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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

INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE ISSUES

Issue I. Can the accused's Post-Traumatic Stress Disorder ("PTSD") be relevant in a self-defense case?

Issue II. Does instructing the jury to presume that the accused had unlawful intent when entering the victim's occupied vehicle improperly relieve the State of its burden to disprove self-defense beyond a reasonable doubt? *See* Fla. R. App. P. 9.210(f).

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions, Statutes, and Legislative Records

Books, Journals, and Other Authorities

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner Juan Javier Oquendo ("Oquendo") was convicted by a jury of the lesser-included offense of manslaughter with a firearm following a trial where he unsuccessfully raised a claim of self-defense. R. 655-56, T. 1785-88.[1] The defense's theory was that when the victim James Cason ("Cason") pulled a gun on Oquendo, he reached into Cason's car to wrestle the gun away and Cason was shot during the struggle (although Oquendo did not realize that at the time), and that once Oquendo gained control of the gun he kept firing because he feared for his life. The State's theory was that Cason never had a gun, that it was Oquendo's gun all along, and that Oquendo shot Cason out of anger.

Prior to trial, Oquendo proffered the testimony of an expert witness, psychologist Dr. Jethro Toomer, who asserted he suffered from PTSD. R. 481-85, 488-90. Oquendo implored the trial court to follow *State v. Mizell*, 773 So. 2d 618, 620 (Fla. 1st DCA 2000), in which the First District held that PTSD evidence could be evaluated on a case-by-case basis for whether it is relevant to self-defense, and in

[1] He was charged with first degree murder. R. 59-60.

Mizell's case it was relevant as it helped explain his state-of-mind. R. 539-43. Counsel articulated several times that he did not intend to use Oquendo's PTSD to argue that he could not form the requisite intent. R. 602-09. Instead, Counsel said he wanted to present evidence of Oquendo's PTSD to help explain his perceptions and reactions to the jury. T. 604.

But the trial court categorized evidence of Oquendo's PTSD as subjective diminished capacity evidence, and excluded the PTSD expert based on its interpretation of Florida's self-defense law as being measured only by an objective standard. R. 546-49. The trial court also based its denial in part on its interpretation of Oquendo's testimony that he was claiming the shooting was purely an accident.[2] R. 545-46, 610-11; T. 1490, 1537-38, 1477-85.

At trial, Oquendo testified that as he was leaving the bar, he was expecting his friend to pick him up outside and that he tried to enter Cason's car because he mistakenly thought Cason was the friend he

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[2] Oquendo did not actually claim that the shooting was purely an accident but instead claimed that an accident occurred while he was exercising lawful self-defense.

had been waiting on. T. 1314-16. Despite Oquendo telling Cason that he mistook Cason's car for his friend's, a fight ensued wherein Cason told Oquendo "I got something for you". T. 1317-18. Oquendo then saw Cason produce a gun and point it at him. T. 1319, 1419-20. Oquendo used a pool stick to try to knock the gun out of Cason's hand and, when that didn't work, he grabbed Cason's arm and the men ended up fighting over the gun. T. 1391-20, 1420-25, 1428.

The gun went off at least once while it was still inside the car. T. 1320. Cason's hand was on the gun when it fired. T. 1466. Oquendo hypothesized since he did not recall being the one who pulled the trigger those times that either the gun went off as a result of their struggle or Cason shot the gun. T. 1434-36. The car began to move forward which caused Oquendo to fear that Cason was going to run him over. T. 1322-23, 1469. The men were still fighting over the gun at this point. T. 1323.

Oquendo did eventually wrestle the gun from Cason. T. 1321-22. While Oquendo did not remember whether Cason tried to grab the gun back, he did remember being afraid that Cason would do that and stated that Cason was still physically close enough to him to accomplish that. T. 1437-39. Once Oquendo realized he had the gun in his hand, he fired it multiple times. T. 1323-24. T. 1439, 1444, 1447-48. After shooting, Oquendo threw the gun down on the ground before running out of the parking lot because he was scared. T. 1334-35.

Oquendo did not realize at exactly what point in this struggle that Cason had been shot. T. 1321, 1440-41. Oquendo was not able to say how many times exactly the gun was fired. T. 1446-47. Oquendo was not aware that twelve total shots were fired [T. 1118] until the prosecutor told him. T. 1450.

Although Oquendo said his ultimate goal wasn't killing Cason but protecting himself [T. 1451-52], he was clear that he shot Cason in self-defense because he thought Cason was trying to kill him. T. 1457. Oquendo testified to being in fear for his life at multiple points, including: when he first saw the gun prior to gaining control of it [T. 1322], after he got the gun away from Cason because Cason could have gotten the gun back [T. 1437-39] and because he was afraid he would be run over [T. 1323], as well as when he was shooting at Cason's car because he was afraid there was either someone else in the car or another gun in the car or both [T. 1444-45] or that Cason still had the capability to hurt him by reversing the car and backing over him [T. 1452-53].

After Oquendo testified, the Defense renewed its request for admission of PTSD evidence and the trial court denied it again. T. 1483-85. The trial court stated that PTSD evidence would not help the jury understand the "reasonable person objective standard." T. 1485.

There were varying accounts of the shooting from the other eyewitnesses. One witness heard Cason say: "I got something for you. I'll be right back." T. 641. Another heard Oquendo say, "I got mine." T. 597. One agreed that Oquendo had stuck a pool stick into the car [T. 640] but another claimed Oquendo had reached into the car and punched Cason. T. 546-47. Two witnesses testified that Oquendo – not Cason – had produced the gun [T. 547, 642-43], although neither of them could say from where. And no one else who saw Oquendo that night saw him with any firearm. Oquendo admitted to drinking alcohol prior to the shooting. T. 1289-90. Witnesses disagreed about whether he was intoxicated and whether he was kicked out of the bar. T. 531, 634-36, 730, 734-36.

After the shooting, Cason's car hit another vehicle in the parking lot. T. 1031-31. The exterior of the car was struck by bullets in the driver side back window and door, driver side back panel and tire, right above the license plate, and on the bumper. T. 1031-33, 1040-41. Inside, there was a bullet in the passenger door. T. 1040. One of the witnesses tried to embellish and say that Oquendo had ran after the car and kept shooting [T. 549] but he was impeached with a prior inconsistent statement where he said that Oquendo shot towards the car from his original position, then ran away [T. 614-17].[3]

Cason died at the scene. T. 1031. Forensics revealed that Cason was only shot once in the head at close range. T. 1179, 1181-85. The trajectory was slightly downward from front to back, and left (near the ear) to right. T. 1185-87. There was no testimony about whether Cason would have been able to move after being shot. Cason's alcohol level was over the legal limit – .118 BAC. T. 1190-91.

Horace Lee, testified that he used to date Oquendo's mother, and

[3] Oquendo said he didn't chase down the car, he instead stood in one spot while shooting then ran the other way. T. 1324, 1331-32.

that Oquendo showed up at Lee's house one night and said that he'd shot someone [T. 992] but that he was shot at first [T. 1020]. Lee agreed with the prosecutor when asked if Oquendo told him "His gun didn't go off, mine did." T. 1090-21. [The judge said Lee was "a living definition of 'unintelligible' ", and that due to a stroke he "need[ed] to take medication", was "going downhill", was "having a hard time answering questions", and was "leaning on the table, holding his head, and trying hard to get up out of his chair." T. 1016. Lee could not even identify Oquendo in court, and after being asked five different times – even after the prosecutor had him step off the witness stand so he could look around the courtroom – Lee said "No, he is not in the room." T. 988-89.] Lee and another witness testified that after finding out that Oquendo was wanted by authorities they alerted police that Oquendo was at Lee's house, leading to his arrest. T. 933, 935-36, 1012,13.

At the close of evidence, the State requested that the trial court use a portion of the standard jury instruction 3.6(f) on self-defense to instruct the jury on Cason's right to stand his ground in his own vehicle. T. 1568-70. Over the defense's many objections [T. 1571, 1592-93, 1736], the trial court eventually acquiesced and gave the following instruction to the jury: "A person who unlawfully and by force enters, or attempts to enter, another's occupied vehicle is presumed to be doing so, with an intent to commit an unlawful act involving force or violence." T. 1742.

