IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

EDDIE RILEY,

Respondent.

CASE NO.: SC08-2116

LOWER CASE NO.: 1D08-0802

RESPONDENT'S ANSWER BRIEF

On Discretionary Review from the
First District Court of Appeal:
Certified Question of Public Importance

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PRELIMINARY STATEMENT

The Respondent, Eddie Lee Riley, will utilize the same abbreviations as Petitioner: "Respondent" for Eddie Lee Riley and "Petitioner," or the "State" for the State of Florida. Respondent's understanding is that the record on appeal consists of three volumes, consecutively marked by pages. Respondent uses the citation form of "(R. ___)," which should serve to identify the appropriate page number of the record, regardless of which of the three volumes contains the referenced page.

STATEMENT OF THE CASE AND FACTS

The Respondent supplements the Statement of the Case and Facts as set forth in the Initial Brief as follows:

Respondent gave a statement to law enforcement, but that statement was not admitted at trial (R. 59). Respondent's statement to law enforcement was the subject of a motion to suppress, including because Respondent claimed his statements to law enforcement were obtained in violation of right to counsel and his privilege against self-incrimination guaranteed by the Fifth and Sixth Amendments and the Due Process Clause of the Fourteenth Amendment to the United States Constitution as interpreted by the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966). (R. 51). In addition to other aspects of this motion to suppress,

Respondent specifically argued that he was not advised of his rights pursuant to *Miranda,* and that any waiver was not freely, intelligently, and voluntarily made. (R. 51). While the detectives procured a written *Miranda* waiver from Respondent at some point, the tape recorder that captured Respondent's statement "malfunctioned" and omitted the beginning minutes of the interview, when the detectives purportedly read Respondent his *Miranda* rights. (R. 54).

Respondent gave testimony at trial and denied the State's characterization of the acts alleged. (R. 67). Respondent did not present or suggest a defense of consent.

SUMMARY OF ARGUMENT

The only question before this Court is the question certified as one of great public interest by the majority of the First District Court of Appeal in its decision below. That question asks whether this Court's reasoning in *Galindez v. State*, 955 So. 2d 517 (Fla. 2007) overrules *State v. Abreau*, 363 So. 2d 1063 (Fla. 1978), such that the appropriate standard of review of a trial court's refusal to instruct a jury on the next lesser-included offense should cease being *per se* error and instead assume a harmless error analysis. This Court should answer the certified question in the negative.

The factual premises and legal reasoning of *Galindez* are remote to the limited circumstances of *Abreau* and this case. For this Court to bridge the gap between *Galindez* and *Abreau* in the context of reviewing this certified question, this Court would have to expand the ruling of *Galindez* – not merely apply it. Such an expansion of *Galindez* through and in this case is not warranted and the decision would be misapplied. Indeed, Petitioner makes only the slightest argument based on *Galindez*, seemingly conceding that the reasoning does not overrule *Abreau*. Rather, Petitioner's arguments prompt this Court to overrule *Abreau* based on purportedly analogous cases – none of which regard the narrow circumstances of *Abreau*.

Even if this Court disagrees and finds that *Galindez* does present applicable reasoning, Petitioner fails to meet its burden in demonstrating to this Court that the three-prong test for receding from precedent is met. Each of the three questions comprising that test militates in favor of preserving the 30-plus years of *Abreau*'s precedent. The doctrine of *stare decisis* is not readily compromised by this Court. Here, the conditions for breaking with a precedent as rooted and long-standing as *Abreau* are absent.

Additionally, this Court exercises considerable restraint when reviewing a certified question. The scope of the Court's review is generally limited to the express question, to the exclusion of other issues submitted by aggressive petitioners or matters that are not germane to the express question.

Moreover, given the strength of *Abreau* as precedent, and the Petitioner's failure to demonstrate the requisite bases for receding from that precedent, this Court should reconsider its review of this case and discharge jurisdiction over this matter.

STANDARD OF REVIEW

Generally, where this Court reviews a pure issue of law presented through a certified question from a district court, the standard of review is *de novo*. *Insko v. State*, 969 So. 2d 992, 997 (Fla. 2007). But that standard does not apply in this narrow instance. The Court's standard of review applicable to this particular certified question is the Court's own test for receding from precedent, or what will be referred to herein as the *stare decisis* standard.

