

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

REPLY BRIEF ON THE MERITS

Howard L. "Rex" Dimmig, II
Public Defender, 10th Jud. Circuit

Rachel Paige Roebuck (FBN 118886)
Assistant Public Defender
Law Office of the Public Defender
P. O. Box 9000 – Drawer PD
Bartow, FL 33831
(863) 534-4200
rroebuck@pd10.org

Counsel for Petitioner

TABLE OF CONTENTS

Table of Contents i

Table of Citations ii

Argument 1

I. The Relevance of PTSD to Self-Defense Claims Should Be
Determined on a Case-By-Case Basis 1

 A. PTSD can be relevant to Self-Defense and is not
 Diminished Capacity 1

 B. Oquendo should have been allowed to tell his jury
 about his PTSD 8

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 13

 A. This Court should reach the merits 13

 B. Oquendo should prevail on the merits 18

 C. The State is sandbagging 23

Conclusion 25

Certificates of Service and Compliance 26

TABLE OF CITATIONS

Cases

<i>Butler v. State</i> , 493 So. 2d 451 (Fla. 1986)	18
<i>Cantor v. Davis</i> , 489 So. 2d 18 (Fla. 1986)	13
<i>Chestnut v. State</i> , 538 So. 2d 820 (Fla. 1989)	2
<i>Coolen v. State</i> , 696 So. 2d 738 (Fla. 1997)	17
<i>Corn v. Zant</i> , 708 F.2d 549 (11th Cir. 1983)	21
<i>Corona v. State</i> , 64 So. 3d 1232 (Fla. 2011)	15
<i>Doorbal v. State</i> , 983 So. 2d 464 (Fla. 2008)	16
<i>Filomeno v. State</i> , 930 So. 2d 821 (Fla. 5th DCA 2006)	2, 3
<i>Francis v. Franklin</i> , 471 U.S. 307 (1984)	20, 21
<i>Franklin v. State</i> , 275 So. 3d 192 (Fla. 4th DCA 2019)	23
<i>Gunn v. State</i> , 78 Fla. 599 (Fla. 1919)	24
<i>Hammond v. State</i> , 34 So. 3d 58 (Fla. 4th DCA 2010)	17
<i>Jackson v. State</i> , 140 So. 3d 1067 (Fla. 1st DCA 2014)	4
<i>Lynn v. City of Fort Lauderdale</i> , 81 So. 2d 511 (Fla. 1955)	17
<i>Murray v. State</i> , 3 So. 3d 1108 (Fla. 2009)	16
<i>O'Neal v. State</i> , 372 So. 3d 733 (Fla. 2d DCA 2023)	1
<i>Oquendo v. State</i> , 357 So. 3d 214 (Fla. 2d DCA 2023)	<i>passim</i>

<i>Pardo v. State</i> , 596 So. 2d 665 (Fla. 1992)	7
<i>Patterson v. Austin</i> , 728 F.2d 1389 (11th Cir. 1984)	20, 21
<i>Sandstrom v. Montana</i> , 442 U.S. 510 (1979)	20, 21
<i>Sheffield v. Superior Ins. Co.</i> , 800 So. 2d 197 (Fla. 2001)	25
<i>Simmons v. State</i> , 934 So. 2d 1100 (Fla. 2006)	17
<i>Spanakos v. Hawk Sys., Inc.</i> , 362 So. 3d 226 (Fla. 4th DCA 2023)	16, 17
<i>State v. DiGuilio</i> , 491 So. 2d 1129 (Fla. 1986)	11, 23
<i>State v. Hall</i> , 641 So. 2d 403 (Fla. 1994)	19
<i>State v. Lyons</i> , No. 2D23-2358, 2024 WL 3733178 (Fla. 2d DCA Aug. 9, 2024) ..	7
<i>State v. Mizell</i> , 773 So. 2d 618 (Fla. 1st DCA 2000)	<i>passim</i>
<i>State v. Nazario</i> , 726 So. 2d 349 (Fla. 3d DCA 1999)	3
<i>State v. Smith</i> , 573 So. 2d 306 (Fla. 1990)	13, 14
<i>Toledo v. State</i> , 452 So. 2d 661 (Fla. 3d DCA 1984)	5
<i>Wagner v. State</i> , 240 So. 3d 795 (Fla. 1st DCA 2017)	9, 10

