

Case No. SC2023-0807

In the Supreme Court of Florida

JUAN JAVIER OQUENDO,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Discretionary Review from the
Second District Court of Appeal
DCA No. 2D21-2408

ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

I. PROCEEDINGS IN THE TRIAL COURT

A. The Charged Offense

On May 8, 2015, Petitioner was charged with first-degree murder for shooting the victim, James Cason, with a firearm. (R. 59).

B. Pretrial Proceedings on PTSD

Petitioner filed a motion for appointment of a psychologist. (R.207). The motion explained that Petitioner suffered from Post Traumatic Stress Disorder (PTSD) at the time of the shooting and that evidence of his mental illness was relevant to his claim of self-defense. Dr. Jethro Toomer was appointed to examine Petitioner. (R.241).

i. The February 25, 2020, pre-trial hearing

Petitioner informed the court Dr. Toomer evaluated him and would testify that Petitioner suffers from PTSD. (R. 317). Petitioner informed the court that Dr. Toomer's testimony would show how somebody who suffers from PTSD can react differently to high-stress situations than somebody who does not. Petitioner clarified that the defense in this case was not diminished capacity. (R. 318, 324-325).

ii. The March 10, 2020, pretrial hearing

At this hearing, Petitioner proffered Dr. Toomer's testimony. (R. 461-561). Dr. Toomer testified he evaluated Petitioner and found that Petitioner suffered from long-standing PTSD. (R. 489).

According to Dr. Toomer, as a result of PTSD, a person's overall cognitive, behavioral, and emotional functioning is impaired in almost every aspect. (R. 490). Individuals develop PTSD as a coping mechanism to deal with the psychological effects of previous trauma. The instinct for survival for those with PTSD is elevated and easily triggered. Persons suffering from PTSD can be impulsive and unable to assess situations appropriately and may come to irrational conclusions. (R. 491).

Dr. Toomer recounted Petitioner's statements to him about the murder as follows: Petitioner told him there was a back and forth between him and the driver of a vehicle, the victim, James Cason. (R. 498). As the back and forth continued, Petitioner felt threatened. According to Petitioner the victim appeared to be reaching under the passenger side of the seat for something. (R. 497). Petitioner said, at this point, the victim told him he would be "whacked." Petitioner

grabbed the victim's arm, there was a struggle, and they fought for the gun. (R. 499). Petitioner gained control of the gun and the car began to move. (R. 500). When the car was moving, Petitioner was frightened because there was a lot of commotion. Petitioner claimed he heard a noise, and he thought there might be someone in the back seat. (R. 501). Petitioner did not make any further statements to Dr. Toomer about the incident. (R. 501-502).

The trial court denied Petitioner's motion to admit expert testimony about Petitioner's PTSD. (R. 548). The trial court found that Petitioner had not satisfied the requirements of *State v. Mizell*, 773 So.2d 618 (Fla. 1st DCA 2000), on which he relied, to support his argument that PTSD is relevant and admissible to establish a claim of self-defense, because Petitioner never admitted to Dr. Toomer that he (Petitioner) shot the victim. Additionally, the trial court found Dr. Toomer's opinion testimony about Petitioner having PTSD would not assist the jury in deciding this case. (R. 548).

C. Trial Testimony

On the night of April 12, 2015, Petitioner played pool at Stinger's bar, where his sister was a bartender. Petitioner's sister

testified that she suspected he was under the influence of the drug K2 that night due to his behavior and his bloodshot eyes. (T.728). After getting into an argument with his sister, Petitioner was so upset that the security guard, Norman White, had to calm him down. (T.733-35).

Petitioner exited the bar through the front door, his pool stick case in hand. (T.738, 1301). Shortly thereafter, Petitioner approached the victim's vehicle because he mistakenly thought that it was his friend picking him up. The victim asked Petitioner what he was doing, and an argument ensued. White testified that Petitioner reached into the victim's car, punched the victim and stated, "I got mine." Petitioner then pulled out a gun and started shooting into the driver's side window. (T.547-49). It appeared the victim had been hit with the initial shot. The car moved forward and ran into another car. (T. 549). Petitioner ran behind the car and shot numerous rounds into it. (T. 549, 641).

Ronnie Dawson was standing outside the front door of the bar at the time of the shooting. (T.626). He testified that Petitioner jabbed the pool stick into the car window and tried to hit the victim with it.

(T.640). In response, the victim stated, “Don’t worry about it. I got something for you. I’ll be right back.” (T.641). As the victim started pulling away, Petitioner turned around, chased the car down and fired six to seven rounds into the car. (T.641). Dawson was “a hundred percent positive,” Petitioner never reached inside the car window to retrieve a gun. (T.642). Dawson never saw Petitioner and the victim fight over a gun in the victim’s hands. (T.642). While Dawson could not say what part of his body Petitioner retrieved the gun from, he was positive Petitioner pulled the gun from his person. (T.699). As the car continued to move forward Petitioner fired at least ten more times. (T.643).

In contrast, Petitioner testified that as he turned away after the argument with the victim, the victim stated, “I got something for you” and pointed a gun at Petitioner. (T. 1422, 1425). Petitioner claimed he tried to knock the gun out of the victim’s hand by hitting the victim’s arm with his pool stick. When that proved unsuccessful, Petitioner grabbed the victim’s arm with both hands and the two of them wrestled for the gun just inside the car window. During the struggle, the gun discharged. (T. 1321). Petitioner claimed he did not

possess the gun, nor did he fire the gun at the victim. (T. 1434-1435, 1436). Instead, Petitioner testified that the victim had the gun in his right hand when the gun fired. (T. 1322, 1435).

According to Petitioner, after the shots were fired, the car moved forward slightly, and he did not know if the victim was trying to run him over. (T. 1323). Petitioner testified that he did not know whether the victim was fatally shot at that point, and they were still struggling. Petitioner claimed he got the gun from the victim's hand and, believing he was in danger, repeatedly pulled the trigger in the direction of the car as it was moving. (T. 1323-1324, 1435, 1446).

Petitioner then tossed the gun away and ran from the scene before the police arrived because he was scared. (T. 1334-1335). He did not turn himself in to the police because he was afraid no one would believe him. (1335).