In this case, the certified question posed by the First District Court of Appeal does not regard an unsettled point of law or a legal ruling by a lower court, but rather questions whether this Court has constructively overruled its decision in *State v. Abreau*, 363 So. 2d 1063 (Fla. 1978).[1] More

[1] In the majority's opinion, the First District Court of Appeal acknowledged:

> A large portion of our analysis is predicated upon the supreme court's holding in *State v. Abreau*, 363 So. 2d 1063 (Fla. 1978), that the court's failure to instruct on an offense one step removed from the charged offense constitutes *per se* reversible error. In light of recent supreme court precedent, however, it is unclear whether the reasoning behind this precedent is still valid. We, therefore, also certify a question of great public importance concerning the continuing validity of the holding in *Abreau*.

specifically, the First District Court of Appeal questions whether this Court's decision in *Galindez v. State*, 955 So. 2d 517 (Fla. 2007), overruled *Abreau* such that this Court has substituted a different standard of review to be applied in instances where a court refuses to instruct a jury on the next lesser included offense. *Riley*, 2008 Fla. App. LEXIS 16428, *8.

For this Court to answer the certified question in the affirmative, it must expressly overrule *Abreau*, as well as the line of cases that precede, found, and inform the decision and the thirty-plus years' worth of decisions that have relied upon that opinion.

As the certified question calls this Court's binding precedent into question, this Court must regard the doctrine of *stare decisis* and consider this Court's own proscriptions against and conditions for breaking with long-standing precedent. *See State v. Whitby*, 975 So. 2d 1124, 1125 (Fla. 2008) (Pariente, J., concurring) (concurring with decision to deny review and discharge jurisdiction over case as there was no basis to recede from the Court's precedent).

This Court has stated time and again that it is committed to the doctrine of *stare decisis*. *Strand v. Escambia County*, 992 So. 2d 150, 159-160 (Fla. 2008) (citing *N. Fla. Women's Health & Counseling Servs., Inc. v.*

Riley v. State, 33 Fla. L. Weekly D 2481, 2008 Fla. App. LEXIS 16428, *1-2 (Fla. 1st DCA Oct. 22, 2008).

State, 866 So. 2d 612, 637 (Fla. 2003)). The "doctrine of *stare decisis*, or the obligation of a court to abide by its own precedent, is grounded on the need for stability in the law and has been a fundamental tenet of Anglo-American jurisprudence for centuries." *Id*. The doctrine was memorialized by this Court a century and a half ago in *Tyson v. Mattair*, 8 Fla. 107 (Fla. 1858). *Strand*, 992 So. 2d at 159. *See also Valdes v. State*, 34 Fla. L. Weekly S 116, 2009 Fla. LEXIS 148 (Fla. Jan. 30, 2009) (directing that "*stare decisis* counsels us to follow our precedents unless there has been a significant change in circumstances after the adoption of the legal rule, or … an error in legal analysis.") (internal quotations omitted) (citing *Rotemi Realty, Inc. v. Act Realty Co.*, 911 So. 2d 1181, 1188 (Fla. 2005) (quoting *Dorsey v. State*, 868 So. 2d 1192, 1199 (Fla. 2003))).

In order to recede from precedent, this Court must satisfy itself that an inclusive, three-prong test has been satisfied. *Strand*, 992 So. 2d at 159. In so doing, this Court "set[s] forth the questions to be considered when asked to recede from precedent, expressly stating that the presumption in favor of precedent is strong." *Id*. The questions to be asked are as follows:

> (1) Has the prior decision proved unworkable due to reliance on an impractical legal "fiction"?
>
> (2) Can the rule of law announced in the decision be reversed without serious injustice to those who

> have relied on it and without serious disruption in the stability of the law?
>
> And:
>
> (3) Have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification?

Id. (citing *N. Fla. Women's Health*, 866 So. 2d at 637).

The burden falls upon the petitioner seeking a break with precedent to present evidence that the prior decision has proved unworkable due to reliance on an impractical legal "fiction." *See Strand*, 992 So. 2d at 159 (declining to recede from precedent and finding that the Court had "not been presented with evidence showing that the [prior] decision has proven unworkable due to reliance on a legal fiction").

Without satisfying itself that these questions have been answered in the affirmative, this Court cannot overrule or recede from *Abreau*. *See id*.

Consequently, any consideration of whether *Abreau* has been constructively overruled or not requires this Court to engage in *stare decisis* review. Only after determining whether this Court has constructively overruled *Abreau* can the Court then answer the certified question. For these reasons, the proper standard of review for the Court with regard to this

narrow scenario and for this particular certified question is this Court's *stare decisis* standard.