Constitutional Provisions, Statutes, Rules, Other Authorities

§ 90.107, Fla. Stat.	4
§ 776.013, Fla. Stat.	18
Fla. Std. Jury Instr. (Crim.) 3.6(f)	22, 23
Fla. Std. Jury Instr. (Crim.) 3.6(p)	4

Lenore E. Walker, <i>Battered Women Syndrome and Self-Defense</i> , 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 327 (1992)	4, 5
---	------

ARGUMENT

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

A. PTSD can be relevant to Self-Defense and is not Diminished Capacity

There should be no question that the Second District's *Oquendo* decision is a categorical ban on PTSD evidence in self-defense cases. The Second District could have said *Oquendo* simply didn't sufficiently prove the probative value of his PTSD. *See O'Neal v. State*, 372 So. 3d 733, 749-50 (Fla. 2d DCA 2023) (holding that notwithstanding *Oquendo*, the expert testimony about PTSD was inadmissible because the expert conceded that she did not have sufficient facts to opine on O'Neal's behavior or state of mind leading up to the murders, did not know how O'Neal physically reacted because she had not interviewed him, and did not review the mental health evaluations performed by other doctors). Instead, it ruled (1) based on statutory interpretation that PTSD was diminished capacity evidence and (2) that it has no relevance to self-defense, and certified conflict with *State v. Mizell*, 773 So. 2d 618 (Fla. 1st DCA 2000), a decision that recognizes the need for a case-by-case determination.

The Second District was wrong on both counts.

First, it mischaracterized state of mind evidence in furtherance of self-defense as diminished capacity and the State now follows suit [AB. 28-29]. But diminished capacity evidence instead concerns defendants who claim they are (or were) incapable of possessing the specified state of mind. *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989). The defendant in *Chestnut* for instance claimed that due to brain damage he did not maintain enough cognitive function to hatch much of any plan, let alone a robbery scheme and disposal of a body. *Id.* at 821.

Contrast that with *Filomeno v. State*, 930 So. 2d 821 (Fla. 5th DCA 2006), where the court considered whether expert testimony on the “fight-or-flight” response should have been admitted at trial to support the defendant’s self-defense claim. The psychologist in that case would have testified to the “fight or flight” response itself, and that Filomeno’s “perceptions of danger were both logical and reasonable.” *Id.* at 822. The court distinguished the purpose of this testimony from improper diminished capacity evidence:

Contrary to the State’s argument, Filomeno’s theory of self-defense was not that of diminished capacity. Filomeno never contended that his acts were involuntary, or that he could not form the requisite intent to commit the crime charged. Rather, he contended that the proffered evidence was relevant to help the jury understand his state-of-mind, a relevant inquiry on the question of self-defense. ... We conclude that the psychologist could have been permitted to testify about the characteristics of the “fight or flight” response if the trial court concluded that such testimony would have aided the jury in understanding the reasonableness of Filomeno’s belief that he was in mortal danger.

Id. at 822-823 (emphasis supplied).