Ultimately, the jury found Oquendo guilty of manslaughter (with a firearm). R. 655-56; T. 1785-88. The trial court sentenced Oquendo to the maximum penalty – thirty years. R. 1067.

On appeal, the Second District affirmed and held that evidence of PTSD "is not relevant to the issue of self-defense in light of the objective standard for establishment of that justification." *Oquendo v. State*, 357 So. 3d 214, 216-18 (Fla. 2d DCA 2023), and certified conflict with *Mizell* which held the opposite.

SUMMARY OF THE ARGUMENT

Issue I. Self-defense is an inherently intentional act. So, evidence that proves the state of mind required for self-defense is ipso facto not diminished capacity. Further, Florida's self-defense includes a subjective component – the defendant's perception of his or her circumstances. PTSD is a disease that impairs several important physiological bodily functions and is thus such a "circumstance" that is just as important as other physical injuries or vulnerabilities which Florida courts have declared relevant to self-defense determinations.

Issue II. The presumption in the castle-doctrine statute, providing that a person who unlawfully and by force enters another's occupied vehicle shall be presumed to be doing do with the intent to commit an unlawful and violent act, is a presumption that operates in favor of the defendant, not the alleged victim. Here, the decedent was the one occupying his vehicle at the time of the shooting. And the defense was that the shooting was justified. Thus, applying this presumption to the detriment of the accused was a clear misapplication of the law that went to the heart of the case. Since a reasonable jury could have interpreted the presumption to lessen – or eliminate altogether – the

State's burden to disprove self-defense beyond a reasonable doubt, it was harmful and reversible error for the trial court to instruct the jury that it was to presume the defendant's criminal intent.

STANDARDS OF REVIEW

Issue I. The ultimate question of whether or not a defendant's PTSD can qualify as a "circumstance" as provided in Fla. Std. Jury Instr. (Crim.) 3.6 (f) on its face involves statutory interpretation, as well as the application of the law to the facts, and is a dispute which will establish law for countless future cases. Thus, it is reviewed de novo. *State v. McKenzie*, 331 So. 3d 666, 670 (Fla. 2021) ("This question of statutory interpretation is subject to de novo review."). *See also Hurst v. State*, 18 So. 3d 975, 991 (Fla. 2009) (holding, in the context of a *Giglio*[4] claim, that an appellate court "review[s] the application of the law to the facts de novo"). Application of less than a de novo standard of review to an issue which transcends individual cases invariably leads to inconsistent treatment of similarly situated claims. *Hildwin v. State*, 951 So. 2d 784, 791 (Fla. 2006) (holding a de novo standard of review, not an abuse of discretion standard, applies to the trial court's determination under *Frye*[5]) (citing *Brim v. State*, 695 So. 2d 268, 274 (Fla. 1997).

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[4] *Giglio v. United States*, 405 U.S. 150, 92 (1972).

[5] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Issue II. Whether a jury instruction represents an accurate statement of law is a legal question reviewed by an appellate court under a de novo standard. *Tower Hill Prime Ins. Co. v. Bermudez,* No. 3D22-0828, 2023 WL 8246151, at *3 (Fla. 3d DCA Nov. 29, 2023). Thus, since the issue of whether applying the standard jury instruction regarding presumption of unlawful intent against the defendant – instead of the alleged victim – resulted in an unconstitutional shift in the burden of proof is a pure question of law, it is therefore subject to de novo review. *State v. Floyd*, 186 So. 3d 1013, 1019 (Fla. 2016) (holding that the certified question of whether a standard criminal jury instruction was "confusing, contradictory, or misleading" posed a pure question of law and was subject to de novo review). *See also Jones v. Federated National Insurance Company*, 235 So. 3d 936, 940 (Fla. 4th DCA 2018) ("We review de novo whether the trial court applied the correct burden of proof in its jury instructions."). *See also Acevedo v. State*, 218 So. 3d 878, 879 (Fla. 2017) (interpretation of a criminal statute is reviewed de novo).

ARGUMENT

I. The Relevance of PTSD to Self-Defense Claims Should Be Determined on a Case-By-Case Basis

A. The Decision Below is Wrong

The Second District mistakenly concludes PTSD evidence is irrelevant to self-defense and is merely a backdoor form of diminished capacity. *Oquendo*, 357 So. 3d at 218-19. Diminished capacity is the inability to form intent. And it is true that, short of an insanity plea, a defendant cannot use a mental illness to argue that he was incapable of forming the intent that distinguishes murder and manslaughter. *Chestnut v. State*, 538 So. 2d 820, 820 (Fla. 1989). However, acts of self-defense are undeniably intentional. Thus, diminished capacity claims for the purpose of negating intent are "easily distinguished" from "certain "state-of-mind evidence" to prove self-defense." *Miller v. State*, No. SC2022-0745, at 39-40 (Fla. February 29, 2024), citing *State v. Mizell*, 773 So. 2d 618, 620-21 (Fla. 1st DCA 2000). So, Florida's lack of recognition of a diminished capacity defense in the former context really has no bearing on the instant case.

It also appears to be true that a defendant cannot argue that a mental illness caused him to make some <u>unreasonable</u> error in judgment regarding whether force was justified because Florida does not recognize imperfect self-defense. *Hill v. State*, 979 So. 2d 1134, 1135 (Fla. 3d DCA 2008).

But the Second District is flat out wrong to assert that self-defense does not make room for the "[u]se of evidence of a disorder affecting a defendant's perceptions". *Oquendo*, 357 So. 3d at 218. Florida law does permit this type of evidence. Jurors in self-defense cases do not decide the issue of whether the defendant's fear was reasonable in a perfect vacuum. It's clear that Florida self-defense is evaluated <u>by</u> an objective standard for reasonableness but assessed <u>from</u> the context of the defendant's position. Fla. Std. Jury Instr. 3.6(f) ("you must consider the circumstances by which [the defendant] was surrounded at the time").

It is equally wrong to assert self-defense does not allow for the defendant's "misunderstanding" or "misperceptions". *Oquendo*, 357 So. 3d at 218. The law's plain language contradicts that conclusion, stating "[t]he danger need not have been actual". Fla. Std. Jury Instr.

3.6(f). The misperceptions and misunderstandings themselves – as well as the circumstances that would cause such mistakes – are the very things the jury needs to know in order to decide whether "the appearance of imminent danger" was or was not "so real that the defendant actually believed the use of deadly force was necessary." Fla. Std. Jury Instr. 3.6(f).

To decide whether a decision was reasonable, one needs to know the context surrounding the decision, the alternatives, and what exactly was at stake for the decision-maker, i.e. what cards he was dealt. Trying to find the exact point where the subjective component of self-defense ends and the objective one begins is largely semantic. For this reason, the Second District's precarious effort to distinguish Battered Spouse Syndrome (BSS) from PTSD [*Oquendo*, 357 So. 3d at 219-21] is a red herring. Counsel agrees that there are some differences between BSS and PTSD, however, (1) there are also significant similarities, and (2) the differences between them doesn't mean that BSS is admissible and PTSD is not.

The DCA fails to realize that it is in fact advocating for at least a little subjectivity. The problem is that when objectivity is applied too rigidly, it fails to encompass the experience of a woman who is terrorized by her abusive husband – that circumstance is too extreme to be included in our objective, collective experience. And so, BSS evidence educates the jury about the <u>psychological</u> impact of domestic abuse. Just like the average "objective" person has not been in the shoes of a battered spouse who strikes back at her abuser, most jurors have never been in a situation where they had to make a decision on whether to use deadly force in defense of self. Undoubtedly, there are subjective factors that go into both assessments, and, just as undoubtedly, jurors may be unlikely to perceive those factors on their own. To remedy that deficiency, and to be consistent, this Court should continue to allow defendants to use both BSS and PTSD to the extent either condition supports a legally acceptable theory of defense.