ISSUE PRESENTED

The sole issue on appeal is the question certified by the First District Court of Appeal:

> BASED ON THE REASONING OF *GALINDEZ V. STATE*, 955 SO. 2D 517 (FLA. 2007), MAY A COURT FIND THAT THE FAILURE TO INSTRUCT THE JURY ON THE NEXT LESSER INCLUDED OFFENSE CONSTITUTES HARMLESS ERROR?

Riley, 2008 Fla. App. LEXIS 16428, *8. For the reasons and authority set forth below, this Court should either answer the question in the negative or decline to answer the certified question and discharge jurisdiction.

ARGUMENT

I. THE REASONING OF *GALINDEZ V. STATE* DOES NOT EXTEND TO THIS CASE OR *ABREAU*, AND THEREFORE THE DECISION DOES NOT DISTURB THE STANDARD OF REVIEW ESTABLISHED BY PRECEDENT OF THIS COURT.

This Court should answer the certified question in the negative because *Galindez* does not disturb the standard of review established by precedent of this Court, including in the *Abreau* decision. First, *Galindez* does not expressly or indirectly regard the standard of review for the limited

scenario shared by this case and *Abreau*. Further, a careful review of *Galindez* demonstrates that the case is both factually and rationally remote from the narrow circumstances shared by this case and *Abreau*. To answer the certified question in the affirmative would require this Court to boldly extend the ruling of *Galindez* in its reasoning and beyond the rationale for its facts. Second, because *Abreau* is controlling law, to answer the certified question in the affirmative, this Court must find that *Galindez* meets the *stare decisis* standard that would permit this Court to break with its precedent in *Abreau*.

A. The reasoning and facts of *Galindez* are so remote from the narrow circumstances of both this case and *Abreau* that the decision would be misapplied here.

Both the ruling and reasoning of *Galindez* would be misapplied here. That appeal reached this Court on a claim of error relating sentencing. 955 So. 2d at 523. More specifically, *Galindez* stands for the proposition that where a defendant admits to having sexual intercourse over a period of months with a victim and defends on the basis of consent, the appellate court can apply the harmless error standard to find that no rational jury could find that the defendant did not sexually penetrate that victim – who, incidentally, was pregnant by the defendant at the time of trial and gave testimony affirming the defendant's admissions. 955 So. 2d at 524.

Essentially, the defendant complained that the jury did not make a specific finding of the element of sexual penetration in relation to the conviction on the counts for lewd and lascivious assault on a minor and child abuse by impregnation. *Id*. at 519-20. As such, he complained, the sentencing scoresheet improperly factored in penetration – presumed by the trial court – and extended his sentence and violated his rights, including this Sixth Amendment rights. *Id*. This Court determined the pertinent issue was "whether the record demonstrates beyond a reasonable doubt that a rational jury would have found penetration." *Id*. at 523. In contradistinction to this case, Galindez's confession – that he had repeatedly engaged in sexual intercourse with the victim over several months – was admitted at trial. *Id*.

The facts of *Galindez* are, by large measure, unique and profoundly distinguishable from this case. This Court's ruling in *Galindez* depended on these incredible facts, and this Court should exercise caution in extending the ruling to cases such as this one, where the facts give rise to sharp points of distinction. Here, Respondent gave a statement to law enforcement, but that statement was not admitted at trial. (R. 59). Further, Respondent denied the State's characterization of the acts alleged at trial. (R. 67). Finally, Respondent did not present or suggest a defense of consent.

Moreover, the law of *Galindez* is simply not applicable to *Abreau* or the instant case. *Galindez*, and the line of cases cited by Petitioner applying rule of *Chapman v. California*, 386 U.S. 18 (1967), or otherwise applying harmless error analysis never regard the situation at bar: a trial court's refusal to instruct the jury on the next lesser-included offense.

First, *Galindez* breaks no new ground in Florida law with regard to the application of the harmless error standard, on which point it simply applies a ruling of this Court from 2005: "Although we have not previously addressed whether [*Apprendi v. New Jersey*, 530 U.S. 466 (2000)] error may be harmless, we have previously held that it is not fundamental error, and that the error must be preserved for appellate review in order to obtain relief." 955 So.2d at 521 (citing *Hughes v. State*, 901 So. 2d 837, 844 (Fla. 2005)). Thereafter, this Court engages in further analysis of a then-recent United States Supreme Court decision, which likewise regards sentencing and has no clear application to this case. *See id*.

Secondly, the ruling of *Galindez* limits the application of harmless error review to the failure to instruct the jury regarding an element of a crime. Nowhere does *Galindez* regard or suggest any bearing on a trial court's failure or refusal to instruct the jury on the next lesser-included offense. Further and relatedly, *Galindez* does not overrule *Abreau* let alone

recognize friction with that opinion or its long-standing precedent. How could it, given the incredible differences in fact and law between these two cases?