The voluntary / involuntary distinction is important. *See State v. Nazario*, 726 So. 2d 349 (Fla. 3d DCA 1999), a factually similar case supporting the proposition that PTSD evidence is inadmissible on the question of self-defense where the expert testified that the defendant’s fight or flight syndrome precluded him from forming an intent to kill and caused him to kill out of an involuntary survival instinct. *Id.* at 350. In *Nazario*, PTSD was used as the entire explanation for the defendant's actions and, therefore, ran afoul of Florida law regarding using mental state to justify or explain criminal conduct. *Id.*

So, *Mizell* as well as these other cases indicate that there are

situations where PTSD evidence may be admissible when offered to support the genuineness or reasonableness of a defendant's self-defense claim, and there are other situations (like a claim of complete involuntariness) when it is not. And in cases where PTSD evidence is admitted, a limiting instruction informing the jury that the expert testimony does not tend to prove lack of specific intent but rather is relevant to establish a particular defense – such as 3.6(p) – might be proper. *See Jackson v. State*, 140 So. 3d 1067, 1069 (Fla. 1st DCA 2014) (limiting instruction in similar crime evidence context). *See also* § 90.107, Florida Statutes (“When evidence that is admissible as to one party or for one purpose, but inadmissible as to another party or for another purpose, is admitted, the court, upon request, shall restrict such evidence to its proper scope and so inform the jury at the time it is admitted.”).

Dr. Lenore E. Walker, an expert in gender violence, who coined the term 'Battered Woman Syndrome' disagrees with the State's characterization that BSS is sufficiently distinguished from PTSD [AB. 25-28]. Rather, Dr. Walker writes “Battered Woman Syndrome is considered a sub-category of the generic Post Traumatic Stress

Disorder”. Lenore E. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 327 (1992). And presenting a battered spouse’s case to a jury requires detailing the same kinds of cognitive disturbances, high-arousal symptoms, and high-avoidance symptoms in the PTSD diagnostic criteria. *Id.* at 327-28.

Also, the State claims that BSS has only ever been admitted when the victim was the abuser [AB. 26], but the State cited no Florida authority for that point so it’s unclear whether that assertion is categorically true¹, and even if true, the same abuser turned victim dynamic could exist in a PTSD case (for example, a child kills an abusive parent).

¹ See *Toledo v. State*, 452 So. 2d 661, 663 n. 1 (Fla. 3d DCA 1984) (“The State suggests that the admissibility of evidence of prior assaults is limited to prior assaults committed by the very same persons who are alleged to be the victims of the offense for which the defendant is being tried. Of course, such testimony, as well as testimony concerning a victim's known reputation for violent conduct and specific prior acts of violence committed by a victim and known to the defendant, is admissible, ... [h]owever, this rule of admissibility is merely an exception to the rule that evidence of the character of the victim is ordinarily irrelevant, ... and does not purport to define the outer limits of relevancy where a self-defense claim is made.”) (internal citations omitted).

As for the question of whether PTSD can be relevant to self-defense, the Second District mistakenly thought the only way to use PTSD in self-defense cases is to make an excuse for unreasonable behavior. Oquendo's Initial Brief pgs. 13-30 provides a multitude of examples of perfectly acceptable uses of PTSD and its symptomology to explain the defendant's fear.

And the State's argument that Oquendo waived any or all of those points [AB. 17-21] is unpersuasive. When Oquendo was at the trial level and when he was briefing in the Second District the issue was straightforward – the trial court failed to follow *Mizell* as it applied to Oquendo. To that end, Oquendo presented proffered testimony that (1) he had PTSD prior to the shooting [R. 475-76, 482-89], (2) the basis of the PTSD was that he had previously witnessed three murders and personally been violently mugged and kidnapped [R. 476-77], and (3) PTSD can cause the instinct for survival to remain elevated [R. 490-91]. Oquendo's attorney then proffered for the trial court the intended use: to explain how PTSD could have impacted Oquendo's perceptions, reactions, and decision-making [R. 506, 599, 604]. Oquendo's attorney made it clear that they were not

planning to use PTSD evidence as diminished capacity [R. 603] or to negate specific intent [R. 604], and distinguished Oquendo's case from cases where the defense was pure accident [R. 608-09].

It is sufficiently clear from Oquendo's proffer that he intended the testimony of the excluded witness to be confined by the safeguards in *Mizell* (which was binding law at the time)² if he raised the issue of self-defense at trial, which his attorney told the judge he would do [R. 506], and which he ultimately did.