Ultimately, it appears Florida law draws a line between inadmissible mental diseases or defects and admissible physical ones. The question then becomes is PTSD a <u>purely</u> mental disorder? Or is it a disease that simultaneously impacts both mental and physiological bodily functions? And just how objective is the "reasonable man"? Is he an omniscient automaton? Or is there any room for a subjective gaze? How much room? The bright-line rule that the Second District advocates for which would categorize PTSD evidence in every conceivable self-defense case as "irrelevant" is not the answer.

i. PTSD is Not *Only* a Mental Illness But a Physiological One As Well

PTSD is classified in the DSM-5 as a trauma disorder.[6] Only a small percentage of individuals exposed to trauma develop PTSD.[7] The symptoms of PTSD will look different for different people. But they are often severe and persistent enough to have a significant impact on the person's day-to-day life. PTSD is associated with

[6] Arieh Shalev, et al., *Chapter 17: Posttraumatic Stress Disorder*, *in* LIPPINCOTT, WILLIAMS, & WILKINS KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY (Benjamin Sadock 10th ed. 2014).

[7] Nicoletta Brunello, et al., *Posttraumatic Stress Disorder: Diagnosis and Epidemiology, Comorbidity and Social Consequences, Biology and Treatment*, 43 NEUROPSYCHOBIOLOGY 150, 151 (2001) (only 10-20% of individuals exposed to trauma develop PTSD); DSM-5, supra note 14, at 276 (stating that in the United States, projected lifetime risk for PTSD is 8.7%).

certain arousal symptoms which can be physiological.[8]

To the extent that admissibility turns on the mental or physical dichotomy of PTSD, that distinction is not easily achieved with any reliable precision. In addition to significantly impacting an individual's mental and emotional well-being, PTSD can also negatively impact a defendant's "relative physical abilities and capacities"[9] that can greatly affect the individual's overall health and quality of life and therefore should be relevant to any self-defense verdict.

In *Elder v. State*, 296 So. 3d 440 (Fla. 4th DCA 2020), the Fourth District considered the relevance of the defendant's Myasthenia Gravis disorder, which is "a chronic autoimmune neuromuscular disease that causes weakness in the skeletal muscles," and "makes it hard [] to breathe". *Id.* at 445. The Fourth District held that the trial court abused its discretion in barring Elder from presenting

[8] *Posttraumatic Stress Disorder*, American Psychiatric Association, DSM-5 Collection, https://www.psychiatry.org/file%20library/psychiatrists/practice/dsm/apa_dsm-5-ptsd.pdf

[9] *See* Fla. Std. Jury Instr. 3.6(f).

testimony from a medical doctor regarding his diagnosis:

> Here, evidence of Elder's diagnosis was relevant to prove a material fact – whether Elder's physical condition made it unlikely that he would pursue activity requiring violent physical exertion. Also, his diagnosis was relevant to put the defense theory of the case in proper context by showing that he stopped his car at the stop sign due to a coughing fit caused by his medical condition, not to lie in wait for the victim. This evidence had some probative value in establishing the identity of the initial aggressor in the confrontation. … The jury could have considered the doctor's testimony significant in evaluating the testimony of the victim's girlfriend, who said that Elder and his codefendant pounded on the victim outside of the car after the stabbing.

Id. at 446.

If you take the symptoms of a disorder like Elder's at face value – muscle weakness and trouble breathing – it could be disingenuous to categorically distinguish it from a person with PTSD. People with PTSD have been known to experience more weakness in their muscles compared to healthy individuals.[10] Respiratory dysfunction,

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[10] Manda L. Keller-Ross, et al., *Muscle Fatigability and Control of Force in Men with Posttraumatic Stress Disorder*, MEDICINE & SCIENCE IN SPORTS & EXERCISE, pgs. 1302-1313 (Vol. 46 July 2014);

Mostafa Sarabzadeh, et al., *Neurophysiological relationship of neuromuscular fatigue and stress disorder in PTSD patients*, JOURNAL OF BODYWORK AND MOVEMENT THERAPIES, pgs. 386-394 (Vol. 24 October 2020).

specifically hyperventilation, is also very common in PTSD.[11] Why should Elder be allowed to legitimize his medical condition to his jury while a person with PTSD cannot, especially when the physiological symptoms experienced can be similar? Once a person experiences a physical infirmity or vulnerability, why does it matter where it comes from?

There are a host of physical symptoms associated with PTSD that would make a person vulnerable in a fight. A cardinal feature of patients with PTSD is sustained hyperactivity of the autonomic sympathetic branch of the autonomic nervous system, which can cause elevations in heart rate, blood pressure, and other psychophysiological measures.[12] Studies have found that individuals diagnosed with PTSD have a higher resting heart rate than those

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[11] Andrea L. Jamison, et al., *Randomized Clinical Trial of Capnometry-Assisted Respiratory Training in Veterans With Posttraumatic Stress Disorder Hyperarousal*, American Psychological Association, PSYCHOLOGICAL TRAUMA: THEORY, RESEARCH, PRACTICE, AND POLICY (2019), https://psycnet.apa.org/manuscript/2019-73114-001.pdf

[12] Jonathan E. Sherin, et al., *Post-traumatic stress disorder: the neurobiological impact of psychological trauma*, National Library of Medicine (Vol. 13 Sept. 2011).

without PTSD.[13] During a stressful event, PTSD hinders the ability to lower one's heart rate.[14] Sustained elevated heart rate can lead to shortness of breath[15], high blood pressure[16], fainting[17], hearing impairment[18], and vision impairment[19].

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[13] Mahnoosh Sadeghi, *Understanding Heart Rate Reactions to Post-Traumatic Stress Disorder (PTSD) Among Veterans: A Naturalistic Study*, Sage Journals (Vol. 64 July 2021), https://journals.sagepub.com/doi/10.1177/00187208211034024

[14] Updesh Singh Bedi, Rohit Arora, *Cardiovascular manifestations of posttraumatic stress disorder*, J NATL MED ASSOC. (June 2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2574374/pdf/jnma00205-0048.pdf

[15] *Overview: Tachycardia*, Mayo Clinic, Diseases and Conditions, https://www.mayoclinic.org/diseases-conditions/tachycardia/symptoms-causes/syc-20355127

[16] Alexander C. McFarlane, *The long-term costs of traumatic stress: intertwined physical and psychological consequences*, World Psychiatry (Feb. 2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2816923/

[17] John Williamson, et al., *Maladaptive autonomic regulation in PTSD accelerates physiological aging*, Front Psychology (Jan. 2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4300857/

[18] *See* discussion of perceptual distortions such as "auditory exclusions" and intensified sounds in DAVE GROSSMAN, ON COMBAT : THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY CONFLICT IN WAR AND IN PEACE (4th ed. 2022), 55-57.

Specific vulnerabilities are evaluated by jurors for whether the threat to – not just anyone – but rather a person "in the [defendant]'s position" was reasonably suggestive of serious harm. *Jackson v. State*, 253 So. 3d 738, 739 (Fla. 1st DCA 2018) (holding defendant who "feared the victim's punches could break his medically vulnerable neck and shoulder" was entitled to the self-defense instruction), citing *Chavers v. State*, 901 So. 2d 409, 411 (Fla. 1st DCA 2005) (including Chavers' "nervous condition" as part of the factors that "could be viewed by a jury as reasonably suggestive of a threat to a person in appellant's position"). *See also People v. Mathews*, 30 Cal. Rptr. 2d 330, 335 (Cal. Ct. App. 1994) (holding that a blind and hearing-impaired defendant claiming self-defense was entitled to be held to the standard of a reasonable blind and hearing-

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[19] *See* discussion of "tunnel vision" in DAVE GROSSMAN, ON COMBAT: THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY CONFLICT IN WAR AND IN PEACE (4th ed. 2022), 71-72.

"PTSD alone, as an emotional reaction, can cause blurry vision because it interferes with the function of tears, cornea, the ciliary muscle, and the retina." Joseph Trachtman, *Post-traumatic stress disorder and vision*, Journal of the American Optometric Assoc. (May 2010), https://www.accommotrac.com/Accommotrac_Vision_Trainer/Professional/PTSDandVision.pdf impaired person as opposed to that of a reasonable person with normal eyesight and hearing).