Tellingly, the entirety of the State's initial brief concedes that this Court has not overruled *Abreau* in or by its reasoning in *Galindez* or in any other fashion – the State merely argues that this Court should do so. Indeed, the State only mentions *Galindez* twice in the Initial Brief. The first reference cites the decision for the application of harmless error analysis to sentencing error. Initial Brief at 17. The second reference regards application of harmless error analysis of *Chapman*, 386 U.S. 18, in *Galindez* to "claims of failure to instruct on an undisputed element." Initial Brief at 19 (quoting *Galindez*, 955 So. 2d at 522). Nonetheless, the State is presenting this Court with numerous arguments of analogy through which this Court is meant to overrule not one, and not two of its precedents, but more than 50 years' worth of precedent since *Killen v. State*, 92 So. 2d 825 (1957), on this narrow issue. Analogy is not sufficient to meet the standard of *stare decisis* review. The State must show this Court that all three prongs of the *stare decisis* test are met. *See Strand*, 992 So. 2d at 159. As discussed in the next section, the State fails to meet this burden.

To extend the reasoning of *Galindez* to this case or *Abreau* would require a bold expansion – rather than application – of that ruling. For the reasons stated above, including because *Galindez* does not regard the standard of review for failure to instruct on next lesser-included offenses, such an expansion of *Galindez* is not warranted or proper. This Court should answer the certified question in the negative.

B. *Galindez* does not expressly or constructively overrule *Abreau*.

The key authority in this matter is the standard of review set forth by this Court more than thirty years ago in *Abreau*. *Abreau* reaffirmed this Court's *per se* standard of review for those limited instances where a trial court refuses to instruct the jury on a next lesser-included offense despite the request for same or objection to its omission by defendant. 363 So. 2d at 1064. Because *Abreau* is the standing authority on this standard of review, any abrogation from this ruling would entail receding from or overruling *Abreau*.

Here, the First District Court of Appeal's decision hinges on the application of *Abreau*. *Riley*, 2008 Fla. App. LEXIS 16428, *8. Because Respondent had requested a jury instruction for the next lesser included offense, and the trial court had refused to include that instruction, the court below properly held that the trial court had committed fundamental error and

Respondent was entitled to a new trial on the pertinent count. *Id*. at *3-4. Thereafter, the court below certified the question of whether *Galindez* constructively overrules *Abreau*. *See id*.

This Court does not intentionally overrule itself, *sub silentio*. *Dorsey*, 868 So. 2d at 1199 (citing *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002)). "Where a court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply our express holding in the former decision until such time as this Court recedes from the express holding." *Puryear*, 810 So. 2d at 905. The district court may certify a question of great public importance where it perceives "disharmony" caused by a decision of this Court. *Id*. at 905-6. Such is the case here. The First District Court of Appeal properly applied *Abreau.* Then, perceiving "disharmony," the lower court certified a question as to whether *Galindez* affected the holding of *Abreau*.

Galindez does not yield the requisite conditions necessary for this Court to recede from the precedent of *Abreau*. *Strand*, 992 So. 2d at 159. As set forth above, *Galindez* is both factually and legally distinguishable from this case and *Abreau*, and therefore bears little influence to the core issues of this case.

Even assuming, *arguendo*, that this Court disagrees and believes that the holding of *Galindez* can be stretched to impact the rule of *Abreau*, Petitioner has failed to demonstrate that the *stare decisis* standard is met in this case and that this Court can therefore overrule the offending cases of *Abreau* and *State v. Bruns*, 429 So. 2d 307 (Fla. 1983).

1. This Court should not recede from *Abreau* because there is no evidence that a legal "fiction" has proven unworkable.

Before this Court will recede from precedent, it "set[s] forth the questions to be considered when asked to recede from precedent, expressly stating that the presumption in favor of precedent is strong." *Strand*, 992 So. 2d at 159. The first prong queries as follows:

> (1) Has the prior decision proved unworkable due to reliance on an impractical legal "fiction"?

Id. (citing *N. Fla. Women's Health*, 866 So. 2d at 637). This Court recently considered whether a legal "fiction" had proven unworkable in its decision *Valdes*, 34 Fla. L. Weekly S 116.