Now that *Mizell's* framework of a case-by-case admissibility determination has been called into question altogether, the briefing is necessarily more robust since this Court is now considering the admissibility of PTSD not just in Oquendo's case but in all self-defense cases. If this Court writes anything short of an opinion that clarifies when you can and can't use PTSD in furtherance of self-defense then the conflict of which opinion is right – *Oquendo* (holding PTSD evidence is banned in self-defense cases no matter what) or

² See *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) (“district court decisions bind all Florida trial courts”), and *State v. Lyons*, No. 2D23-2358, 2024 WL 3733178, at *3 (Fla. 2d DCA Aug. 9, 2024) (“The law at the time the trial court rendered its decision was clear ... ”)

Mizell (holding that it depends) – will remain unresolved. To settle this, the full spectrum of potential uses for PTSD needs to be examined. It is Counsel’s job to assist this Court with that task and she has tried her utmost to do so.

The State’s policy argument that continuing to follow *Mizell* would “have the effect of acquitting the defendant and releasing him to commit the same catastrophic mistakes” [AB. 29] falls flat. The State did not present any proof that PTSD evidence has had such an effect on Florida juries in the twenty-four years since – or even before – *Mizell*. If PTSD evidence is allowed in some self-defense cases, where appropriate, jurors will still be just as free as they always have been to accept, reject, or disregard it.

B. Oquendo should have been allowed to tell his jury about his PTSD

In a bid to avoid the harm done here, the State refuses to admit this was even a self-defense case at all, despite Oquendo testifying to that effect several times. T. 1321-23, 1323-24, 1434-36, 1437-39, 1444, 1447-48, 1469. The record also reflects Oquendo’s attorney spent five pages of his closing argument discussing the self-defense

jury instructions. T. 1700-05. And he made several specific declarations of self-defense. T. 1657 (“this is a self-defense case”); T. 1698 (“Mr. Oquendo is fighting for what he believes is his life.”); T. 1701 (“he had reason to believe that he was in imminent death or great bodily harm; somebody is putting a gun to your face.”); T. 1703 (“So he had every right to do and react exactly as he did.”); and T. 1705 (“He had every right to defend himself”).

The State points to *Wagner v. State*, 240 So. 3d 795, 796 (Fla. 1st DCA 2017) [AB. 31], to no avail. Wagner’s sole defense to the actual discharge of the gun was that it was an accident rather than self-defense. *Id.* at 796-98. Oquendo testified that while the men were fighting over the gun it went off and he was not sure who shot it because both men were struggling over it. T. 1320-22. At some point he is positive the gun was in his hand [T. 1321-22] but he was scared Cason – who was still alive and struggling with him – would get the gun back. T. 1322. Oquendo’s fear that Cason was trying to shoot him, and potentially hurt him with his car, were happening contemporaneously. Oquendo testified that the car began moving while Cason was still alive, and the men were still fighting over the

gun. T. 1327. Oquendo then shot in self-defense. T. 1323-24. So, just because Oquendo is unsure who caused the gun to go off the first time, he was firm that he shot the gun after that.

Based on both medical examiner testimony and crime scene evidence, a few things are clear: (1) multiple shots were fired at the scene, (2) Cason was killed by a single gunshot, and (3) because of the wound trajectory being front to back, whichever bullet killed Cason hit him while Oquendo was either inside the car or at his car window. However, it appears impossible to know at this point exactly how many shots went off at the car window or inside the car. And it is also impossible to know which bullet in this sequence hit Cason.

So, Oquendo – who didn't know which shot killed Cason – presented two possibilities: either the fatal shot was when he had sole control over the gun and intended to shoot to save his own life or it was when the men were struggling over the gun and Oquendo was trying to get control of the gun to do the same. This is different from a defendant like Wagner who offers only an accident theory.