The next day, Petitioner called his supervisor, and told him he would not be coming to work, he was sorry, and he had "fucked up." (T.895-96). Petitioner sought refuge at Horace Lee's house in Dade City. (T.985). Lee testified that Petitioner showed up at his house scared and nervous. Petitioner told Lee that he shot somebody.

(T.992). Petitioner told Lee that the other guy tried to shoot him first, but his gun didn't go off whereas Petitioner's did. (T.1020).

The victim died of a gunshot wound to the head. (T. 1187). The bullet entered the left temporal scalp and exited to the right at a slightly downward angle. (T. 1179-1187). The shooter was one to two feet away from the victim when he fired the gun. (T. 1184, 1189).

Police located twelve shell casings scattered in the bar parking lot. (T. 479, 1116). There were bullet holes on the driver's side and the rear of the car. (T. 479, 1037-1043). All the casings were fired from the same .40 caliber firearm. (T. 1168-1169).

Petitioner renewed his motion to admit Dr. Toomer's expert opinion testimony that Petitioner suffered from PTSD arguing it supported Petitioner's claim of self-defense. (T. 1481-1483). The trial court denied the motion noting Petitioner never admitted to Dr. Toomer that he (Petitioner) shot the victim in self-defense. Likewise, Petitioner did not testify at trial that he shot the victim in self-defense. (T. 1484). The court also found Dr. Toomer's opinion testimony would not be helpful to the jury in deciding whether Petitioner reasonably believed deadly force was necessary to prevent

imminent death or great bodily harm to himself. (T. 1484-1485).

The jury found Petitioner guilty of the lesser-included charge of manslaughter. (R. 655).

II. THE SECOND DISTRICT'S DECISION

Petitioner raised two issues in his initial brief to the Second District Court of Appeal. First, Petitioner argued that the trial court abused its discretion when it excluded Dr. Toomer's testimony that Petitioner suffered from PTSD.

Second, Petitioner argued the trial court erred by giving the jury instruction, "a person who unlawfully and by force enters or attempts to enter another's occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence."

The Second District Court of Appeal affirmed Petitioner's judgment and sentence and wrote only to explain why the trial court was correct to reject Petitioner's request to present expert testimony of his PTSD to support his theory of self-defense. *See Oquendo v. State*, 357 So. 3d 214 (Fla. 2d DCA 2023). The district court agreed with the trial court's reasoning that the expert testimony was not relevant to the issue of self defense because the defense is evaluated

using an objective standard. Specifically, the district court explained that introducing evidence of a mental disorder “affecting a defendant’s perceptions would necessarily be – as it was here- in support of a theory that the defendant’s belief was more reasonable to him than it might have been to one not suffering from such disorder.” *Id.* at 217. The court explained that such evidence served only to offer Petitioner’s subjective comprehension of the situation, which is “incompatible with the objective standard of reasonableness” Florida law applies. *Id.*

The Second District acknowledged that the First District came to the opposite conclusion in *State v. Mizell*, 773 So. 2d 618 (Fla. 1st DCA 2000), when it held “that PTSD evidence is relevant on the question of self-defense.” *Id.* at 621. Consequently, the Second District Court certified conflict with *State v. Mizell*, 773 So. 2d 618 (Fla. 1st DCA 2000).

BASIS FOR DISCRETIONARY REVIEW

Petitioner sought discretionary review in this Court to resolve a certified conflict between the Second District's decision in this case and the First District's decision in *State v. Mizell*, 773 So. 2d 618 (Fla. 1st DCA 2000). This Court granted review.

STATEMENT OF THE ISSUES

The first issue presented in this case is whether expert testimony concerning Post Traumatic Stress Disorder is admissible to explain a defendant's elevated perception of danger.

The second issue is whether jury instruction 3.6 (f), which reads "a person who unlawfully and by force enters or attempts to enter another's occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence" is properly given when the defendant is the intruder.

SUMMARY OF THE ARGUMENT

Issue I

Petitioner's argument that Post Traumatic Stress Disorder comes with physical symptoms that are part of the circumstances the jury may consider was not presented in the trial court nor was it argued to the Second District Court of Appeal, therefore, the argument is unpreserved and waived. Further, there is no evidence that Petitioner suffers from any physical manifestations of PTSD. Notably, this argument is unrelated to the conflict certified by the district court, and it is within this Court's discretion to decline to exercise its jurisdiction over this matter.

Additionally, Petitioner has failed to brief the issue for which jurisdiction was granted, that expert testimony a defendant suffers from PTSD is admissible to explain the defendant's elevated perception of danger; therefore, the argument is waived.

Assuming this Court reaches the merits of the certified conflict, the Second District Court of Appeal correctly determined that evidence of PTSD is incompatible with Florida's reasonable person standard used in assessing self-defense claims.

Issue II

This Court should decline to consider whether the trial court erred when it instructed the jury that “a person who unlawfully and by force enters another’s occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.” Petitioner did not argue in the Second District Court of Appeal that the instruction shifted the burden, did not advance any argument as to why the instruction violated the United States Constitution, and did not argue that a mandatory presumption was created; thus, those arguments are unpreserved and waived.

Further, the instruction was not given in error. The standard jury instruction was not modified, did not shift the focus to the right of the victim, and did not shift the burden of proof. Finally, if the giving of the instruction was error, no reversible error occurred.

STANDARD OF REVIEW

Issue I

Whether Florida’s “reasonable person standard” applicable to self-defense claims allows a defendant to present expert testimony that his perception of danger is altered by his Post Traumatic Stress Disorder is a question of law that this Court reviews de novo. *See J.M. v. Gargett*, 101 So. 3d 352, 356 (Fla. 2012); *see also State v. McKenzie*, 331 So. 3d 666, 670 (Fla. 2021).

Issue II

This Court reviews de novo whether it is error for the jury instruction at issue to be given when the defendant is the intruder. *See State v. Floyd*, 186 So. 3d 1013, 1019 (Fla. 2016) (Finding that whether a standard jury instruction was confusing, contradictory or misleading was a pure question of law reviewed de novo).

ARGUMENT

ISSUE I

Whether expert testimony concerning Post Traumatic Stress Disorder is admissible to explain a defendant's elevated perception of danger.