So, the Second District demonstrated that it was underinformed about how multifaceted PTSD is when it said that “PTSD would only go to show that his reaction was objectively unreasonable”. *Oquendo*, 357 So. 3d at 218 (emphasis in original). To the person experiencing them, physical impacts as a result of PTSD would be indistinguishable from experiencing similar infirmities as a result of a physical disease or defect. And if a person had PTSD for any significant period of time, just like with any long-term illness, they would be aware of these symptoms and learn to expect them, which may lead to increased fear of physical harm or death if attacked. So PTSD can explain perceptions themselves – what a defendant sees, hears, and feels. It can also help determine if an error in perception or judgment was made, whether it was reasonable to make. And it can medically legitimize an infirmity that would make a defendant vulnerable to physical attack.

ii. PTSD Evidence Can Be Helpful To Jurors In Other Ways

Expert testimony in Florida is evaluated by a "helpfulness" standard. *Anderson v. State*, 786 So. 2d 6, 8 (Fla. 4th DCA 2000) (Expert testimony is admissible if it is "helpful to the trier of fact" and "concern[s] a subject which is beyond the common understanding of the average person."). If any of the perceptions or physical impairments that PTSD can cause are left unexplained to the jury, prosecutors will be free to tell the jury the defendant is simply making them up, since comments on the defendant's failure to produce evidence is fair game when the defendant assumes some of the burden of proof by asserting a defense such as self-defense. *Johnson v. State*, 293 So. 3d 46, 57-58 (Fla. 1st DCA 2020), citing *Jackson v. State*, 575 So. 2d 181, 188 (Fla. 1991). *See also Elder*, 296 So. 3d at 446 (holding exclusion of expert not harmless; "[a]lthough Elder described his medical condition, the jury might have given it little weight because he was the defendant on trial, not a medical expert.")

Demeanor and credibility are closely correlated, and thus a huge concern for the defendant in any trial.[20] For this reason, for example, great pains are taken to suppress any emotion prone to misinterpretation but especially anger, even in self-defense cases where the accused should in theory be entitled to it. A trial attorney's worst nightmare is a cross-exam that turns a client – who seemed levelheaded moments before – into a bitter, reckless bully. You can feel the shift in the atmosphere. You can almost hear the jurors' thoughts: *I'll bet he did murder that poor guy, look at how angry he just got in a courtroom in front of a judge and all of us, imagine him in a dark parking lot when no one's watching.* It's game over.

PTSD can influence demeanor and emotions, including anger.[21] PTSD causes hyperarousal, a state of feeling overly alert or agitated.[22]

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[20] *See Parker v. State*, 641 So. 2d 483, 485 (Fla. 5th DCA 1994) (where a witness takes the stand, "he subject[s] himself, as does every witness, to opposing counsel's comments regarding his credibility and demeanor as a witness."); Fla. Std. Jury Instr. (Crim.) 3.9 (the standard criminal jury instruction on credibility states that the jury should "consider how the witnesses acted, as well as what they said").

[21] Deborah Epstein, *Discounting Credibility: Doubting the Stories of Women Survivors of Sexual Harassment*, 51 SETON HALL L. REV. 289, 305-06 (2020).

[22] Treatment Improvement Protocol Series, *Chapter 3, Understanding the Impact of Trauma*,

A defendant who gets flustered or angry will be poked and prodded by the prosecutor and may therefore be discredited by the jury. You can't show too little emotion either. Numbing may cause many PTSD sufferers to testify about emotionally charged incidents with an entirely flat affect.[23] If a defendant recalls a shooting with the same tone as one would describe what they ate for dinner the night before – the prosecutor will say he is a cold, calculated killer.

People who have PTSD also tend to feel more stressed or frightened when triggered, even after they are no longer in danger.[24] This could provide a jury with an alternative to the prosecution's classic argument that a defendant who left the scene must have done so due to a guilty conscience. *Sims v. State*, 681 So. 2d 1112, 1116 (Fla. 1996) (finding defendant's actions after the shooting, including

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https://www.ncbi.nlm.nih.gov/books/NBK207191/

[23] *Id.*

[24] National Institute of Mental Health, *What is post-traumatic stress disorder, or PTSD?*, https://www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-ptsd#:~:text=People%20who%20have%20PTSD%20may,experienced%20trauma%20can%20cause%20PTSD

fleeing, "evince a consciousness of guilt").

In addition to disturbances in trauma-related memory, people with higher PTSD symptom severity have more memory deficits and recall fewer fine-grained actions than those with lower symptom severity.[25] Prosecutors routinely discredit defendants who are unable to recall the details of the alleged crime. Unable means unwilling to a prosecutor, who in closing argument will surely tell the jury "he says he can't remember – how convenient!"

This Court shouldn't be more willing to allow testimony when the State, as opposed to a defendant, relies on it. In sex cases for example, prosecutors fear that jurors will think a "real victim" would report the crime straight away or be able to coherently articulate what happened. But as courts catch up with science, a trend has emerged in several states of educating juries on "the neurobiology of

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[25] Barbara Pitts, et al., *PTSD is associated with impaired event processing and memory for everyday events*, Cognitive Research: Principles and Implications (April 2022), https://cognitiveresearchjournal.springeropen.com/articles/10.1186/s41235-022-00386-6;

Almut Hupbach & Joelle M. Dorskind, *Stress Selectively Affects the Reactivated Components of a Declarative Memory*, 128:5 BEHAV. NEUROSCIENCE 614, 618-19 (2014).

trauma" because the effects of psychological trauma on the formation of memory, such as the tendency to recount what happened in a disorganized or non-linear way, and how sexual assault victims may give partial or confused disclosures are concepts that are not within the common experience of the average juror. *States v. Racion*, No. 1:20-CR-00020-JLT, 2022 WL 3908096, at *6 (E.D. Cal. Aug. 30, 2022); *People v. Royster*, No. 358834, 2023 WL 2618439, at *3 (Mich. Ct. App. Mar. 23, 2023)[26].

A search revealed no results in Florida for opinions on "trauma neurobiology" – yet. But there seems to be no reason to think this type of evidence wouldn't be admitted here, as Florida law allows the State to put on testimony about the manner in which abuse victims disclosed if the defense claims that changes in the victim's story

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[26] Relying on *People v Peterson*, 537 N.W.2d 857, 868 (Mich. 1995) (holding that the prosecution may present relevant and helpful evidence to generally explain the common postincident behavior of child victims of sexual abuse); and *People v Beckley*, 456 N.W.2d 391, 406 (Mich. 1990) (explaining "the purpose of allowing expert testimony in these kinds of cases is to give the jury a framework of possible alternatives for the behaviors," and "to provide sufficient background information about each individual behavior at issue which will help the jury to dispel any popular misconception commonly associated with the demonstrated reaction.").

indicate fabrication. *Russ v. State*, 934 So. 2d 527, 531 (Fla. 3d DCA 2006); *Torres v. State*, 999 So. 2d 1077, 1078 (Fla. 4th DCA 2009).

And, as has been recognized in other jurisdictions[27], evidence of PTSD specifically may be admitted for certain corroborative purposes to benefit the State; for example, testimony on PTSD may assist in corroborating the victim's story, or it may help to explain delays in reporting the crime or to refute the defense of consent. *State v. Hicks*, 768 S.E.2d 373, 404 (N.C. Ct. App. 2015); *Chapman v. State*, 18 P.3d 1164, 1169-74 (Wyo. 2001); *State v. Martens*, 629 N.E.2d 462, 468 (Ohio Ct. App. 1993) (holding victim's PTSD "helped to explain why [she] waited approximately three months before reporting the rape").

<u>Self-defense flips the script</u> – the accused and the alleged victim are each claiming to be the <u>real</u> victim and the jury decides who's which. If the State can mitigate gaps in the jurors' understanding by informing them of the alleged <u>victim</u>'s PTSD, there should be no double standard. Defendant's claiming self-defense should not be

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[27] Florida research has not turned up any cases that specifically disallow use of PTSD evidence to corroborate victim testimony.

denied the same opportunity.

Now, of course once the jury hears that PTSD is a possible explanation for why the defendant wasn't able to perfectly recall the sequence of events when cross examined, why the defendant seems angry on the stand, or fled the scene, or didn't report the crime, the jury isn't forced to acquit. Jurors can simply believe or disbelieve the testimony of any defendant or any other witness. There is no reason for concern that PTSD evidence will lead to automatic, otherwise unwarranted acquittals. It simply allows the jury to weigh all of the relevant circumstances holistically.

iii. Eroding Self-Defense Protections is Inconsistent with Florida's Values

Florida leads the nation in how seriously it takes self-defense.[28] A blanket ban on PTSD evidence in all self-defense cases based on a cramped interpretation of objective reasonableness would not only be hard to reconcile with Florida's emphasis on the importance of the

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[28] We were the first state to explicitly expand a person's right to use deadly force for self-defense by removing the duty to retreat. *See* Cora Currier, *The 24 States That Have Sweeping Self-Defense Laws Just Like Florida's*, ProRepublica (March 22, 2012), https://www.propublica.org/article/the-23-states-that-have-sweeping-self-defense-laws-just-like-floridas

right to defend oneself against threatened violence, but would offend the "inalienable" right to "enjoy and defend life" that is a crucial part of our state's constitutional fabric. Fla. Const. Art. I, § 2.