This Court cannot say beyond a reasonable doubt that the exclusion of Oquendo's PTSD did not affect the verdict, so the error is

by definition harmful. *State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). Even the State’s “a hundred percent positive” eyewitness [AB. 5] had been drinking [T. 658-59] and didn’t see where the gun came from [T. 681-82]. No one saw the full picture of what happened at the car window because no one else was standing right there. This is not a case where the evidence disproving self-defense is anywhere approaching overwhelming. And overwhelming evidence isn’t even the test. *Id.*

Given the *DiGuilio* standard, the question should be: Did the State benefit from anything at trial that PTSD could have explained? When the prosecutor was cross-examining Oquendo, he characterized Oquendo in front of the jury as angry on the witness stand. T. 1441. The alternative explanation PTSD provides for this is in the Initial Brief pgs. 24-26. In closing argument, the State said Oquendo’s flight was proof of his guilt [T. 1622-23]. Generally speaking, PTSD could have provided an alternative explanation [see Initial Brief pgs. 26-27], and at the pretrial proffer Dr. Toomer also specifically said PTSD causes survival instincts to remain elevated. T. 490-91. The State said Oquendo’s inability to recall details of the

shooting meant he was intentionally being evasive [T. 1714-15] and that all of this meant his testimony was not credible [T. 1734]. The Initial Brief pgs. 27-31 explains that PTSD could have given the jurors an alternative to automatically discrediting Oquendo simply because he does not recall every detail of the event perfectly.

And the harm increases when Issues I and II are considered together. Even if this Court does not resolve Issue II, this Court shouldn't ignore that Oquendo's PTSD was kept from his jury in a case where they were also wrongly told to presume his criminal intent. The weight and impact of the errors together seriously prejudiced Oquendo's right to a fair trial. Justice mandates a new trial in which Oquendo is allowed to fully present his defense to a new jury equipped with the right jury instructions and the insight it needs to reach a just verdict.

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

A. This Court should reach the merits

Just because this Court often declines to address issues outside the scope of the certified question doesn't mean it has to. *Cantor v. Davis*, 489 So. 2d 18, 20 (Fla. 1986) ("Once this Court has jurisdiction, however, it may, at its discretion, consider any issue affecting the case."). And this Constitutional violation was bad enough that what this Court frequently does should not be the guiding principle.

In *State v. Smith*, 573 So. 2d 306, 312 (Fla. 1990), the Second District reversed Smith's conviction and remanded for a new trial, certifying two questions, one regarding what version of the jury instructions on excusable homicide should have been used and the other regarding whether fundamental error occurred if the wrong version was given to the jury. *Id.* at 309. The State petitioned this Court to disapprove of the Second District's answers to the certified questions. Smith then filed a cross-petition "alleging a series of

additional errors.” *Id.*

This Court’s *Smith* opinion ultimately held that as to the certified questions no reversible error had occurred. But its review “[did] not end there”. *Id.* 312. This Court also answered five other unrelated issues raised by Smith, one about the court calling its own witness [*id.* at 312-13], another about the court showing that witness gruesome autopsy photographs [*id.* at 313], another about a prosecution witness’ prior inconsistent statement [*id.* at 313-16], yet another alleging that the prosecutor violated Smith’s constitutional right to silence [*id.* at 316-17], and finally a claim that Smith was barred from presenting testimony about specific acts of violence allegedly committed by the victim in support of Smith’s self-defense claim [*id.* at 318].

Why? This Court said simply “because we find merit in Smith's cross-petition in which he claims the district court failed to find other errors that deprived him of a fair trial.” *Id.* at 312.

So especially if this Court does not find reversible error in Issue I, review of whether Oquendo received a fair trial should not end there.

And as far as preservation goes, Oquendo raised the same ground at trial that he did on appeal. During the charge conference, trial counsel objected multiple times on the grounds that the presumption was from the defendant's perspective not the victim's, and using it against the defendant was taking it out of the context that the Legislature intended and was confusing to the jury. T. 1566-75, 1592-93, 1736.