Petitioner argues that the Second District Court of Appeal erred when it found expert witness testimony that a defendant suffers from PTSD is irrelevant to the issue of self-defense because it is incompatible with Florida's objective, reasonable person, standard. Petitioner argues, for the first time in this Court, that PTSD is relevant and admissible because it comes with physical symptoms that are part of the circumstances the jury is allowed to consider when assessing a self-defense claim. Petitioner further argues that PTSD is relevant to explain a hypothetical defendant's flight from the scene, his demeanor on the stand, and his inability to recall the events.

In *Mizell*, the First District Court of Appeal found that expert testimony of a PTSD diagnosis is admissible when a defendant raises the affirmative defense of self-defense to explain "what PTSD is and how PTSD affects an individual's perceptions." *Id.* at 620. This is so,

according to the First District, because the jury is permitted to consider a defendant's perception of danger and are instructed that "(b)ased upon appearances, the defendant must have actually believed that the danger was real." *Mizell*, 773 So. 2d at 621.

The Second District found that the First District's decision in *Mizell* was based on an incomplete analysis of the self-defense instruction and its analysis converted the objective standard applicable to justify self-defense to a subjective standard. *Oquendo*, at 218. The court explained that a mental illness that is unique to the defendant should not be considered in determining whether a defendant reasonably believed that he was facing a threat of imminent death because the reasonableness of the belief is tested against an objective person standard. *Id.*, at 219. The court noted that *Oquendo* clearly intended to show that his belief of imminent danger was reasonable to him, though it might not be to others, because of his PTSD. The court found such evidence is not probative of what a reasonably cautious and prudent person in the same circumstances would believe; therefore, it is inadmissible. *Id.*, at 220.

The Second District also concluded that expert testimony regarding PTSD is inadmissible diminished capacity evidence. The Second District certified conflict with the First District on the issue of whether PTSD is admissible to explain the defendant's perception of danger.

Neither *Mizell* nor *Oquendo* contain any discussion about the physical symptoms of PTSD. Because neither opinion addresses the relevancy of the physical symptoms of PTSD as they relate to the circumstances the jury can consider in assessing a self-defense claim, this Court should decline to exercise jurisdiction over that issue. *See Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982) (The “authority to consider issues other than those upon which jurisdiction is based is discretionary with this Court and should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case.”); *See also Younkin v. Blackwelder*, 331 So. 3d 686, 689 (Fla. 2021), quoting *In re Workmen's Compensation Fund*, 119 N.E. 1027, 1028 (1918) (noting that it is a fundamental principal of judicial power that “[t]he function of the courts is to determine controversies between litigants. They do

not give advisory opinions. The giving of such opinions is not the exercise of the judicial function.”)

Should this Court, in its discretion, retain jurisdiction, the arguments Petitioner makes in his Initial Brief are not preserved. “In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.” *Tillman v. State*, 471 So. 2d 32, 35 (Fla.1985) (citing *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla.1982)). Failure to brief the argument in the district court results in its waiver. *See Baptiste v. State*, 324 So. 3d 453 (Fla. 2021); *Simmons v. State*, 934 So. 2d 1100, 1117 n.14 (Fla. 2006) (concluding that “any arguments not expressly included” in the brief were waived), *see also Coolen v. State*, 696 So.2d 738, 742 n.2 (Fla. 1997) (noting that a “failure to fully brief and argue” a point “constitutes a waiver”).

In the trial court, Petitioner argued that Dr. Toomer’s testimony would show “how somebody who suffers from post-traumatic stress

can react differently to a high-stress situation as opposed to somebody that does not.” (R. 318).

Likewise, in his initial brief on direct appeal in the Second District, Petitioner argued specifically and exclusively that expert testimony of his PTSD diagnosis was relevant to his “elevated perception of danger.” (Pet. Init. Br. 2DCA at 16). Petitioner relied on *Mizell* for that proposition and explained “it was important to understand [Petitioner’s] elevated perception of danger especially where multiple shots were fired in rapid succession.” (Pet. Init. Br. 2DCA at 16). Petitioner continued, “[t]he PTSD evidence could have helped the jury understand the elevated perception of fear.” (Pet. Init. Br. 2DCA at 18).

Petitioner has abandoned that argument and now claims that PTSD is relevant to the issue of self-defense because the physical symptoms of PTSD render the sufferer weaker and more vulnerable to an attack. Petitioner further argues that expert testimony regarding the physiological effects of PTDS would explain a defendant’s memory defects, flight from the scene, and possible irritable demeanor on the stand. (Pet. Init. Br. Mer. at 18).

Specifically, Petitioner argues that PTSD can manifest in physical symptoms such as muscle weakness or elevated heart rate and a defendant's awareness of those symptoms makes a situation more dangerous to him than to someone who does not suffer from PTSD. Pointing out that courts routinely take those types of physical characteristics in consideration when assessing the reasonableness of a defendant's actions, Petitioner accuses the Second District of being uninformed for failing to recognize that PTSD is admissible as a physical characteristic of the defendant. (Pet. Init. Br. at 23).

Petitioner fails to recognize that if the Second District was uninformed it was because Petitioner failed to inform it. Petitioner did not make the argument that Dr. Toomer's testimony was admissible because PTSD manifested in physical symptoms such as muscle weakness or elevated heart rate. It was incumbent upon Petitioner to make that argument and create a record to support the argument. Petitioner did neither.

Further, while Petitioner offers a list of physical symptoms associated with PTSD, Petitioner does not argue that *he* suffered from any of these symptoms, Dr. Toomer's proffered testimony did not

mention any of these physical symptoms, and Petitioner admits in his brief that “[t]he symptoms of PTSD will look different for different people.” (Pet. Init. Br. at 17).

Petitioner steps further astray with arguments that PTSD is relevant to explain a defendant’s demeanor on the stand, his flight from the crime scene, and his memory deficit. None of these arguments were made in the trial court, none of these points are addressed in the Second District’s opinion, and none of these issues are addressed in *Mizell*.

Turning now to the certified conflict, it is important to understand the standard Florida uses to assess a claim of self-defense. Florida Statute 776.012 states in subsection (2):

A person is justified in using or threatening to use deadly force if he or she **reasonably believes** that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.

