R. Co. v. Levy*, 67 So. 47, 48 (Fla. 1914). The appellant railroad claimed the jury instructions were confusing and

contradictory. This Court agreed that such instructions are not allowed. But it affirmed because the appellant was the source of some of those instructions: "where, as in the instant case, the complaining party is chiefly or largely responsible for such a state of affairs, we will not reverse the judgment upon that ground alone." *Id*. at 48 (emphasis added). *See also Roe v. Henderson*, 190 So. 618, 620 (Fla. 1939) ("The charge as a whole has been read and we do not find it amenable to the assault made on it. A large portion of it was requested by the plaintiff in error and we do not see that he is in position to complain.").

Invited error involves the exercise of "strategic choices." Daniel D. Blinka, *Ethics, Evidence, and the Modern Adversary Trial*, 19 Geo. J. Legal Ethics 1, 23 (2006).

There is a big difference between inviting an error – by actually inducing a court into error as a matter of strategy – and a mere failure to make an objection.

A recent Columbia Law Review article identifies invited error as related to the doctrine of judicial estoppel:

> Essentially, the doctrine of judicial estoppel reflects a decision that parties should not be able insist to on the enforcement of rights they intentionally waived. Case law distinguishes between true waiver ("the intentional relinquishment of a known right") and mere forfeiture ("the failure to make the timely assertion of a right"). *See United States v. Staples*, 202 F.3d 992, 995 (7th Cir. 2000) ("Where waiver is accomplished by intent, forfeiture comes about through neglect."). When a party has intentionally waived a known right at an earlier stage of litigation, the re-

> lated doctrine of "invited error" prevents the party from later complaining of the court's failure to enforce that right. *See United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2007) (noting "[o]ur prior cases make clear that waiver bars a defendant from appealing an invited error"); see also id. (citing cases where court "reject[ed] the defendant's challenge to the conditions of his supervised release because he had proposed them through counsel and personally agreed to them at his sentencing" and "reject[ed] the defendant's claims of misjoinder because his two cases had been tried together at his request").

Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 Colum. L. Rev. 1444, 1521 n. 282(2011) (emphasis added). *See also Richardson v. Missouri Pac. R. Co.*, 186 F.3d 1273, 1277 (10th Cir. 1999) (invited error rule "is equitable in nature and precludes a party from inducing action by the district court and then later arguing on appeal that the action was reversible error.").

2. Failure to object

Because of the strategic nature of a truly invited error, it differs morally and in practice from a simple failure to object, which (although it may sometimes be called a waiver) is a forfeiture or procedural default.

This distinction is of decisive importance for purposes of appellate review:

> A party waives a right when he intentionally relinquishes or abandons it. *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *United States v. Mitchell,* 85 F.3d 800, 807 (1st Cir.1996). This is to be distinguished from a situation in which

> a party fails to make a timely assertion of a right-what courts typically call a "forfeiture." *United States v. Olano,* 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). The difference is critical: a waived issue ordinarily cannot be resurrected on appeal, *see, e.g., United States v. Ross,* 77 F.3d 1525, 1542 (7th Cir.1997), whereas a forfeited issue may be reviewed for plain error, *Olano,* 507 U.S. at 733-34, 113 S.Ct. 1770.

United States v. Rodriguez, 311 F.3d 435, 437 (1st Cir. 2002). *See also United States v. Robinson*, 744 F.3d 293, 298 (4th Cir. 2014) (under *Rodriguez* "[a] party who identifies an issue, and then explicitly withdraws it, has waived the issue.").

Thus, as the Supreme Court has ruled, a true waiver is an intentional relinquishment or abandonment <u>of a known right</u>:

> "[W]aiver is the '<u>intentional relinquishment or abandonment of a known right</u>.'" *Kontrick v. Ryan,* 540 U.S. 443, 458, n. 13 (2004) (quoting *United States v. Olano,* 507 U. S. 725, 733 (1993)). The State's conduct in this case fits that description. Its decision not to contest the timeliness of Wood's petition did not stem from an "inadvertent error," as did the State's concession in *Day*. See 547 U.S., at 211. Rather, the State, <u>after expressing its clear and accurate understanding of the timeliness issue</u>, see *supra,* at 469-70, <u>deliberately steered the District Court away</u> from the question and towards the merits of Wood's petition. In short, the State knew it had an "arguable" statute of limitations defense, see *ibid*., yet it chose, in no uncertain terms, to refrain from interposing a timeliness "challenge" to Wood's petition. The District Court therefore reached and decided the merits of the petition. The Tenth Circuit should have done so as well.