Valdes demonstrates a proper instance for receding from precedent, and consequently it strikes a contrast with this case. The legal "fiction" in *Valdes* was the "primary evil" test to determine whether a defendant's dual convictions under sections 790.15(2) and 790.19, Florida Statutes, arising out of the same episode, violate double jeopardy. *Id*. at *23-24. Based on

the body of case law, this Court observed that "[n]ot only have the district courts struggled with the application of the 'primary evil' test, but over the years this Court has also struggled to craft a consistent interpretation that would provide guidance to trial and district courts." *Id*. This Court then ruled that the "primary evil" test had proven unworkable, as evidenced by the difficulty experienced by trial courts, district courts, and this Court in attempting to apply the test. *Id*. at *29. Consequently, *Valdes* met the first prong of the *stare decisis* standard and contributed this Court's receding from precedent. Similarly, this Court labeled *Amlotte v. State*, 456 So. 2d 448 (Fla. 1984), the "classic case" wherein a decision of this Court proved unworkable as the precedent relied on several legal fictions to uphold the existence of the criminal offense of attempted felony murder. *N. Fla. Women's Health & Counseling Servs.*, 866 So. 2d at 637. The legal fictions in *Amlotte*, however, "subsequently proved too abstruse for courts to maintain." *Id*.

There is no such legal "fiction" that has proven unworkable in this case, or in *Abreau*. The State has not identified a legal "fiction" that has proven unworkable, like the "prime evil" test in *Valdes*.[2] The State expresses

[2] Indeed, jury lenity might be deemed to be a "necessary evil." The State benefits from jury lenity in the form of inconsistent verdicts. *See In re Std. Jury Instructions in Crim. Cases-Report No. 2008-01*, 996 So. 2d 854,

alarm about irrational juries, but the ever-present risk of a so-called "rogue" or "outlaw" jury is not a legal "fiction" upon which *Abreau* rests or functions. The State contends that *Abreau* relies on an illogical premise. Initial Brief at 5. But that premise – however logical – has not fostered disharmony among the district courts or otherwise proved unworkable in the manner of *Valdes* or *Amlotte*.

Contrary to those cases, nothing about *Abreau* and its long line of dependent cases has proven unworkable. This case did not come to this Court upon a conflict among the district courts, but rather on a certified question. The rule of *Abreau* is well-settled and well-known, and there is no disharmony in its application.

The closest thing to a conflict on this issue came to this Court recently in *Sanders v. State*, 946 So. 2d 953 (Fla. 2006). *Sanders* regarded "whether a defendant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel for failing to request an instruction on a lesser-included offense." *Id*. at 955. Certainly this Court expressed its discontent with jury

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856-57 (Fla. 2008) (comment) ("As a general rule, inconsistent verdicts are permitted because they may be the result of jury lenity."); *State v. Powell*, 674 So. 2d 731, 733 (Fla. 1996); *Potts v. State*, 430 So. 2d 900, 903 (Fla. 1982) ("[T]o adopt the consistency of judgment doctrine, however, is to trade one doctrine for another. This we refuse to do because what we gain is less than what we give up. To do so, in essence, is to invade the province of the jury which we decline to do.").

pardons in that decision. *See id*. Even so, this Court did not recede from the rule of *Abreau* in *Sanders* and held forth that "despite their suspect pedigree, jury pardons have become a recognized part of the system; so much so that, in direct appeals, '[t]he failure to instruct on the next immediate lesser included offense (one step removed) constitutes error that is per se reversible.'" *Id*. at 959 (quoting *Reddick v. State*, 394 So. 2d 417, 418 (Fla. 1981)).

Ostensibly, this Court might have overruled *Abreau* shortly before the *Sanders* case, in *Pena v. State*, 901 So. 2d 781, 788 (Fla. 2005). Instead, this Court effectively reaffirmed the rule of *Abreau* – as it has so many times since deciding *Abreau*. *See id*. The *Pena* ruling simply reiterated the constraints on *Abreau* from a precedent upon which *Abreau* is based: *Hand v. State*, 199 So. 2d 100, 104 (Fla. 1967), discussed further below.

The State acknowledges that *Delvalle v. State*, 653 So. 2d 1078 (Fla. 5th DCA 1995), "presents the closest example for the application of the [harmless error] test to a jury pardon deprivation claim under *Abreau*." Initial Brief at 24. *Delvalle* is distinguishable on a number of bases, any one of which renders it totally without influence here. First, the trial court in *Delvalle* did not refuse to instruct the jury on the next-lesser included charge – the instruction was given. 653 So. 2d at 1079. Second, the sole error

complained of was that a next lesser-included charge that was instructed to the jury was nonetheless omitted from the verdict form. *Id*. Third, the district court deemed the error as invited because counsel for the defendant not only failed to object to the verdict forms, but twice expressed assent to the form. *Id*. *Delvalle* hardly represents retreat from *Abreau*, and it does not demonstrate confusion among the district courts.