Section 776.012(2), Fla. Stat. (emphasis added).

In accordance with the statute, this Court formulated Florida criminal jury instruction 3.6(f). The instruction advises juries that a defendant was “justified in using” deadly force if he “reasonably believed” that such force “was necessary to prevent” imminent death or great bodily harm to himself. The instruction then explains how the jury should assess whether the defendant was justified:

In deciding whether (defendant) was justified in the use of deadly force, you must consider the circumstances by which he was surrounded at the time the force was used. The danger need not have been actual; however, to justify the use of deadly force, the appearance of imminent danger must have been so real that the defendant actually believed the use of deadly force was necessary. Moreover, to justify the use of deadly force, **a reasonably cautious and prudent person under the same circumstances would have believed the use of deadly force was necessary.**

Fla. Std. Crim. Jury Instr. 3.6(f) (Crim.) (emphasis added).

Thus, juries are to assess a self-defense claim using an objective standard. *See Chaffin v. State*, 121 So.3d 608 (Fla. 4th DCA 2013). *See also Reimel v. State*, 532 So. 2d 16, 18 (Fla. 5th DCA 1988) (“The law does not ascribe a subjective standard as to a defendant's state of mind, but concerns a reasonably prudent person's state of mind.”)

This is of course not to say that the proverbial reasonable person is blind to the circumstances under which the events take place. Florida courts have found that the circumstances and facts as they appeared to the defendant must be attributed to the reasonable person to determine the reasonableness of the defendant's actions. See *Cummings v. State*, 310 So. 3d 155, 158 (Fla. 2d DCA 2021) (“The question under this objective evaluation of a defendant's conduct is whether, based on the circumstances as they appeared to the defendant at the time of the altercation, a reasonable and prudent person in the same position as the defendant would believe that the use of deadly force is necessary to prevent imminent death or great bodily harm or the imminent commission of a forcible felony.” (quoting *Bouie v. State*, 292 So. 3d 471, 481 (Fla. 2d DCA 2020))); see also *Garcia v. State*, 286 So. 3d 348, 351 (Fla. 2d DCA 2019); *State v. Quevedo*, 357 So. 3d 1249, 1253 (Fla. 3d DCA 2023); *Viera v. State*, 163 So. 3d 602, 604 (Fla. 3d DCA 2015).

This Court has formulated specific standard jury instructions that delineate what circumstances juries may consider. See Fla. Std. Crim. Jury Instr. 3.6(f) (Crim.). It is evident from the jury instructions

that three different categories of circumstances are applicable. First, circumstances that pertain to the defendant's knowledge of threats or acts of violence the victim previously committed against the defendant or others; second, circumstances that pertain to the victim's bad character evidence to show that he acted in conformity with his bad character even if the defendant did not know of his character; and third, the relative physical abilities of the defendant and the victim. None of the categories allow for the defendant's impaired or altered perception to be factored into the determination of the circumstances.

As the Second District explained, Petitioner's goal in adducing evidence of his PTSD was to explain an otherwise unreasonable belief, a misperception as to the dangerousness of the situation, with which the reasonably cautious and prudent person would not agree. *State v. Oquendo*, 357 So. 3d 214, 218 (Fla. 2d DCA 2023). As the court noted, Petitioner's counsel specifically explained that the testimony would show "how somebody who suffers from post-traumatic stress can react differently to a high-stress situation as opposed to somebody that does not." *Id.*

Respondent agrees with Petitioner that Florida law allows for some misperception when it states that “[t]he danger need not have been actual,” Fla. Std. Jury Instr. 3.6(f) (Crim.), but those misperceptions must be those the reasonably prudent person would have had as well. Petitioner’s subjective personal misperceptions do not entitle him to use deadly force in self-defense. See *O’Neal v. State*, 372 So. 3d 733, 748 (Fla. 2d DCA 2023) (“Evidence of a defendant’s warped perceptions is purely subjective and does not implicate the state-of-mind used in a self-defense analysis.”).

In *Mizell* the defendant was charged with second degree murder and sought to introduce expert testimony of his PTSD diagnosis to explain “what PTSD is and how PTSD affects an individual’s perceptions.” *Id.* at 620. The First District ruled that the expert testimony did not constitute prohibited diminished capacity evidence, and found it analogous to battered spouse syndrome, which the *Mizell* court stated, “has been admitted to support a claim of self-defense.” *Id. citing State v. Hickson*, 630 So. 2d 172, 173 (Fla. 1993).” The *Mizell* court explained that “[t]he cases that admit evidence of BSS do so to help the jury understand why the victim

would **subjectively** fear increased aggression against her.” *Mizell*, 773 So. 2d at 621. (emphasis added).

Mizell’s conclusion that Florida’s standard is subjective is irreconcilable with the state’s legal precedents, and *Mizell*’s reliance on the admissibility of Battered Spouse Syndrome to support the admissibility of PTSD is misplaced.

Prior history of domestic violence clearly falls under the “threats or prior difficulties” category the jury may take into consideration when determining the reasonableness of the defendant’s actions. Accordingly, Battered Spouse Syndrome has only been admitted in self-defense cases where the defendant and the victim were in a romantic relationship and the evidence established that the victim had a history of abusing the defendant. As to the purpose for which Battered Spouse Syndrome is admitted, *Mizell* cited to its own precedent in *Hawthorne v. State*, 408 So. 2d 801, 806-07 (Fla. 1st DCA 1982) for the proposition that the purpose of the testimony is the reasonableness of the defendant’s perception. However, the *Hawthorne* court was most unclear and waivered back and forth between two purposes for admission, the reasonableness of the

defendant's perception and the reasonableness of the defendant remaining in the home despite the ongoing abuse, the full quote reads:

The expert would have been offered in order to aid the jury in interpreting the surrounding circumstances as they affected the reasonableness of her belief . . . that because she suffered from the syndrome, it was reasonable for her to have remained in the home and, at the pertinent time, to have believed that her life and the lives of her children were in imminent danger. It is precisely because a jury would not understand why appellant would remain in the environment that the expert testimony would have aided them in evaluating the case.