Wood v. Milyard, 566 U.S. 463, 474 (2012) (emphasis added).

Thus, where there is a failure to object rather than an actual intentional abandonment of a known right, a court may re-

verse for plain error as to a jury instruction. *See Mays v. Springborn*, 719 F.3d 631, 633 (7th Cir. 2013) (reversing for plain error in jury instruction despite appellee state's claim that appellant inmate "agreed with the instruction").

3. State supreme courts generally review erroneous jury instructions despite claims of invited error respecting jury instructions

a. Some states may review even if the error is invited.

In *State v. Richard*, 7 A.3d 1195 (N.H. 2010), the court considered the doctrine of invited error at length, reviewing case law around the country. It noted that the rule unrealistically "assumes a complete familiarity with the relevant law and penalizes the ill-prepared or unwitting lawyer just as harshly as the malicious lawyer," so that "[i]n order to eliminate the machinations of a few, the invited error ban denies appellate review to all." *Id.* at 1202. Further, it "removes any discretionary remedy from the appellate court's panoply of options and subjugates the interests of justice to the demands of a procedural mechanism." *Id*.

Hence, it concluded that, even if the defense requests an erroneous instruction, there will be no bar to review for "plain error." *Id*.

In *State v. Bailey*, 176 A.3d 800 (N. J. 2018), the state supreme court held that the invited error doctrine did not bar

review of an erroneous standard jury instruction, even though the defense asked for the instruction. The court wrote:

> Here, defendant asked the trial court to comply with the model jury charge based on this Court's dicta in Brown. This is not the sort of gamesmanship-driven scenario to which the invited error doctrine is traditionally applied. We do not apply it here because the error cut mortally into defendant's due process right to have the jury decide each element beyond a reasonable doubt.

Id. at 810. (Notably at bar, the erroneous instruction was also a standard instruction and it appears that no one at trial was aware that the standard instruction had recently been changed.)

Moreover, in *State v. Hurst*, 624 S.E.2d 309 (N. C. 2006), the court held that the invited error doctrine did not bar review of failure to give a capital sentencing jury instruction as to mitigation even though the defense requested that the instruction not be given. It wrote that the trial court has an independent duty to give such an instruction. Hence, "the doctrine of invited error cannot apply when the instruction is withheld at the defendant's request." *Id*. at 320.

Likewise, the Minnesota Supreme Court concluded in *State v. Carridine*, 812 N.W.2d 130, 144 (Minn. 2012) that the defendant's request of an erroneous instruction does not bar review of the instruction for plain error.

The District of Columbia Court of Appeals seems to take a similar approach. *See Preacher v. United States*, 934 A.2d 363,

368 (D.C. 2007) (stating that review of an unobjected-to error is for plain error, and also noting that invited error doctrine's "bar to claims of error on appeal is not absolute").

Alaska also seems to allow limited review even as to an invited instructional error. *See Frankson v. State*, 282 P.3d 1271, 1274 (Alaska Ct. App. 2012) (discussing precedents of state supreme court and writing: "Frankson did not simply fail to preserve her claim—her attorney actively told the judge that the necessity instruction should not be given to the jury. We must therefore review the trial record to determine whether this case involves an exceptional situation where we are required to reverse an invited error.").

B. The bulk of states will review unobjected-to instructions for plain error unless the error is genuinely invited.

There is general support for the rule that review of an instruction is barred by the invited error rule only if the party knowingly and strategically sought the erroneous instruction.