2. This Court should not recede from *Abreau* as it would cause serious disruption in the stability of the law.

The State presents no argument as to the second prong of the stare decisis standard, which queries:

> (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law?

Strand, 992 So. 2d at 159 (citation omitted). At best, the State argues that there exists a trend to relax the standard of review for so many other issues that formerly did or did not enjoy a *per se* standard of review and that the trend should extend to the narrow circumstances controlled by *Abreau* and present in this case. That very sort of argument was rejected by this Court in *N. Fla. Women's Health & Counseling Servs.*, 866 So. 2d at 634. *But see Chames v. DeMayo*, 972 So. 2d 850, 856 (Fla. 2007) ("We have been willing to recede from precedent when it conflicted with the law in a

majority of states.") (citations omitted). In *N. Fla. Women's Health & Counseling Servs.*, this Court recognized that this prong can be measured by how many times the subject precedent had been cited by Florida courts, and how ingrained the precedent was in the jurisprudence of Florida. *See id*. at 638 (subject precedent was then 14 years old, had been cited more than 50 times, and utilized extensively by this Court).

Similarly here, those metrics militate against receding from *Abreau*. If this Court recedes from *Abreau*, a serious injustice will result, destabilizing the jurisprudence on this issue and leading to confusion among the criminal defense bar, prosecutors, trial judges, thereafter the district courts and – in short order – this Court. *Abreau* has stood for nearly 31 years. It has been cited in 192 Florida opinions. As a matter of precedent, *Abreau* is vital, useful and used, and not at all a "legal coelacanth,"[3] as urged by the State. Initial Brief at 28. What is more, *Abreau* is not an outlier opinion fashioned in a fit of creativity by this Court in 1978.

Abreau hardly established the precedent at issue in this case – rather, this Court was following its own established precedent. *See Lomax v. State*,

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[3] "Coelacanth" is defined by Merriam-Webster's on-line dictionary as "any of an order (Coelacanthiformes) of lobe-finned fishes known chiefly from Paleozoic and Mesozoic fossils." *Available at* http://www.merriam-webster.com/dictionary/coelacanth, (April 4, 2009).

345 So. 2d 719 (Fla. 1977); *Hand*, 199 So. 2d 100,[4] *Killen*, 92 So. 2d at 826-827. In *Killen*, more than fifty-years ago, this Court "reaffirm[ed] the rule that where evidence is sufficient to support a verdict of guilty of the degree of the offense charged, the jury has the power to find the defendant guilty of a lesser degree of the offense, irrespective of the evidence as to such lesser degree." *Id*. at 828 (citations omitted). *Killen*'s rule has stood for more than 50 years.

This Court's decision in *Hand* further elucidates the sturdy foundation of *Abreau*. There, this Court overruled two decisions from the First District Court of Appeal wherein that court affirmed decisions refusing to instruct juries on next lesser-included offenses, despite timely requests for those instructions by the defendants. 199 So. 2d at 101. This Court regarded a developing line of district court authority affirming trial court decisions refusing to instruct on next lesser-included offenses because the trial court believed that no jury could reasonably find the lesser offense applied. *Id*. The Court quashed those decisions and held that "such judicial determination at trial level obviously takes a most critical evidentiary matter from the proper province of the jury and vests it improperly as a matter of

[4] In a concurring opinion as recent as 2003, this Court cited *Hand* on its continuing authority on a more specific point of law as to lesser included offenses of robbery. *Welsh v. State*, 850 So. 2d 467, 471 (Fla. 2003) (Pariente, J., concurring).

law with the trial judge." *Id*. at 102. Furthermore, this Court commented on how giving the requisite, next lesser-included instruction promoted judicial economy and reduced appeals. *Id*. at 103. "Giving such requested instruction neither shackles nor unduly burdens the prosecution, nor is it any more than is required by statute and fundamental trial fairness." *Id*.

Similarly, in *Lomax*, refined by *Abreau*, this Court overruled a decision by the Second District Court of Appeal that had affirmed the trial court's refusal to instruct the jury on the next lesser-included offense because the trial court's error "may be harmless if there is overwhelming evidence" that the defendant committed the greater crime. 345 So. 2d at 720. This Court held that such rationale was flawed because in such a scenario "the trial court is permitted to invade the province of the jury by making a unilateral determination that a lesser-included offense instruction is unnecessary because there is overwhelming evidence to convict" on the greater crime. *Id*. at 721.