Id. This Court, though, has clarified that the purpose of admitting evidence of Battered Spouse Syndrome is to explain to the jury why the defendant would remain in the abusive environment not to explain the defendant's subjective fear. *See State v. Hickson*, 630 So. 2d 172, 174 (Fla. 1993); *Weiland v. State*, 732 So. 2d 1044, 1054 (Fla. 1999) ("In *Hickson* we authorized the admission of battered spouse syndrome evidence to rebut the common myths concerning battered women and explained the very real dangers faced by women in these relationships"). The justifications behind the admissibility of

evidence about Battered Spouse Syndrome do not support the admissibility of PTSD in self-defense cases.

Mizell offers no support for its finding that PTSD is not diminished capacity other than its reliance on Battered Spouse Syndrome. The doctrine of diminished capacity generally permits a defendant to introduce evidence of an abnormal mental condition, not constituting legal insanity, to negate the element of specific intent. See 16 Fla. Jur 2d Criminal Law § 63. (2024). Florida prohibits the use of such evidence to negate both specific and general intent crimes. See Fla. Std. Crim. Jury Instr. 3.6(p) (Crim.) (“Mental illness, an abnormal mental condition, or diminished mental capacity is not a defense to any crime in this case. Any such evidence may not be taken into consideration to show that the defendant lacked specific intent or did not have the state of mind essential to proving that [he] [she] committed the crime[s] charged [or any lesser crime].”)

Petitioner argues that Florida’s categorical rejection of the doctrine has no bearing here because acts of self-defense are undeniably intentional. Far from being irrelevant, Florida’s refusal to recognize the doctrine shows its refusal to allow defendants to use

mental illness as an extenuating factor in the guilt phase. See *Evans v. State*, 946 So. 2d 1, 11 (Fla. 2006) (“[D]iminished capacity is not a viable defense in Florida.”); *Zeigler v. State*, 402 So. 2d 365, 373 (Fla. 1981) (“During the guilt phase of the trial, testimony regarding the mental state of a defendant in a criminal case is inadmissible in the absence of a plea of not guilty by reason of insanity.” (citing *Tremain v. State*, 336 So. 2d 705 (Fla. 4th DCA 1976))).

In *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989), this Court explained that crimes are often committed by “persons with mental aberrations” and only those who “meet the definition of insanity” should be acquitted and “treated for their disease.” This Court strongly rejected the idea that a category of individuals who do not meet the criteria for insanity could be acquitted and “obtain immediate freedom to prey on the public once again . . .” *Id.* at 825.

Adapting the reasonable person standard through the lens of a defendant’s mental illness would similarly have the effect of acquitting the defendant and releasing him to commit the same catastrophic mistakes. Further, the distinction is purely semantic. When a defendant offers evidence that he suffers from PTSD to

promote his self-defense claim, the defendant is arguing that he did intentionally commit the crime, but because of his PTSD he did not have the specific intent or state of mind required for a conviction. *Mizell* was wrongly decided.

Even if the trial court erred when it found that expert testimony was irrelevant to explain that Petitioner's instinct for survival was elevated and easily triggered because he suffered from PTSD, (R.491), the testimony still would not have been admissible because Petitioner never claimed that he shot the victim in self-defense. Instead, Petitioner claimed that while he and the victim were wrestling for the gun, Petitioner never possessed nor fired the gun at the victim. (T. 1434-1435, 1436). Petitioner admitted only to firing the gun in the direction of the car as it was moving forward. (T. 1446). Thus, Petitioner has never admitted to shooting the victim at all. In closing argument, defense counsel argued:

How do we know who was holding that trigger when it went off? If two people are fighting over a firearm, is there any proof that's been presented to you, even on that issue, that when the bullet hit Mr. Cason, that that is the one that Mr. Oquendo pulled the trigger on? Now, not that he doesn't have an absolute defense for doing this, because

this is a self-defense case, but I'm just pointing out to you, that that is an issue as well.

(T.1657). While a theory of self-defense is not necessarily inconsistent with a theory that the gun discharged accidentally, *see Williams v. State*, 588 So. 2d 44 (Fla. 1st DCA 1991), it does not follow that testimony of PTSD is relevant to a theory of self-defense when the defendant alleges that the struggle with the victim led to an accidental discharge. *See Wagner v. State*, 240 So. 3d 795 (Fla. 1st DCA 2017) (finding evidence of Battered Spouse Syndrome inadmissible when Wagner claimed that the gun discharged by accident, not in self-defense).

Additionally, here, Petitioner testified and claimed that he was threatened by a gun at very close range. In closing argument, his attorney argued:

[Y]ou can't pull out a gun and point it at somebody and expect them not to react, because Mr. Oquendo reacted like I think most people would, "This guy is going to kill me," and he reacted. (T.1698).

[T]he danger was real. I mean, if somebody pulls a gun on you, that's putting you in real danger. (T.1704).

These circumstances, if accepted by the jury, provided a textbook basis for a reasonable fear of imminent death. Because a reasonable person would undeniably be in fear of imminent death if a gun was pointed at them, there is no reasonable possibility that the omission of information that Petitioner suffered from PTSD contributed to the verdict.

In summary, in resolving the certified question, this Court should adopt the Second District's reasoning and find that a defendant's elevated perception of danger resulting from PTSD is irrelevant to the issue of self-defense. Such evidence is incompatible with the objective standard of reasonableness applicable to a self-defense claim. Further, admitting evidence that a defendant suffers from PTSD would violate Florida's long-standing prohibition against diminished capacity evidence and would allow a defendant to be exonerated and released on account of a mental illness.

Mizell's reliance on the admissibility of Battered Spouse Syndrome to support the admissibility of PTSD is flawed. Jurors have long been permitted to consider evidence of prior acts of violence between the parties to show that the defendant's perception of danger

was reasonable under the circumstances. Evidence of Battered Spouse Syndrome is admissible not to explain the defendant's *misperception* of the danger presented but rather to show why one would remain in the home despite an objectively reasonable perception of danger.

Further, even if this Court disagrees with the Second District's analysis, expert testimony that Petitioner suffered from PTSD was inadmissible in this case because Petitioner claimed that the gun discharged on accident. Finally, exclusion of the expert testimony was harmless error because there is no doubt that the reasonably prudent person would feel at risk of imminent death under the circumstances described by Petitioner.