Cases in this category are: *People v. Townsel*, 368 P.3d 569, 596–97 (Ca. 2016) ("The Attorney General contends defendant invited any error by agreeing that the instruction should be given as read, and thus forfeited his appellate claim. But the invited error doctrine does not apply here, in the absence of any clear tactical purpose on defense counsel's part in agreeing to [instruction given]."; emphasis added); *Cheddersingh v.*

State, 724 S.E.2d 366, 370 (Ga. 2012) ("The exchange with the trial court does not show that Cheddersingh intentionally relinquished his right to have the burden of proof properly stated in the verdict form; rather, the failure to object is more appropriately described as a forfeiture of the right.") (emphasis in original); *Adkins v. State*, 800 S.E.2d 341, 345 (Ga. 2017) ("affirmative waiver, as opposed to mere forfeiture by failing to object to jury instruction, prevents a finding of 'plain error'"); *State v. Sawyer*, 966 P.2d 637, 642 (Hi. 1998) ("As a general rule, jury instructions to which no objection has been made at trial will be reviewed only for plain error. If the substantial rights of the defendant have been affected adversely, the error will be deemed plain error."; citations omitted); *Brewington v. State*, 7 N.E.3d 946, 976-77 (Ind. 2014) (although review of unobjected-to failure to give instruction would have otherwise been allowed under plain error rule, review was not allowed because defendant invited error by deliberately withdrawing instruction as part of strategy to thwart prosecution argument); *State v. Sasser*, 391 P.3d 698, 703 (Kan. 2017) ("a party must do more than just fail to object to a proposed jury instruction at the instructions conference" for invited error doctrine to bar review); *Com. v. Jennings*, 490 S.W.3d 339, 342 (Ky. 2016) ("We are not persuaded Appellee's failure to specifically request an instruction on the [statutory] exemption quali-

fies as either invited or induced error. Appellee failed to object to the trial court's omission of the exemption theory, but she did not affirmatively urge or encourage the omission of the instruction."); *State v. Fox*, 105 A.3d 1029, 1036 (Me. 2014) (under "obvious error" doctrine, court will reverse if there is a reasonable probability that unobjected-to instruction affected trial's outcome); *State v. Rich*, 3 A.3d 1210, 1217–18 (Md. 2010) (adopting rule that invited error occurs only when defendant "was aware of, i.e., knew of, the relinquished or abandoned right"); *Com. v. Roderiques*, 968 N.E.2d 908, 919 (Mass. 2012) (applying invited error rule only because defense "made a tactical decision to request" instruction in question); *Berry v. State*, 728 So. 2d 568, 571 (Miss. 1999) (court reviews unobjected-to instruction for plain or fundamental error); *State v. Foxen*, 29 P.3d 1071, 1075 (N.M. Ct. App. 2001) ("we see no manner in which the deficiencies in the instructions could have been the product of tactic or strategy; by all appearances, they were simply the result of oversight or neglect. We will not withhold review for fundamental error under such circumstances … ."); *State v. Erickstad*, 620 N.W.2d 136, 142 (N.D. 2000) ("When a defendant fails to properly object to a proposed instruction, or fails to specifically request an instruction or object to omission of an instruction, the issue is not adequately preserved for appellate review and our inquiry is limited … to whether the

jury instructions constitute obvious error affecting substantial rights."); *Cuesta-Rodriguez v. State*, 241 P.3d 214, 237 (Okla. Crim. App. 2010) (invited error rule barred review where defense invited error by including challenged language in his own proposed jury instructions); *State v. Holloway*, 482 N.W.2d 306, 309 (S.D. 1992) (court would not review for plain error as to instruction defendant specifically asked for, thus inviting error: "If you seek and receive, you shall not claim plain error."); *State v. Johnson*, 416 P.3d 443, 460 (Utah 2017) (while court can review unojbected-to error for plain error, it would not do so where defendant invited error by proposing erroneous special instruction: "Because submitting an erroneous jury instruction to the court is a quintessential example of invited error, we decline to conduct a plain error review."); *State v. Davis*, 2018 VT 33, ¶ 21 (Vt. 2018) (reviewing unobjected-to instruction for plain error); *State v. Lewis*, 776 S.E.2d 591, 600 (W. Va. 2015) (refusing to review challenge to instruction because petitioner "proffered the abduction with intent to defile instruction that was <u>given by the trial court over the State's objection</u>"; emphasis added).