The State quibbles with Oquendo's word choice at trial and in his Second District briefs, arguing that he waived much of the support for his arguments detailed in his Initial Brief to this Court because although he used the word "presumption" what he should have said – according to the State – was that the "mandatory presumption" had "shifted the burden". AB. 39. It is unclear to Counsel what a presumption does other than shift the burden. A presumption moves the goalpost (or burden) closer to the party it favors. If the question of waiver is to be determined by whether the terms "presumption" and "burden shifting" are synonymous enough, Oquendo should prevail. *See Corona v. State*, 64 So. 3d 1232, 1242 (Fla. 2011) ("[W]e do not interpret our precedent as imposing a

requirement that a defendant intone special “magic words” in order to preserve this constitutional claim.”); *Murray v. State*, 3 So. 3d 1108, 1117 (Fla. 2009) (“While no magic words are needed to make a proper objection, the articulated concern must be ‘sufficiently specific to inform the court of the perceived error.’”).

The State basically complains that counsel has elaborated on previously raised grounds in briefing to this Court. But what really is the point of an appeal? To elaborate of course. To provide additional support for arguments made below. *See Doorbal v. State*, 983 So. 2d 464, 482 (Fla. 2008). Counsel admits to providing such support to this Court, but the ground complained of now is the same as it was at Oquendo’s trial and at the Second District – that the presumption intended to aid him instead was used against him to presume his unlawful intent. Nothing has changed.

And this issue was sufficiently briefed to the Second District. There are many examples of what insufficient briefing truly looks like in the cases the State cites in its Answer Brief: *Spanakos v. Hawk Sys., Inc.*, 362 So. 3d 226, 245 (Fla. 4th DCA 2023) (“In one sentence, Spanakos attacks the award of an expert witness fee without making

any legal argument.”); *Hammond v. State*, 34 So. 3d 58, 59 (Fla. 4th DCA 2010) (“In one sentence, he concludes, without explanation, that the court erred ...”); *Lynn v. City of Fort Lauderdale*, 81 So. 2d 511, 513 (Fla. 1955) (“In respect to this question the appellant fails to cite a single authority or advance a single argument to support her position in regard to the issue.”); *Simmons v. State*, 934 So. 2d 1100, 1118 (Fla. 2006) (“Simmons' brief states that arguments made at the trial court level regarding Simmons' motion to suppress are incorporated by reference into his brief on this appeal.”); *Coolen v. State*, 696 So. 2d 738, 742 (Fla. 1997) (“In a footnote in his brief, Coolen notes two other statements that he contends should have been deleted from the tape.”). (Emphasis supplied.)

Contrast that with what Oquendo filed below. Issue II was not a bare-bones, conclusory allegation. Oquendo explained what the constitutional error was and applied the facts of his case to the legal claim. See Cert. Copies of App'l Pprs. 50. The substance of Oquendo's Issue II to the Second District is a clear argument explaining that the trial court erred by instructing the jury to presume his unlawful intent. To argue that the Second District wasn't on notice about what

the alleged error was is disingenuous because Oquendo's brief acquainted the Second District with the material facts and the points of law involved.

B. Oquendo should prevail on the merits

The bottom line is *Butler v. State*, 493 So. 2d 451, 453 (Fla. 1986), told trial courts not to shift focus from the defendant's perspective to the victim's. It corrupts the proper rubric and confuses jurors. *Id.* And the State's attempt to use principles of statutory interpretation [AB. 42] to convince this Court that the Legislature simply doesn't care who uses this presumption is baseless. Because although the Legislature amended our self-defense laws many times since *Butler*, including the creation of the specific presumption in § 776.013 at issue here, none of that legislation disturbed the holding in *Butler*.

So, the State is wrong to claim that the Florida's Legislature has to "specif[y] that the presumption exists only in cases where the defendant was the owner or resident of the dwelling or occupied vehicle" in order for us to know for sure that the presumption is only intended to be used in favor of the accused. AB. 42. To the contrary,

courts should assume the Legislature's inaction means its statutory intent is in harmony with the judiciary's interpretation. *See State v. Hall*, 641 So. 2d 403, 405 (Fla. 1994) ("Because the legislature has failed to make any substantive changes to the pertinent statutory language, we must assume that it has no quarrel" with this Court's interpretation of the statute.).