ISSUE II

Whether jury instruction 3.6 (f), which reads “a person who unlawfully and by force enters or attempts to enter another’s occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence” is properly given when the defendant is the intruder.

In his second issue, Petitioner argues that the trial court committed reversible error in giving a jury instruction. This Court should decline to exercise jurisdiction over the issue.

This Court accepted jurisdiction to resolve the conflict between the Second District and the First District regarding the admissibility of PTSD in self-defense cases. Once this Court accepts jurisdiction over a case, it may, in its discretion, resolve other issues “properly raised and argued.” *See Savoie v. State*, 422 So. 2d 308, 310 (Fla.1982). This issue is not properly raised. The relevance and admissibility of PTSD in self-defense cases is the *only* issue addressed by the Second District Court of Appeal’s decision. Petitioner asks this Court to exercise its jurisdictional discretion, which is limited by design, to consider arguments for reversal of a criminal conviction that are not related to the certified question and were not argued to the district court.

This Court routinely declines to address issues outside the scope of the certified question. *See Chester v. Doig*, 842 So. 2d 106, n.5 (Fla. 2003); *see also Gouty v. Schnepel*, 795 So.2d 959, 966 n.4 (Fla. 2001); *State v. Perry*, 687 So. 2d 831, 832 (Fla. 1997) (“We decline to review the second cross-appeal issue raised by respondent because the issue is unrelated to the certified question upon which this Court’s jurisdiction is based.”); *McKenzie Check Advance of Fla., LLC v. Betts*, 112 So. 3d 1176, 1178 n.4 (Fla. 2013) (declining to address issue outside the scope of certified question) (*citing Major League Baseball v. Morsani*, 790 So. 2d 1071, 1080 n. 26 (Fla. 2001) (“As a rule, we eschew addressing a claim that was not first subjected to the crucible of the jurisdictional process set forth in article V, section 3, Florida Constitution.”)).

Declining to consider the issue is especially appropriate here because the Second District disposed of this issue summarily; making no mention of it in the written opinion. *See Chames v. DeMayo*, 972 So. 2d 850, 853 n.2 (Fla. 2007) (this Court refused to address other issues, which were both outside scope of certified question and affirmed summarily by the district court); *see*

also *McEnderfer v. Keefe*, 921 So.2d 597, 597 n.1 (Fla. 2006) (declining to address issues “that were either not directly addressed by the district court . . . or were merely implied or cursory, at best”); *Agatheas v. State*, 77 So. 3d 1232, 1236 n.1 (Fla. 2011) (“Because the Fourth District did not specifically address this claim, and it is outside the scope of the conflict issue, we decline to address it.”); *Kasischke v. State*, 991 So. 2d 803, 815 (Fla. 2008) (declining to decide issue that the district court did not address and that was outside the scope of the conflict). The Second District’s silent affirmance of the issue offers no basis for this Court’s jurisdiction over the issue. See *St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304 (Fla. 1980).

Further, this Court should decline review because Petitioner’s arguments in this Court were never made to the district court and are, therefore, waived. See *Baptiste v. State*, 324 So. 3d 453 (Fla. 2021) (declining to entertain an argument because it was not made before the district court and was not the conflict issue on which jurisdiction was based); see also *Puzio v. State*, 320 So. 3d 684, 688 (Fla. 2021) (declining to decide an issue because “the State neither

asked the trial court . . . nor raised the issue in the district court . . .”). Although *Savoie* permits this Court to exercise its discretion to review extra-jurisdictional issues that are properly raised and briefed, “nothing in *Savoie* stands for the proposition that a party who abandons an argument on appeal in the district court can revive that argument by briefing it to this Court.” *D.H. v. Adept Cmty. Services, Inc.*, 271 So. 3d 870, 888 (Fla. 2018) (Canady, J. dissenting).

What was argued in the district court, in a mere two pages, is a far cry from the extensive arguments presented to this Court. In his initial brief in the district court, as he did in the trial court, Petitioner alleged only that the instruction should not be given when the defendant is the intruder because such use went beyond what the legislature authorized. Petitioner did not brief any other arguments and offered nothing but a conclusory statement that the instruction was given in violation of his Fifth, Sixth, and Fourteenth Amendments rights provided by the United States constitution.

A conclusory assertion fails to sufficiently present an issue for appellate review. *Spanakos v. Hawk Sys., Inc.*, 362 So. 3d 226, 245 (Fla. 4th DCA 2023). “When points, positions, facts and supporting

authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy.” *Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983). “Claims for which an appellant has not presented any argument, or for which he provides only conclusory argument, are insufficiently presented for review and are waived.” *Hammond v. State*, 34 So. 3d 58, 59 (Fla. 4th DCA 2010).

As this Court has observed nearly seventy years ago:

It is elementary that when a decree of the trial court is brought here on appeal the duty rests upon the appealing party to make error clearly appear. An appellant does not discharge this duty by merely posing a question with an accompanying assertion that it was improperly answered in the court below and then dumping the matter into the lap of the appellate court for decision. Under such circumstances it must be held, as we now hold here, that we are under no duty to answer the question.

Lynn v. City of Fort Lauderdale, 81 So. 2d 511, 513 (Fla. 1955).

An argument for reversal must be specifically preserved in the trial court and then specifically raised and briefed to the appellate court to be considered for review. *See Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). Failure to brief the argument in the district court results in its waiver. *See Baptiste v. State*, 324 So. 3d 453 (Fla.

2021); *Simmons v. State*, 934 So. 2d 1100, 1117 n.14 (Fla. 2006) (concluding that “any arguments not expressly included” in the brief were waived), *see also Coolen v. State*, 696 So.2d 738, 742 n.2 (Fla. 1997) (noting that a “failure to fully brief and argue” a point “constitutes a waiver”).

Petitioner did not argue in the Second District that the instruction shifted the burden, did not advance any argument as to why the instruction violated the United States Constitution, and did not argue that a mandatory presumption was created. The State, consequently, did not address any of these arguments and the Second District did not rule on them.