The reasonable man is already applied subjectively – through each jurors' understanding of how the world works. People tend to believe that their own thinking is just basic common sense and that, as a result, if we believe a certain thing or would behave in a certain way, other people will (or at least should) do the same.[29] Jurors who don't understand how PTSD impacts a person's senses, fear, memory, and demeanor are likely to discredit the defendant unnecessarily, when there exist explanations which have been withheld from them.

This intolerance for ambiguity produced by bright-line categorical bans of certain types of evidence denigrates both juries and judges alike. These questions – what a defendant should have reasonably heard, seen, felt, assessed, and whether any legitimate

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29 Lawrence Solan, et al., *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1268 (2008) ("Psychologists call the propensity to believe that one's views are the pre-dominant views, when in fact they are not, 'false consensus bias.' ").

vulnerabilities weighed on them, are classic questions jurors have been prudently and intelligently answering for centuries.

As for judges, applying the law to the facts on a case-by-case basis and determining whether expert testimony supports a legally acceptable theory of defense is quite literally the job. There is no good reason that this issue – the admissibility of a disorder with as much variability as PTSD in any and all self-defense cases – should be decided categorically, when it can and should be determined based on the particulars of each case. *Mizell* got it right and *Oquendo* got it wrong.

B. This Error was Harmful

Oquendo's trial has nearly every variety of proof that this error was not harmless. First and foremost, given the amount of dispute in the evidence, both between Oquendo and the other eyewitnesses and among the eyewitnesses themselves, and given the fact that there was nobody else in the car that saw what exactly went on between the men before the gun went off, it is impossible to determine how the exclusion of the relevant expert testimony of Dr. Toomer might have affected the jury's consideration of Oquendo's self-defense claim and thus there exists a reasonable possibility that it contributed to the conviction. *See Stickney v. State*, 237 So. 3d 1022, 1025-26 (Fla. 4th DCA 2018), *Butler v. State*, 493 So. 2d 451, 453 (Fla. 1986), *State v. DiGuilio*, 491 So. 2d 1129, 1138-39 (Fla. 1986). *See also Elder*, 296 So. 3d at 445-46 ("The jury could have considered the doctor's testimony [about Elder's "<u>neuro</u>muscular disease"] significant in evaluating the testimony of the victim's girlfriend, who said that Elder and his codefendant pounded on the victim outside of the car after the stabbing.") (emphasis supplied).

And there was demonstrated trepidation amongst Oquendo's jurors. During deliberations, the jurors asked the judge <u>five questions</u> in total. First, they wanted "depraved" defined [T. 1772], and they "need[ed] clarification" on the definition of reasonable doubt and what it meant when "there's not an abiding conviction of guilt, or, if, having a conviction, it is one … which is not stable, but one which wavers and vacillates" [T. 1772-73]. While the trial court and parties were discussing whether and how to answer those questions, the jury submitted more: "What kind of phone was in the pocket, and which pocket was it in? Are we allowed to see depositions?" and "Do witnesses see depositions before testifying?"[30] T. 1776, 1778. *See People v. Mathews*, 30 Cal. Rptr. 2d 330, 336 (Cal. Ct. App. 1994) (rejecting harmless error argument where, during deliberations, the jury asked the trial court for help on the meaning of an instruction that explained what a person "reasonably should have known").

The jury, deadlocked, then sent a third note: "We cannot agree on a verdict." T. 1781. Eventually, the jury had to be given an *Allen*[31] charge. T. 1783-85. When the jury finally did agree on a verdict, it was for the lesser included offense of manslaughter. T. 1785-88. *Elder*, 296 So. 3d at 445 ("This was a close case, as evidenced by Elder's conviction of culpable negligence, a lesser-included offense. Thus, there is a reasonable possibility that the error … affected the verdict.").

The combination of this error, which compromised Oquendo's right to fully present his only defense, was compounded by the error articulated in Issue II. The two errors worked in concert to weaken

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[30] The trial court ultimately told the jury she was not able to answer any of the questions. T. 1778-80.

[31] *Allen v. United States*, 164 U.S. 492 (1896).

Oquendo's self-defense claim by excluding PTSD evidence, and then bolstering the prosecution's case by turning the burden of proof on its head. In a case where the jury was literally told to presume the existence of an unlawful state-of-mind [see Issue II] – which gave the prosecutor an unearned upper hand – it is especially egregious to tie Oquendo's behind his back.

II. Misapplied Jury Instruction that Presumed the Defendant's Unlawful and Violent Intent Unconstitutionally Relieved the State of its Burden to Disprove Self-Defense Beyond a Reasonable Doubt

Under federal[32] and Florida law[33], due process guarantees protect a criminal defendant from conviction except upon proof beyond a reasonable doubt <u>of every fact necessary</u> to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis supplied). The State's burden in a case where self-defense is raised includes not only the elements of the crime itself but the burden to disprove self-defense.

In the instant case, the trial court violated Oquendo's due process rights by instructing the jury it could presume he had violent and unlawful intent when attempting to enter Cason's vehicle. This presumption is intended to work in favor of, not against, the accused. Specifically, the effect of this presumption against Oquendo was that it unconstitutionally eased the State's burden to disprove his self-defense claim beyond a reasonable doubt.

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[32] U.S. CONST. amend. XIV.

[33] Art. I, § 9, FLA. CONST.

Since both errors raised in this brief – individually and in combination – hamstrung [Issue I] and negated [Issue II] Oquendo's defense that he acted in self-defense, they are related, and both issues were thoroughly preserved and argued below, and have been properly briefed and argued on appeal. As this Court recognized in *Jacobson v. State*, 476 So. 2d 1282, 1285 (Fla. 1985), "[h]aving jurisdiction, we have jurisdiction over all issues", but the decision whether to exercise it is discretionary. *See Baptiste v. State*, 324 So. 3d 453, 456 (Fla. 2021) (Court's discretionary "authority to consider issues other than those upon which jurisdiction is based … should be exercised only when these other issues have been properly briefed and argued"). *See also Gabriele v. State*, 99 So. 3d 943 (Fla. 2012). In contrast with Oquendo's case, Baptiste's other issue was never raised in the DCA. Similarly, in *Puzio v. State*, 320 So. 3d 684, 688 (Fla. 2021), the Court declined the State's invitation to consider another issue where the State had neither raised that matter in the trial court or the district court, and "the potential double jeopardy implications … have not been fully briefed."

A. The Presumption Applies Only in Favor of Defendants

Florida law recognizes that it is categorically reasonable to be fearful of an intruder, and thus provides additional protections to its citizens in the form of the presumption of an intruder's unlawful and violent intent in section 776.013, Florida Statutes, and the corresponding portions of jury instruction 3.6(f). The text of section 776.013 is plain, clear, and unambiguous. Subsection (1) states that there is no duty to retreat before you use deadly force in your own home. Subsections (2) and (3) define who is entitled to the presumption of an intruder's unlawful intent, to wit: people in their own homes or vehicles (i.e. the victims of intruders). Subsections (2) and (3) all describe this intruder as "[t]he person against whom the defensive force was used". In other words, in a criminal trial, the "victim". The force of subsection (4) is equally as straight-forward: If the victim entered or attempted to enter the defendant's vehicle, it is presumed the victim did so with the intent to commit a violent, unlawful act and thus the defendant's fear of that unlawful violence is presumed reasonable.

The jury instruction at issue in this case was derived from subsection (4) which, instead of using the phrase "[t]he person against whom the defensive force was used" like subsections (2) and (3), simply describes the intruder as "a person". We know this because the subsection goes on to say that that "person" "enter[ed] or attempt[ed] to enter" another person's "dwelling" or "occupied vehicle". Quite obviously, when the plain language of subsection (4) is read in the context of the rest of the statute and not in isolation it is clear that "a person" harkens back to the "person against whom the defensive force was used" in subsections (2) and (3) that immediately precede it, i.e. in a homicide case, the intruder (or person) who was killed.