Ultimately, the State banks on the fact that the jury was also instructed on reasonable doubt [AB. 44] and that the balance of the self-defense instructions enabled the jurors to acquit Oquendo if that's what they truly wanted to do [AB. 44-45]. First of all, Oquendo's jury didn't even completely understand critical portions of the general instructions as indicated by one of their five questions during deliberations asking for clarification on the definition of reasonable doubt. R. 651.

And, even when presumed understood by the jury, standard instructions as to the prosecution's burden and the defendant's presumption of innocence do not dissipate this type of error:

[G]eneral instructions on the State's burden of persuasion and the defendant's presumption of innocence are not "rhetorically inconsistent with a conclusive or burden-

shifting presumption,” because “[t]he jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied.”

Francis v. Franklin, 471 U.S. 307, 319 (1990), citing *Sandstrom v. Montana*, 442 U.S. 510, 518-19 n. 7 (1990) (emphasis supplied).

So, in light of the instructions on intent given in this case, a reasonable juror could have thought that, although unlawful intent must be proved beyond a reasonable doubt, proof of Oquendo’s entry or attempted entry into Cason’s car constituted proof of intent beyond a reasonable doubt unless Oquendo persuaded the jury otherwise. See *Franklin*, at 320. And Oquendo’s jury was never specifically told elsewhere in its instructions that Oquendo’s criminal intent should in fact not be presumed. So, even if the jurors believed that the rest of the self-defense instructions or any other instruction conflicted with the presumption against Oquendo, “it would be impossible for [this Court] to tell which one they decided to apply, or whether they applied something in between.” *Patterson v. Austin*, 728 F.2d 1389, 1394 (11th Cir. 1984).

The only way the charge as a whole could have cured the instruction would have been to explain by what quantum of

evidence the defendant must rebut the presumption. If no instruction is given expressly to explain or limit an instruction that otherwise impermissibly shifts the burden of persuasion under *Sandstrom*, we inevitably face a situation where the reasonable juror could conclude from either one impermissible shift or several conflicting presumptions, some of which are impermissible, that the burden has shifted.

Id. at 1394-95.

Compare with Corn v. Zant, 708 F.2d 549, 558 (11th Cir. 1983) (holding challenged instruction did not impermissibly shift the burden based on the context of the overall instructions given that Corn's jury was specifically told that the accused may but was not required to show circumstances to negate intent, and that the burden was not on the defendant to disprove intention).

The State thinks that any reasonable jury would have acquitted Oquendo if they believed his version of events. AB. 44-45, 51. But even if the jurors thought Cason produced the gun, the burden-shifting presumption still may have confused them. Just like in *Franklin*, Oquendo's unlawful intent was presumed from an uncontested fact – that he entered or attempted to enter Cason's car.

The presumption could have been triggered when Oquendo tried to get into Cason's car (an attempt to enter someone else's car could certainly be interpreted as both "unlawful" and "forceful" by jurors) or when the argument at the car window began (the jurors could have thought any entry Oquendo made past the threshold of the car window was "unlawful" and "forceful"). At that point, even if the jurors believed that the gun was Cason's, they could have thought that Oquendo's presumed "intent to commit an unlawful act [of] violence" meant that Oquendo was the "initial aggressor" or that he was "otherwise engaged in criminal activity".