Respondent respectfully requests this Court not exercise jurisdiction over the jury instruction issue, which was not adequately briefed and argued in the district court and is separate and independent of the conflict issue over which this Court granted jurisdiction. *See Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982).

In summary, this Court should refuse to take the extraordinary step of reviewing an unelaborated decision of a district court of appeal on an issue not related to the certified conflict and which was

waived by virtue of Petitioner's failure to fully brief it in the district court. Additionally, because there is no written opinion on this issue, this Court would be blindly guessing about the basis for the district court's decision. Finally, the issue is fact and case specific and is not likely to reoccur; therefore, there is no risk of nonuniform practice or procedure among the district courts and there is no issue of public importance for this Court to address.

Should this Court reach the merits of this argument, the State asserts that the instruction was not error, and if it were, the error was harmless. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). "In order to be preserved for further review by a higher court, an issue must be presented to the lower court and *the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.*" *Sigismondi v. State*, 380 So. 3d 1208, 1218 (Fla. 2d DCA 2024) (emphasis in original) (citing *Tillman v. State*, 471 So. 2d 32, 35 (Fla.1985)). Preserved jury instruction errors are reviewed for harmless error. *State v. Dashner*, 377 So. 3d 156, 159 (Fla. 4th DCA 2024). Thus, the harmless error

test applies to Petitioner’s claim that giving the instruction went beyond what the legislature authorized.

Should this Court believe that Petitioner’s late-in-the-game arguments are not waived, Petitioner has the burden of establishing fundamental error. This Court has defined fundamental error as error that go to “the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.” *Figueroa-Sanabria v. State*, 366 So. 3d 1035, 1055 (Fla. 2023) (citing *J.B. v. State*, 705 So. 2d 1376, 1378 (Fla. 1998)).

Florida Statute 776.013 (4) creates a presumption that a person who unlawfully and forcibly enters an occupied vehicle does so with the intent to commit an unlawful act involving force or violence.¹ The trial court found the presumption applicable to the facts of this case and advised the jury that:

A person who unlawfully and by force enters or attempts to enter another’s occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

¹ See Florida Statute 776.013(4): “A person who unlawfully and by force enters or attempts to enter a person’s dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.”

(T.1742). Petitioner argues that the plain language of the statute shows that the legislature meant for the instruction to apply only when the defendant is the owner or occupant of the vehicle, and an intruder unlawfully and forcefully enters.

“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Conage v. U.S.*, 346 So. 3d 594, 598 (Fla. 2022) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Petitioner’s claim is unpersuasive. There is nothing in the statute that prevents use of the instruction when the defendant is the intruder. The legislature could have specified that the presumption exists only in cases where the defendant was the owner or resident of the dwelling or occupied vehicle, this Court cannot assume that its failure to do so was an oversight.

Petitioner cites *Franklin v. Francis*, 471 U.S. 307 (U.S. 1985) to support his argument that giving the instruction violated his due process rights. In *Francis*, the United States Supreme Court

explained that courts are to consider jury instructions in their entirety and not focus exclusively on the complained-of phrase or specific portion of the instruction alleged to be error. This contextual approach is necessary, the Court explained, because the ultimate question is what the instructions would convey to a reasonable juror. *Id.* at 315.

The instruction at issue in *Franklin*, advised the jury that:

The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.

Id. Based on that instruction, the prosecution needed only to prove that Franklin shot the victim, an uncontested fact, to give rise to the presumption that he intended to kill the victim, which is the probable consequence of the act of shooting someone. Franklin's sole defense was that he did not intend to shoot or kill the victim but that the shooting and the victim's death was an accident. The instruction thus placed on Franklin the burden of proving that he did not intend the natural and probable consequences of his acts – the victim's

death. Once the State proved the predicate act, the jury was instructed to presume Franklin acted with the intent to kill the victim eliminating the State's burden of proof on that element.

The instruction in the case at hand is remarkably different. Unlike in *Franklin*, the jury in this case was not instructed to presume Petitioner's intent based on the probable consequences of his actions. Nor was it instructed that it must presume Petitioner's actions were unjustifiable. Instead, the jury was instructed to consider, based on the evidence presented, whether Petitioner's action in entering the occupied vehicle was unlawful. The jury was instructed that Petitioner was presumed to be innocent unless the State overcame that presumption with proof beyond a reasonable doubt as to each element of the offense. (T. 1757), Fla. Std. Crim. jury Instr. 3.7. *See also Smith v. State*, 521 So. 2d 106, 108 (Fla. 1988) ("despite any shortcomings, the standard jury instructions, as a whole, made it quite clear that the burden of proof was on the state to prove all the elements of the crime beyond a reasonable doubt").

Undoubtedly, the jury understood that if it believed Petitioner's version of events the presumption was not triggered. Especially when

the jury was instructed that the killing of a human being is justifiable homicide and “lawful” if necessarily done while resisting an attempt to murder or commit a felony upon the defendant. (R.626). Further, jury instruction 3.6(f) is replete with explanations of the circumstances that would make the murder justifiable, which in turn, the instruction explains, is a defense to the crime.

Petitioner erroneously argues that the jury instruction in this case is similar to the instruction in *Butler v. State*, 493 So. 2d 451 (Fla. 1986). In that case, Butler fired two shots at Jones in Jones’s home. *Id.*, at 452. Butler argued that he acted in self-defense because Jones had pointed a gun at him. Jones denied being armed. *Id.* Other witnesses also testified that Jones was not armed when he was shot.

The trial judge correctly instructed the jury on self-defense; however, the court gave a modified justifiable use of deadly force instruction, which read:

If a *person* is attacked in his own home or on his own premises, he has no duty to retreat and has a lawful right to stand his ground and meet force with force, even to the extent of using force likely to cause death or great bodily harm if necessary to prevent death or great bodily harm to himself or another.

(Then Florida Standard Jury Instruction (criminal) 3.04(d)).

Because the shooting happened in the victim's home (Jones) as opposed to the defendant's home, the trial judge changed the word *defendant* in the standard instruction to *person*.