Since there is no ambiguity lurking within 776.013, this should be the end of this Court's interpretative work. *See State v. Peraza*, 259 So. 3d 728, 730 (Fla. 2018) (" '[W]hen the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.' ... This Court is 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications.' " (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)). But even though the Court need not look to legislative intent[34], it turns out that as a bonus the legislature was deliberate in their effort to only give the presumption of an intruder's unlawful intent in favor of the accused.

Section 776.013 in its entirety was created in 2005. The legislature's rationale for passing the law was to protect people who had killed in self-defense from being prosecuted at all, or from ultimately being convicted:

> WHEREAS, the Legislature finds that it is proper for law-abiding people to protect themselves, their families, and others <u>from intruders</u> and attackers <u>without fear of prosecution or civil action for acting in defense of themselves and others</u>, ... [35]

The creation of section 776.013(4) which states that any person who unlawfully and forcefully enters or attempts to enter another person's occupied vehicle, is presumed to have unlawful, malicious

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[34] *See State v. Floyd*, 186 So. 3d 1013, 1019 (Fla. 2016).

[35] Ch. 2005-27, Committee Substitute for Senate Bill No. 436, *Protection of Persons Bill.*

intent “eliminated the burden of proving that the defender had a reasonable belief that deadly force was necessary by providing a conclusive presumption of such.” *State v. Heckman*, 993 So. 2d 1004, 1006 (Fla. 2d DCA 2007). The Senate Judiciary Committee at the time stated that "[l]egal presumptions, are typically rebuttable. The presumptions created by the committee substitute, however, appear to be conclusive," and “the intruder's actual intent is irrelevant.”[36] <u>In fact the legislature specifically rejected an amendment that would have made the presumptions rebuttable.</u>[37]

B. It is Unconstitutional to Instruct the Jury to Presume the Defendant Had Unlawful Intent

Conclusive, irrebuttable presumptions operate as “a rule of law

[36] Staff of Fla. S. Comm. on the Judiciary, Senate Staff Analysis and Economic Impact Statement on CS/CS/SB 436, at 6 (Reg. Sess. 2005),
https://www.flsenate.gov/Session/Bill/2005/436/Analyses/20050436SJU_2005s0436.ju.pdf

[37] Amendment No. 481721 for Senate Bill No. 436 (April 5, 2005),
Amendment text:
https://www.flsenate.gov/Session/Bill/2005/436/Amendment/481721/HTML
Bill history:
https://www.flsenate.gov/Session/Bill/2005/436/?Tab=BillHistory

which no amount of proof will dislodge." *State v. Rolle*, 560 So. 2d 1154, 1160 n. 7 (Fla. 1990) (Barkett, J., concurring), citing D. Louisell & C. Mueller, Federal Evidence § 67, at 534 (1977). Once the state produces evidence sufficient to establish the basic fact, the defendant is then precluded from offering evidence to negate that fact.[38] *State ex rel. Boyd v. Green*, 355 So. 2d 789, 793 (Fla. 1978). When applied to the elements of a crime, a conclusive presumption always violates due process because it impermissibly relieves the State of its burden of proof. *Francis v. Franklin*, 471 U.S. 307, 314 (1984) (emphasis supplied).

In *Francis v. Franklin*, a Georgia jury was instructed: "[The] acts of a person of sound mind and discretion are presumed to be the product of a person's will," and a person "is presumed to intend the

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[38] Presumptions are contrasted with another common evidentiary device – inferences. An inference merely "allows – but does not require – the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant." *Cnty. Ct. of Ulster Cnty., N. Y. v. Allen*, 442 U.S. 140, 157 (1979). A presumption, on the other hand, requires that once some fact is established, some other fact at issue (the presumed fact) must be deemed true. *Francis v. Franklin*, 471 U.S. 307, 314 n. 2 (1984).

natural and probable consequences of his acts ...”. *Id.* at 315. In holding the instructions violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt, including of course the element of the defendant’s intent, the United States Supreme Court observed that the jurors “were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it.” *Id.* at 316, quoting *Sandstrom v. Montana*, 442 U.S. 510 (1979).

In *Sandstrom v. Montana*, the Supreme Court examined a trial court's instruction to a jury that “the law presumes that a person intends the ordinary consequences of his voluntary acts.” 442 U.S. 510, 512 (1979). Just like in *Frances*, the Court concluded that because the jury might have viewed the instruction as shifting the burden of persuasion and obviating the requirement that the prosecution prove the element of intent beyond a reasonable doubt, it violated the defendant's right to due process of law. *Id.* at 523-24.

“[I]f there is a danger that a juror could have reasonably viewed the instruction in an unconstitutional manner, the instruction violates due process.” *Gatlin v. State*, 556 So. 2d 772, 773 (Fla. 1st

DCA 1990). There was such a danger in the instant case – that Oquendo's jury interpreted this presumption that they were explicitly told to use against Oquendo as at best shifting the burden to Oquendo to prove his self-defense case and at worst foreclosing his claim of self-defense altogether. At trial, Oquendo claimed he acted in self-defense and that Cason was the initial aggressor, and that he had to partially enter Cason's vehicle to exercise self-defense and disarm Cason. When the defense of self-defense is asserted, a defendant has the burden of producing only enough evidence to establish a prima facie case demonstrating the justifiable use of force. *Fields v. State*, 988 So. 2d 1185, 1188 (Fla. 5th DCA 2008), citing *Fowler v. State*, 921 So. 2d 708, 711 (Fla. 2d DCA 2006) and *Murray v. State*, 937 So. 2d 277, 282 (Fla. 4th DCA 2006) (holding that the law does not require a defendant to prove self-defense to any standard measuring assurance of truth, exigency, near certainty, or even mere probability; defendant's only burden is to offer facts from which his resort to force could have been reasonable).

Once a defendant makes a prima facie showing of self-defense, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. *Fowler*, 921 So.2d at 711. The burden of proving guilt beyond a reasonable doubt, including the burden of proving that a defendant did not act in self-defense, <u>never shifts</u> <u>from</u> <u>the</u> <u>State.</u> *Id.* (citing *Brown v. State*, 454 So. 2d 596, 598 (Fla. 5th DCA 1984) (emphasis supplied).”

However, when the trial court instructed Oquendo’s jury on self-defense, it also instructed 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”. T. 1742. But because Cason was the only person in his own occupied vehicle, a reasonable jury could only have understood the presumption to apply in favor of Cason and against Oquendo. Thus, once the State proved the basic fact that Oquendo entered or attempted to enter Cason’s car (about which there was no dispute), the jury had little or no choice but to presume that Oquendo’s actions were “unlawful” and his self-defense unjustified.

A nearly identical situation to the instant case arose in *State v. Abdi*, 248 P.3d 209 (Ariz. Ct. App. 2011). Abdi had previously threatened the victim at the victim's residence. *Id.* at 211. Abdi returned a few days later, they struggled, and Abdi stabbed the victim multiple times. *Id.* The trial court instructed the jury on Abdi's self-defense claim, including that "[t]he person is presumed to have acted reasonably if the person acted against another person who unlawfully or forcefully entered the person's residential structure," tracking language from A.R.S. § 13-419.[39] *Id.* This presumption was given to explain the victim's use of force.

Even though the statute utilized generic terms such as "person," The Court of Appeals of Arizona concluded that its history and language were such that § 13-419 was only "meant to apply in favor of a defendant in a criminal action who raises a justification defense." *Id.* at 212. The Court held that because the presumption was mandatory, not permissive, "a reasonable jury could only have understood the presumption to apply in favor of [the victim], rather than [the defendant]." *Id.* at 212-14.