In receding from *Abreau*, this Court must recognize that *Abreau* is built upon several more decades of this Court's precedent. Over and over this Court has rejected the application of the harmless error standard in the limited circumstances of this case and *Abreau*, preserving the province of the jury. *Abreau* is no outlier opinion, but well-founded precedent.

Moreover, for the reasons discussed above, *Abreau* continues to be vital and useful case. *See Pena*, 901 So. 2d 781.

3. This Court should not recede from *Abreau* because there is no showing that the factual premises underlying the decision have changed "drastically."

The third prong of the *stare decisis* review has not been demonstrated. That prong queries as follows:

> (3) Have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification?

Strand, 992 So. 2d at 159 (citation omitted). The State fails to make a showing of a drastic change to the factual premises underlying *Abreau*. There is no such change to speak of. *Abreau* is not a fact-driven case. By way of counter-example, this Court considered changes in medical technology and care in considering this prong in *N. Fla. Women's Health & Counseling Servs.*, but found that no drastic changes had occurred in those areas sufficient to move the Court to recede from the subject precedent. 866 So. 2d at 634.

Here, however, *Abreau* rests comfortably as a common law precedent that is not dependent upon the terms or existence of statutes or other any other factual premise. The irrationality of juries of which the State complains is not a new problem for the courts or prosecutors. Rational or

not, dutiful or not, ever since Florida's ancestral common-law courts began using juries in criminal trials, there has existed jury lenity or the aberrant "jury pardon." Given that there is no "drastic" change to the factual premises of *Abreau*, this prong is not met and this Court should decline to recede from *Abreau*.

4. The doctrine of *stare decisis* promotes and protects the authority of this Court.

The doctrine of *stare decisis* both promotes and protects the authority of this Court. In considering the public policy ramification of receding from precedent, this Court must carefully apply its *stare decisis* review.

In declining the State's invitation to recede from another of its precedents in *N. Fla. Women's Health & Counseling Servs.*, this Court held forth that the "doctrine of stare decisis, or the obligation of a court to abide by its own precedent, is grounded on the need for stability in the law and has been a fundamental tenet of Anglo-American jurisprudence for centuries." 866 So. 2d at 637. This Court then cited Blackstone's Commentaries extensively:

> For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent,

> is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the lands; not delegated to pronounce a new law, but to maintain and expound the old one.

Id. (quoting 1 William Blackstone, *Commentaries* *69). The doctrine of *stare decisis* was part of the English common law when the State of Florida was founded and thus was adopted and codified by the Florida Legislature in 1829. *Id*. (citing § 2.01, Fla. Stat. (1999)). In that case, the Court concluded that it could not "forsake the doctrine of stare decisis and recede from our own controlling precedent when the only change in this area has been in the membership of this Court." 866 So. 2d at 638. This Court continued, quoting Justice Stevens of the United States Supreme Court:

> A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.

Id. at 638-39 (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting)).

5. *Chapman*'s harmless error analysis has been consistently rejected by this Court in the narrow circumstances of this case and *Abreau*.

As for the State's argument that this Court wrongly decided *Abreau* because the "contours" of *Chapman* had not yet settled, the argument is misguided. Initial Brief at 28.

First, *Chapman* is distinguishable in that while the decision has been utilized to open the door to the use of harmless error review in other instances – including by this Court[5] – the decision has not been applied here or anywhere else that undersigned counsel is aware of to constrain *per se* review of a trial court's refusal to instruct a jury on a lesser-included offense.

Second, even if *Chapman* or the harmless error analysis has been so applied outside of Florida, this Court has consistently rejected such a standard of review in this narrow instance for more than fifty years, electing to preserve the province of the jury. *Killen*, 92 So. 2d 825. Indeed, this Court has had – ostensibly – opportunities to recede from *Abreau* before, but

[5] *See State v. DiGiulio*, 491 So. 2d 1129, 1135 (Fla. 1986) (applying harmless error standard on facts nearly identical to *Chapman*, relating to comments on defendant's silence at trial).

always honored its precedent. *See Sanders*, 946 So. 2d 953; *Pena*, 901 So. 2d 781.

Third, this Court does not recede from its precedent merely because the State presents a divergent line of decisions in the United States Supreme Court or elsewhere. *See N. Fla. Women's Health & Counseling Servs.*, 866 So. 2d at 634. The petitioner must go further and show that the prongs of the *stare decisis* standard are satisfied. *See id*. *But see Chames*, 972 So. 2d 850, 856 (Fla. 2007) (considering a conflicting rule of a "majority of states" to be persuasive).