And although the initial aggressor instruction still allows for a defendant to use deadly force if he tries to withdraw from the fight (Oquendo tried explaining his mistake) and the victim re-engages with a threat (the gun), *see Fla. Std. Jury Instr. (Crim.) 3.6 (f)*, the erroneous presumption, however, had no explanation about how Oquendo could have rebutted the unlawful intent achieved by his entry or attempted entry into the vehicle or how much rebuttal would have overcome the presumption. Additionally, the presumption that Oquendo had "intent to commit an unlawful act [of] violence" could have worked in concert

with the “otherwise engaged in criminal activity” instruction in 3.6(f) to cause the jury to think it was required to find Oquendo had a duty to retreat when it otherwise would have made no such finding.

In a self-defense case – where the defendant’s intent is relevant throughout the encounter and inextricably linked with his or her fear – it’s unacceptable to lower the State’s burden to prove the defendant’s criminal intent at any point, whether in the beginning, middle, or end of the fight. Since once the jury applied the presumption of unlawful intent against Oquendo there is no telling when or how he could have recovered from it, the State cannot prove beyond a reasonable doubt that it had no impact on the guilty verdict. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

C. The State is sandbagging

In a move as unsurprising as it is dismaying, the State claims even if this burden-shifting instruction was error, it’s not one the State benefitted from at trial. AB. 47-51. In other words, the State now takes on appeal the polar opposite position it took below. But if Florida law does not allow the defense to take advantage of erroneous jury instructions, *see Franklin v. State*, 275 So. 3d 192, 195 (Fla. 4th

DCA 2019), what gives the State the right to invite such error?

The prosecutor successfully argued for the presumption during the charge conference. T. 1566-72.³ He told the trial court he wanted the presumption included in the instructions so that he could argue that the victim has the right to defend himself in closing argument. T. 1570. Then the prosecutor in his rebuttal closing argued that the defense was hiding this presumption from the jurors, saying in response to defense counsel's closing: "the law gives you some more instruction on that, and here's the rest of it, that he left out" before reading the jury the improper burden-shifting instruction. T. 1711 (emphasis supplied).

Clearly the prosecutor, in arguing for the presumption, and the trial court, in including it in the jury instructions, considered it helpful in guiding the jury on the issue of intent. "Who can say that [it] ... did not and could not have the effect that the state's attorney intended?" *Gunn v. State*, 78 Fla. 599, 604-05 (Fla. 1919).

³ See T. 1568 ("[I]f the victim is in his car and the defendant is poking him in his occupied vehicle with a stick or his hand, he is forcibly entering the victim's vehicle. The victim has the right to defend himself.").

The State got what it wanted below, an erroneous jury instruction it hoped would help put Oquendo in prison. It cannot make a U-turn now and claim it had no impact on his guilty verdict. *See Sheffield v. Superior Ins. Co.*, 800 So. 2d 197, 202 (Fla. 2001) (“A party may not make or invite error at trial and then take advantage of the error on appeal.”).

Conclusion

Ultimately, the combined impact of the errors in Issues I and II was a one-two punch: (1) exclude evidence of his state-of-mind, and (2) presume his state-of-mind. This conviction cannot stand.

Respectfully submitted,



RACHEL PAIGE ROEBUCK (FBN 118886)
Assistant Public Defender

HOWARD L. “REX” DIMMIG, II
Public Defender, 10th Jud. Circuit
Law Office of the Public Defender
P. O. Box 9000 – Drawer PD
Bartow, FL 33831
(863) 534-4200
rroebuck@pd10.org

Counsel for Petitioner

Certificate of Service

I hereby certify that a copy of the foregoing was served via the e-filing portal to the following this 15th day of August 2024:

Laurie Benoit-Knox
Senior Assistant Attorney General
laurie.benoit-knox@myfloridalegal.com

Marilyn Frances Muir
Chief Assistant Attorney General
marilyn.muir@myfloridalegal.com

Office of the Attorney General
CrimappTPA@myfloridalegal.com



RACHEL PAIGE ROEBUCK (FBN 118886)
Assistant Public Defender

Certificate of Compliance

I certify, as required by Fla. R. App. P. 9.210(a)(2)(B), this document contains 4,943 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).



RACHEL PAIGE ROEBUCK (FBN 118886)
Assistant Public Defender