This Court reversed Butler's conviction, finding that the instruction was "extremely confusing and misleading" and "unrelated to the evidence adduced at trial." *Butler*, at 452. According to Butler's version of events Jones was not attacked in his own home but was the initial aggressor. There was no evidence presented that Jones exercised any force before he was shot. In fact, Jones himself denied being armed and other witnesses corroborated his testimony in this regard. Thus, this Court concluded that the instruction "improperly gave the state the benefit of a situation which was disavowed even by its own witnesses and was therefore never presented into evidence." *Id.*

This Court further concluded that the instruction improperly shifted the focus from Butler's claim of self-defense to the right of the victim to fight force with force. This Court explained that the instruction gave the impression that a homeowner had a blanket

right to use deadly force in his home when, in fact, the law requires a “reasonable belief that such force is necessary” and that issue was not litigated because Jones denied using any force in response to Butler’s use of force. *Id.* at 453.

Here, the instruction was not modified and was given as the standard jury instruction approved by this Court and was related to evidence admitted at trial. Moreover, the instruction did not improperly shift the focus of the case from Petitioner’s right to self-defense to the victim’s right to fight force with force. The instruction did not even include the words self-defense and did not attribute any rights to the victim.

Unlike in *Butler* and its progeny, the instruction in this case was a standard jury instruction, unmodified by the court and related to facts that were in evidence. The presumption was not automatic, and the State was still required to prove that Petitioner’s actions were unlawful and unjustified.

Petitioner argues that the instruction rises to reversible error because the prosecutor exploited the instruction and committed other errors of law in closing argument. Petitioner claims that the

prosecutor misstated the law of self-defense when he argued, “[y]ou cannot disarm an individual and then kill that person.” (T.1720). However, the unobjected-to comment was not a misstatement of the law. The prosecutor was arguing the law of self-defense as it pertained to the facts of the case. Specifically, the prosecutor argued that even if the victim was pointing a gun at Petitioner, once Petitioner removed the gun from him, the threat was gone, and Petitioner’ use of deadly force was no longer reasonable. Attorneys are permitted wide latitude in closing arguments. *See Breedlove v. State*, 413 So. 2d 1 (Fla. 1982). The prosecutor’s argument did not exceed the latitude afforded attorneys during closing arguments.

The evidence showed that at the time Petitioner started shooting, he was standing on the driver’s side of the car. There was no reasonable way for the victim to run over Petitioner unless Petitioner chose to position himself right in front of the victim’s car. Neither was Petitioner’s argument that the victim could have put the car in reverse any more convincing. In its closing, defense counsel made the same cursory argument when it stated, “[i]f [Ppetitioner] does

not have a gun, there is no charge. There is no charge. If [Petitioner] does not have a gun, there's no charge.” (T.1696).

Petitioner unsuccessfully attempts to liken the prosecutor's comments in closing argument to those this Court decried in *Butler v. State*, 493 So. 2d 451, 453 (Fla. 1986). In *Butler*, in finding that the erroneous instruction was not harmless, this Court explained, “the prosecutor repeatedly told the jury that even if the defendant's testimony was true, he should still be convicted *because the victim had a right to be armed and consequently the defendant had no right to claim self-defense.*” *Butler* at 453. (emphasis added).

Thus, Petitioner makes much of the prosecutor arguing, “even if you believe that to be true, it was still – the Defendant's actions in this case would still be unlawful. The Defendant would still be guilty.” (T.1710). However, in context, it is apparent that the prosecutor was not arguing that the presumption meant that even if the jury believed he was acting in self-defense he was still guilty. *C.f. Butler*. The prosecutor was arguing that even if the jury believed that Petitioner was acting in self-defense when he entered the car, once he disarmed the victim, he could no longer claim that his use of deadly force was

reasonable. As evidenced by the very next sentence the prosecutor uttered, “[y]ou cannot disarm an individual and then kill that person. That is not self-defense.” (T.1710). To be sure, every time the prosecutor stated something to the effect of “even if you believe his story, he is still guilty under the law,” the prosecutor was clearly referring to the notion that the defendant was no longer justified in using deadly force after he disarmed the victim. Thus, the prosecutor did not use the presumption in a manner to effect reversible error.

The prosecutor mentioned the instruction and applied it to the facts of the case by explaining to the jury that when Petitioner hit the victim with a pool stick Petitioner was engaged in criminal activity. (T.1711). The prosecutor acknowledged Petitioner’s position that the presumption is not triggered when he explained, “[b]ut they want you to believe that the Defendant was not engaged in criminal activity, and that it’s self-defense. . . that is not what the evidence shows. The evidence does not show the Defendant’s version of events, it does not. The evidence shows, consistently, that the Defendant was the one with the firearm, and fired it on the victim” (T.1711).

In summary, the prosecutor did not exploit an erroneous instruction. Rather, the prosecutor's argument addressed the jury instruction in the context of the broader self-defense instructions, which informs juries of a multitude of circumstances related to whether a defendant reasonably acted in self-defense. In fact, the prosecutor encouraged the jury to "listen to the law, as a whole." (T.712). Nestled between the self-defense instructions applicable if Petitioner was "otherwise engaged in criminal activity" and the self-defense instructions applicable if Petitioner "initially provoke[d]" the victim, the instruction appeared as part of the choices the jury could take or leave. Either the jury believed the victim pointed a gun at Petitioner and Petitioner's following actions were in self-defense, i.e., not unlawful, or the jury believed that Petitioner was the initial aggressor and thus was acting unlawfully and had a duty to retreat before resorting to deadly force, which he did not do. There is no reasonable possibility that the instruction affected the verdict.

CONCLUSION

Based on the authorities and arguments presented herein, the State of Florida respectfully requests that this Honorable Court approve the Second District's affirmance of Petitioner's conviction for manslaughter.

/s/Laurie Benoit-Knox
LAURIE BENOIT-KNOX

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 1, 2024, I electronically filed the foregoing with the Clerk of the Court by using the e-filing portal system, which will send a notice of electronic filing to Rachel Roebuck, Assistant Public Defender, P.O. Box 9000 – Drawer PD, Bartow, Florida 33831 (appealfilings@pd10.org; rroebuck@pd10.org).

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style, in compliance with Fla. R. App. P. 9.045(b). This brief contains 9,827 words.

Respectfully submitted,

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