There are a series of Florida cases that address the "confusion" caused by modifying the standard self-defense jury instructions by

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[39] § 13-419 is Arizona's castle doctrine statute, entitled – much like Florida's – "Presumptions; defense of a residential structure or occupied vehicle".

swapping the words "defendant" and "victim" to inform the jury about the victim's use of force, and how this misleads jurors because it improperly shifts the focus of the case away from the accused's claim of self-defense. *See Butler v. State*, 493 So. 2d 451, 453 (Fla. 1986) (holding that a jury instruction informing that the victim had a right to be armed and use force against the defendant "improperly shifted the focus of the case from the applicability of the defense of self-defense to the right of the victim to fight force with force. As a result, the confusing and misleading instruction virtually negated the defendant's only defense, that of self-defense."); *Mann v. State*, 135 So. 3d 450, 456 (Fla. 5th DCA 2014) ("The additional jury charge regarding whether [the victim] was justified in his initial use of force against Mann improperly creates a presumption of provocation. Thus, as in *Butler*, the improper instruction might lead a reasonable jury to conclude that [the victim]'s right to use non-deadly force precluded Mann's right to use deadly force."); *Stickney v. State*, 237 So. 3d 1022, 1025 (Fla. 4th DCA 2018) ("Here, the modified jury instruction on [the victim]'s right to use non-deadly force was misleading and confusing, because it improperly shifted the focus of the case from appellant's claim of self-defense to the issue of [the victim]'s right to use force. Because [the victim] was not charged with any offense, the question of whether [the victim] was legally justified in using force against appellant was not at issue in this case.”).

The trial court in Oquendo’s case plucked the presumption of an intruder’s malicious intent right out of its unambiguous context of being favorable to the defendant and was then, in turn, confused by what “person” meant. T. 1565-72. There is no reason to think Oquendo’s jury would have been any less disoriented than an experienced trial judge.

And what happened in the instant case is worse than mere confusion. Switching “defendant” and “victim” distracts the jury as to whose violence is at issue. The presumption against Oquendo here operated to completely foreclose his self-defense claim. Simply put, self-defense is legally justifiable violence and as such is antithetical to unlawful violence, so self-defense became impossible for Oquendo once the jury was told it had to presume he had unlawful intent. It is an understatement to say that this misemployed jury instruction granting the State an irrebuttable presumption on the crucial issue of intent lessened the State's burden of proof. It made it virtually impossible for Oquendo to prevail on self-defense, and handed a conviction of some offense (murder or manslaughter) to the State on a silver platter.[40]

Of course, technically the presumption was only triggered if the State proved that Oquendo unlawfully entered Cason's vehicle. But *Hansen v. State*, 898 So. 2d 201, 203 (Fla. 2d DCA 2005), yet another case with an inapplicable and improperly modified self-defense instruction, demonstrates that even conditional statements about victim's rights in self-defense cases prejudice the accused. In *Hansen*, a fight broke out in the victim's home and the dispute at trial centered on whether the defendant or the victim was the initial aggressor. *Id.* at 202-03. Because the battery occurred in the victim's home, the trial court gave a modified form of Fla. Std. Jury Instr. (Crim.) 3.04(d) by changing the word "defendant" to "person." *Id.* at 203. The court instructed:

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[40] Given that the jury explicitly told the Court "[w]e cannot agree on a verdict" [T. 1781], there exists a reasonable probability that the jury compromised on a verdict of manslaughter and would have instead acquitted Oquendo based on self-defense if they had not been required to presume his unlawful intent.

> A person has no duty to retreat when faced with the wrongful entry to his or her home by another person. In that situation, a person has the right to defend his or her home, property, and himself or herself with a reasonable force including force not likely to cause death or great bodily harm.

Id.

The Court in *Hansen* relied on the reasoning in *Butler v. State*, 493 So. 2d 451 (Fla. 1986), and held that in addition to the modified instruction improperly shifting the focus of the case to the victim's right to use force, "[t]he instruction also <u>implied that [the victim] was "faced with the wrongful entry to [her] home" by Hansen, a fact that was disputed at trial and critical to the jury's determination of whether [the victim] was the initial aggressor and whether Hansen was therefore justified in using force to defend himself.</u>" *Id.* 203 (emphasis supplied).

The same reasoning applies here. Whether Oquendo entered Cason's vehicle lawfully (to disarm him), is inextricably intertwined with the question of whether he ultimately shot Cason in self-defense. Just like the instruction in *Hansen*, the predicate "[a] person who unlawfully and by force enters or attempts to enter another's occupied vehicle" implied to Oquendo's jury that Cason had been "faced with the wrongful entry to [his] vehicle" in the first place. *Id.* Standing alone with no other context, this instruction took something out of dispute that was very much in controversy, that is whether Oquendo had a right to go into Cason's vehicle to protect himself from being shot and whether Cason had threatened him to begin with.

To be sure, there is no question in a self-defense case that the victim's behavior often comes under scrutiny and is relevant. But it is not necessary or appropriate to instruct the jury to presume the victim's reasonable fear – or conversely the defendant's malicious intent – for the State to prove that the defendant's use of force was not justified. Instead, the State can meet its burden in at least two other ways. The State can present evidence that the defendant was the initial aggressor. *See 3.6(f) Aggressor* § 776.041(2), Fla. Stat.; *see also Thompson v. State*, 257 So. 3d 573, 581 (Fla. 1st DCA 2018) (giving of initial aggressor exception to use of deadly force jury instruction was justified). Or the State can show that a reasonable person in the defendant's position would not have thought that force was immediately necessary. *See 3.6(f) Aggressor* § 776.012(2) or

776.031(2), Fla. Stat.; *see also Cruz v. State*, 189 So. 3d 822, 827 (Fla. 4th DCA 2015) ("The jury could have reasonably found that the threat to appellant was over when he armed himself with the knife, and that appellant's use of deadly force was not 'necessary to prevent imminent death or great bodily harm.' ").

Oquendo's jury was instructed on both concepts [T. 1739, 1743], so the State had everything it needed to support its argument that Oquendo wasn't legally defending himself, without misusing the presumption of unlawful intent against him. *Stickney v. State*, 237 So. 3d 1022, 1025 n.1 (Fla. 4th DCA 2018) ("The standard instruction on appellant's justifiable use of non-deadly force already instructed the jury on the law of self-defense as applied to an aggressor who initially provoked the use of force against himself, so a separate instruction as to [the victim]'s right to use self-defense was unnecessary and improperly shifted the focus of the case.").

C. This Error was Harmful

Harm can be compounded by the prosecutor's closing argument. *Thomas v. State*, 831 So. 2d 253, 253–54 (Fla. 3d DCA 2002) ("An incorrect jury instruction on the defense of justifiable use of deadly and non-deadly force constitutes fundamental error if there is a reasonable possibility that the instruction may have led to the conviction. … Such an error is compounded where the prosecutor emphasizes the lack of a threat of imminent harm during closing arguments.”).

As further proof this was not harmless error – in addition to the harmless error arguments in Issue I [see pgs. 32-35] – in rebuttal closing argument the State admitted that this was a credibility contest:

> When you think about the facts that are important, the facts the State has to prove, <u>not a whole lot of dispute.</u> <u>The only real dispute, I would submit to you, is the Defendant's version about how it started, as opposed to every other witness,</u> about how it -- how it took place. Right? <u>The only real difference here, is the Defendant claims that the victim had the gun,</u> and they struggled over it, before he took it away and fired multiple times. <u>That's really the only dispute. That narrow fact pattern, right there.</u>

T. 1709-10 (emphasis supplied).[41]

And as for the misused presumption specifically, the State utilized that confusing, misstatement of law to its benefit, telling the

[41] See also T. 1734 (“You have seen the Defendant's incredible testimony in this case, which is not credible, frankly, … ”).

jurors:

> Here's what else I'll tell you. It's not self-defense because the Defense says so. <u>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.</u>
>
> <u>You cannot disarm an individual and then kill that person. That is not self-defense.</u> Don't look at what he said regarding self-defense and think that's the entirety of it. There's a whole lot more to it than that.
>
> So, did he leave something out, when he was talking about self-defense? I'd submit that he did. Here's part of it he didn't tell you – and I want you to rely on the whole thing. The Judge is going to give you the instructions. This is why you've got to look at these things as a whole. Okay?
>
> He went on and on and on, to say the Defendant wasn't committing criminal activity, didn't he? Did the Defendant hit the victim with a pool stick, according to the witnesses? Is that criminal activity, when you strike somebody against their will? Of course.
>
> Well, the law gives you some more instruction on that, <u>and here's the rest of it, that he left out: 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.</u>
>
> What's a presumption? What do we mean by "presume"? That means you should assume it, unless it's overcome by other evidence. You should assume it, right?
>
> <u>So the Defendant going in Mr. Cason's car, you should assume, according to the law, that he was there to do</u>

> <u>violence on that victim.</u> That's what the law says. Not me, not my request. It's not what I want you to believe. That's what the Judge is going to instruct you, about the law. But they want you to believe that the Defendant was not engaged in criminal activity, and that it's self-defense.
>
> So, with that said, I can tell you, 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. Okay?
>
> But, I wanted to make that point, because <u>even if, for some reason, you, as the finder of fact, decided that their version of events were true, he's still guilty, according to the law. He is still guilty.</u> Don't take my word for it. Listen to the law, as a whole. Okay?