In *Nunamaker v. State*, 401 P.3d 863 (Wyo. 2017), the Wyoming Supreme Court reviewed a jury instruction error for plain error where, as at bar, it was "apparent that defense counsel, the prosecutor, and the district court were all unaware" of the

error. The court wrote: "Appellant did not waive the claim. Rather, he forfeited it by failing to preserve it and, accordingly, his claim is subject to review for plain error." *Id*. at 866-67.

Likewise, in *Russell v. Stricker*, 635 N.W.2d 734, 737 (Neb. 2001), the court held that review is for plain error when a party fails to object to a jury instruction "after it has been submitted to counsel for review." *Id*. at 740. Finding plain error, it reversed for a new trial: "Courts of this state have the responsibility to give the proper instruction and to ensure that compliance with § 25–21,185.09 is not made an occasion for gamesmanship. It was plain error for the district court to fail to give the proper jury instruction under § 25–21,185.09." *Id*. at 742.

Finally, the Rhode Island Supreme Court would not review a jury instruction for error when a party "declined curative instructions as a matter of trial strategy to turn around and challenge the original instructions on appeal." *Youngsaye v. Susset*, 972 A.2d 146, 149 (R.I. 2009) (emphasis added).

C. Some states treat the mere failure to object as invited error.

In *State v. Bellamy*, 147 A.3d 655, 666–67 (Conn. 2016), the state supreme court determined that a mere failure to object to an instruction is invited error even if counsel does not discuss

the instruction at trial. *See also State v. Clay*, 533 S.W.3d 710, 714 (Mo. 2017) (holding invited error bars review where when defendant "jointly proffers" erroneous instruction with state); *Seltzer v. Morton*, 154 P.3d 561, 579 (Mont. 2007) ("We have held that failure to object to a jury instruction at trial constitutes a waiver of the opportunity to raise the objection on appeal."); *Commonwealth v. Veon*, 150 A.3d 435, 456 n. 33 (Pa. 2016) ("There are appealing arguments for applying the plain error doctrine, and a considerable number of jurisdictions have done so, but we emphatically are not among them."); *State v. Schaler*, 236 P.3d 858, 872 (Wash. 2010) ("Schaler did not object to the 'threat' instruction given by the trial court or propose an alternate threat instruction despite being clearly cognizant of the supposed shortcoming. Schaler thus invited the error he is complaining about.").

Finally, Wisconsin has an odd rule that the state supreme court may review an instructional error for plain error, but that Court of Appeals may not. *See State v. Langlois*, 901 N.W.2d 768, 780 n. 2 (Wis. Ct. App. 2017) (Reilly, J., dissenting).

D. *Like defense attorneys, prosecutors and judges should be incentivized to ensure that jurors receive accurate instructions*.

1. The unlikely incentive assigned to defense counsel by the lower court

The lower court majority was concerned that, by reversing

for fundamental error as to a jury instruction, it would create a "perverse incentive" for defense counsel.

This calls up to the mind's eye a unlikely scenario. It envisages that the judge and the prosecutor are ignorant of the law. It then presents the defense attorney as someone with superior knowledge and craft. This attorney, it would seem, resolves to torpedo his or her client's right to accurate jury instructions on the off chance of obtaining an appellate reversal after the client has languished in prison for a considerable stretch of time.[1]

(Alternatively, one must assume a judge and/or prosecutor who knows the law and wants the jury to receive inaccurate instructions favorable to the state, as noted by the dissent from denial of rehearing in banc. App.IBF 26.)

The majority opinion below offered no basis for this dark scenario, one that was disputed in the dissenting panel opinion of Judge Wolf, App. 21-22 (stating that "the record reflects nothing more than unknowing acquiescence") and in the opinion of Judge Makar dissenting from denial of en banc rehearing. App. 24-25 (noting that "no record evidence shows that defense counsel knew of or was made aware of the erroneous instruction as precedent requires; the trial judge and prosecutor both missed

[1] The present case was pending on appeal in the First District for two years before the original panel decision, and then it was on rehearing for another year and a half.

it too. And nothing but supposition supports the belief that defense counsel knowingly and intentionally engaged in a stratagem or ploy to dupe the court and create reversible error on appeal.").

2. Incentives are not only for defense lawyers

Under the decision below, prosecutors and judges have no incentive to ensure the accuracy of the jury instructions so long as there is no defense objection.

The question of prosecutorial incentives has received considerable scrutiny, largely in the context of such issues as prosecutorial immunity as to unlawful convictions, and disclosure of exculpatory *Brady* evidence.

As to the first of these issues, there can be no dispute about the fact that prosecutors and courts should be incentivized to prevent unlawful convictions.

"Wrongful convictions should include those where the crime with which a defendant is convicted or the resulting sentence does not accurately reflect the defendant's culpability." Charles E. MacLean et. al., *Stop Blaming the Prosecutors: The Real Causes of Wrongful Convictions and Rightful Exonerations*, 44 Hofstra L. Rev. 151, 153 (2015) (emphasis in original).

Unlawful convictions become more likely so far as jurors are given instructions that erroneously favor the prosecution.

Respecting *Brady*, Professor Miriam H. Baer, herself a for-

mer prosecutor, has written at length about how prosecutorial incentives to violate *Brady* grow as the case progresses to trial. Miriam H. Baer, *Timing Brady*, 115 Colum. L. Rev. 1 (2015).

Among other things, she notes that, as a matter of common sense, the more work one has put into a case the less one wants to lose it: "after charges have been filed and hearings have been held, the case may become associated with a particular prosecutor: Colleagues may refer to it as *Michael's* case or *Patricia's* hearing. Ownership, in turn, brings with it reputational risk. Michael wishes not to lose *his* case and Patricia desires not to lose *her* hearing. *Id*. at 36-37 (emphasis in original, footnote omitted).

The same can be said as to jury instructions. Under the decision below, the prosecutor cannot have a trial victory slip away on appeal even if the jury instructions illegally favor the prosecution – so long as there is no defense objection.

Thus, by the logic of the decision below, the prosecutor is disincentivized to point out an error in the instructions that favors the state

George Washington University Professor Roger A. Fairfax has pointed out that a rule of reversal will positively incentivize prosecutors and judges. Under such a rule, "both trial courts and prosecutors would be especially vigilant in ensuring that juries are properly instructed." Roger A. Fairfax, Jr., *Harmless*

Constitutional Error and the Institutional Significance of the Jury, 76 Fordham L. Rev. 2027, 2062 (2008). If "the appellate remedy of reversal would be swift and sure, special attention would be paid" to the instructions. *Id*.

Fairfax recognizes the problem identified by the lower court – the hypothetical unscrupulous and crafty defense lawyer who "sandbags" the prosecutor by not objecting at the jury instruction stage. *Id*. at 2070-71. But he points out that if the prosecutor and court are incentivized to independently ensure the accuracy of the jury instructions, such defense gamesmanship cannot succeed: "Of course, such strategic behavior is only effective where both the judge and the prosecutor fail to notice the error in the jury instruction about which defense counsel stood silent. An automatic reversal approach would incentivize trial courts and prosecutors, thus diminishing the incidence of erroneous jury instructions." *Id*. n. 219.

E. *The present case is not a case in which the doctrine of invited error should bar review*.

The correct focus must be on how to ensure that jurors receive accurate instructions they need to do their job.

Certainly a countervailing concern arises if the defense lobbies for an incorrect instruction – in that case some sanction may be called for.

But in the present case, there is no reason to think that

the defense lawyer was seeking a hidden advantage such as to torpedo his client's real chance of a conviction on the lesser offense of attempted manslaughter. This is not a case of invited error. There should be no bar to fundamental error review under this Court's settled case law.

The decision of the lower court itself creates a perverse incentive for prosecutors to submit, consciously or unconsciously, erroneous instructions favoring the state on the chance that the unwitting defense attorney will not detect the error.

In the present case, there is no basis to posit sharp dealing on either side. The record shows no awareness of an instruction that had been adopted only a month before the trial. *See In re Standard Jury Instructions in Criminal Cases—Instruction 6.6*, 132 So. 3d 1124 (Fla. 2014).

CONCLUSION

The Court has jurisdiction and should exercise its jurisdiction to review the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 30 July 2018 a copy hereof has been electronically filed with this Court and furnished to the following by email:

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CERTIFICATE OF FONT SIZE

I certify this brief is submitted in Courier New 12-point font in compliance with Florida Appellate Rule 9.210(a)(2).

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