T. 1710-12 (emphasis supplied).

The benefit that this misapplied (and therefore unconstitutional) presumption provided the State was compounded by the prosecutor making other misstatements of law to the jury. The prosecutor twice told them that the law does not allow you to defend yourself against someone you have disarmed. T. 1710 ("You cannot disarm an individual and then kill that person. That is not self-defense."); T. 1720 ("He disarmed Mr. Cason. No longer self-defense. When you're armed, and they're not, that's no longer self-defense."). This is of course not true. You could successfully disarm someone, and there could still exist sufficient danger that you would need to shoot them in self-defense, like they were trying to in turn disarm you back. Or, you could disarm someone in self-defense, or be attempting to – just like Oquendo claimed he was – and the gun could go off during that struggle.

Wrestling over a firearm is chaotic and frightening and the stakes couldn't be higher. The State was wrong here to tell the jury that <u>by</u> <u>law</u> disarming an attacker means that you've reached the outer limit of your ability to defend yourself. *See Dwyer v. State*, 743 So. 2d 46, 48-49 n.3 (Fla. 5th DCA 1999) (reversing for new evidentiary hearing in the context of a newly discovered evidence claim in regards to the victim's violent reputation):

> The dissent attempts to isolate the shooting and treat it separately from the entire event. We find it impossible to do so. … The fact that Dwyer alleges he shot Lawson by accident while exercising the right of self-defense does not eliminate the "self-defense against an aggressor" principle. *Williams v. State*, 588 So. 2d 44 (Fla. 1st DCA 1991) (defendant entitled to self defense instruction where defendant alleged that during the course of the altercation in which he was defending another, his knife slipped open and struck victim in the shoulder). The principle continues until some intervening act occurs, such as a departure and return or an unreasonable expiration of time between disarmament and departure, or some other factual

> scenario which makes it no longer reasonable for a jury to conclude that an accident resulted from a justifiable use of force. Here, each side of the altercation vigorously accused the other of being the initial aggressor and disagreed over the course and cause of events that followed.

The prosecutor also told the jury that even if they believed Oquendo, he was still guilty (which was an argument that, without the benefit of the conclusive presumption against Oquendo, would have been a much harder sell):

> So the defense appears to be, in this case: Do not believe your own eyes. Do not believe your own eyes. Do not believe the testimony of the witnesses in this case, <u>only believe the Defendant's testimony -- and even with that, he's still guilty, according to the law</u> -- but that's what they want you to believe. Don't believe anything except the Defendant.

T. 1713-14 (emphasis supplied).

> You have to base the decision entirely on the evidence that's been presented.
>
> And when you do that, and use your common sense, there's really only one outcome. Do you believe the witnesses, that indicated that the Defendant is the one that pulled the firearm and fired it at the victim? <u>Or do you believe the Defendant -- it still would be unlawful, by the way --</u> or do you believe, the Defendant says that the guy, that Mr. Cason pulled the gun out, and he took it away from him, and then fired multiple times. Right?

T. 1719-20 (emphasis supplied).

All of this to say, the prosecution relied pretty heavily on the presumption that Oquendo wasn't acting in self-defense as well as the idea that Oquendo was lying and their witnesses were telling the truth. But there's more to it than that. For example, the prosecutor in *Butler v. State*, 493 So. 2d 451, 453 (Fla. 1986), compounded the jury instruction error by repeatedly telling Butler's jury that even if his testimony was true, he should <u>still</u> be convicted, because the victim had a right to be armed, and consequently Butler had no right to claim self-defense. Similarly, Oquendo's prosecutor argued to his jury that even if the jury believed Oquendo <u>it</u> <u>didn't</u> <u>matter</u> because the moment Oquendo went "in Mr. Cason's car", the jury had to "assume, according to the law" that Oquendo had violent, unlawful intent – i.e. he wasn't defending himself. T. 1711. *See also Keyes v. State*, 804 So. 2d 373, 375 (Fla. 4th DCA 2001) (reversing for new trial where prosecutor improperly told jury Keyes' request for a self-defense instruction was an admission to the crime, despite the lack of a sufficient objection because "[n]evertheless, comments which improperly shift the burden of proof to the defendant present a deprivation of the fundamental right to a fair trial serious enough to require reversal”).

“The yard stick by which jury instructions are measured is clarity, for jurors must understand fully the law that they are expected to apply fairly.” *See Butler*, 493 So. 2d at 452, citing *Perriman v. State*, 731 So. 2d 1243, 1246 (Fla. 1999). Aside from being a misstatement of the law as applied, the instruction effectively negated Oquendo's only defense and relieved the State of its burden of proving beyond a reasonable doubt that Oquendo did not act in self-defense and, therefore, vitiated the fairness of his trial. *See Smith v. State*, 76 So. 3d 379, 387 (Fla. 1st DCA 2011) (holding that an instruction which “gutted” the defendant's key defense was so erroneous as to affect the verdict); *Vowels v. State*, 32 So. 3d 720, 721 (Fla. 5th DCA 2010) (erroneous forcible-felony instruction “led the jury to believe that [the defendant's] theory of self-defense was not available to him”).

It is fundamental error to give an inaccurate and misleading instruction where the effect of that instruction is to negate a defendant's only defense. *Zuniga v. State*, 869 So. 2d 1239, 1240 (Fla.

2d DCA 2004) (fundamental error when the only disputed issue at trial was whether Zuniga acted in self-defense); *Dunnaway v. State*, 883 So. 2d 876, 877-79 (Fla. 4th DCA 2004) (fundamental error where defense to the charge was self-defense; "fundamental error results where an inaccurate and misleading instruction negated a defendant's only defense"); *Carter v. State*, 469 So. 2d 194, 196 (Fla. 2nd DCA 1985); *Davis v. State*, 804 So. 2d 400, 404 (Fla. 4th DCA 2001); *Pollock v. State*, 818 So. 2d 654, 657 (Fla. 3d DCA 2002). So, misleading jury instructions on the defendant's sole defense have been found to be fundamental error, and here, in a case where the error was preserved over and over again, the threshold for reversal (mere harm) is much lower.

If merely distracting the jury from Oquendo's self-defense claim is harmful error, which it is [*see Butler*, 493 So. 2d 453; *Mann*, 135 So. 3d at 456; *Stickney*, 237 So. 3d at 1026; *Hansen*, 898 So. 2d at 204], then there is no way the State can claim that it was harmless to instruct the jury to presume Oquendo wasn't acting in self-defense. It is a lot more likely that Oquendo lost his self-defense claim because of the presumption against him than it was that Butler, Mann, Hansen, or Stickney lost their self-defense claims because their juries got "distracted". Since this Court cannot say beyond a reasonable doubt that the conclusive and irrebuttable presumption that Oquendo had violent and unlawful intent was harmless error, this Court should exercise its jurisdiction and remand for a new trial.

CONCLUSION

Petitioner respectfully requests that the Court hold that trial courts can continue to use discretion on a case-by-case basis as to whether a defendant's PTSD is relevant to his or her self-defense claim, vacate the opinion below which seeks to create a categorical ban on this type of evidence, and grant Petitioner a new trial.

Alternatively, Petitioner requests a new trial be granted based on the trial court violating his due process rights by misinforming the jury about the State's burden of proof.

Respectfully submitted,

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Certificate of Compliance

I certify, as required by Fla. R. App. P. 9.210 (a)(2)(B), this document contains 11,950 words, excluding the parts of the document exempted by Fla. R. App. P. 9.045 (e). I further certify that this document complies with the typeface requirements of Fla. R. App. P. 9.045 (b).

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