Fourth, this Court was well-aware of *Chapman* for nearly a decade before it decided *Abreau*. Chief Justice Ervin referenced *Chapman* in a quotation in his dissent in a 1970 case. *See State v. Stubbs*, 239 So. 2d 241, 243 (Fla. 1970) (Ervin, C.J., dissenting). This Court analyzed and applied *Chapman* well in advance of *Abreau*. *See Resnick v. State*, 287 So. 2d 24, 33 (Fla. 1973) (applying *Chapman*'s harmless error analysis to suppression of evidence issue); *see also Lomax*, 345 So. 2d at 720 (ten years after *Chapman*, overruling district court's holding that trial court's refusal to instruct on lesser-included offense was harmless error because of "overwhelming evidence" of commission of greater offense).

This Court has not been neglectful, naïve or ignorant of *Chapman* and its legacy – rather, this Court has simply declined to recede from more than 50 years of precedent, *Killen*, 92 So. 2d 825, in favor of stretching *Chapman* beyond that ruling's facts and rationale.

II. REVIEW SHOULD BE LIMITED TO THE EXPRESS QUESTION CERTIFIED BY THE COURT BELOW OR RECONSIDERED AND DECLINED ALTOGETHER.

This Court should follow its practice of declining to address issues outside of, or otherwise extrinsic to, the question certified. Should this Court determine to maintain its jurisdiction over the question certified, it should limit its ruling to that question and disregard issues extraneous to those that have not been carefully presented to this Court by certification of the court below. Alternatively, Respondent submits that this Court should reconsider reviewing this case and discharge jurisdiction.

A. Review of this case should be limited to the express question certified by the district court.

This matter reaches this Court upon the Court's discretionary review permitted under the Florida Constitution, which provides that this Court:

> May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

Art. V, § 3(b)(4), Fla. Const.

Given the limited and discretionary nature of this form of review, this Court has constrained its review of such cases to the confines of the question certified and declined to address issues outside of the express question. *See State v. Meshell*, 34 Fla. L. Weekly S 41, 2009 Fla. LEXIS 250, *2-3 n.2 (Fla. Jan. 22, 2009) (citing *McEnderfer v. Keefe*, 921 So. 2d 597, 597 n.1 (Fla. 2006)); *Williams v. Davis*, 974 So. 2d 1052, 1055 n.1 (Fla. 2007); *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216, 1237 (Fla. 2006); *Battle v. State*, 911 So. 2d 85, 87 n.1 (Fla. 2005). *But see Confederation of Canada Life Ins. Co. v. Vega y Arminan*, 144 So. 2d 805, 807 (Fla. 1962) (denying writ of certiorari while reserving right to look at district court's entire decision, beyond the certified question); *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 596 (Fla. 1961) (holding that Florida Constitution does not limit this Court's review of certified questions, that restraint or declination is discretionary, and comprehensive review is permitted in the interest of avoiding piecemeal appellate litigation) (citing *Susco Car Rental Sys. v. Leonard*, 112 So. 2d 832, 834 (Fla. 1959)).

It is the role and place of the district courts to carefully and narrowly present issues of great public importance. *See Duggan v. Tomlinson*, 174 So. 2d 393, 394 (Fla. 1965); *Chames*, 972 So. 2d at 863 n.2; *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1080 (Fla. 2001). In the *Major*

League Baseball opinion, this Court demonstrated its restraint this regard in characterizing the formation of certified questions in the district courts:

> We decline to address the other claim raised by Major League Baseball because it is outside the scope of the certified question and was not the basis of our discretionary review. As a rule, we eschew addressing a claim that was not first subjected to the crucible of the jurisdictional process set forth in article V, section 3, Florida Constitution.

Id. at 1080 n.26. To that end, this Court has been reluctant to substitute its vision or conception of what issues need review for what issues have been constitutionally identified as questions of great public importance by the district courts:

> Our discretionary review of district court decisions certifying questions of great public importance under article V, section 3(b)(4), Florida Constitution, is limited to decisions that rule on the questions certified. *Salgat v. State*, 652 So. 2d 815, 815 (Fla. 1995). We should not use our certified question jurisdiction to correct errors of fact on which a certified question is based and then compose our own question of great public importance based on the actual facts.

State v. Campbell, 948 So. 2d 725, 725-726 (Fla. 2007) (J. Pariente, concurring).

This Court regularly eschews superlative review of issues tacked to the certified question – much in the fashion of pork-barrel legislating – by

over-reaching petitioners. *See McEnderfer*, 921 So. 2d at 597 n.1 ("Petitioner raised several issues that were either not directly addressed by the district court in this case or were merely implied or cursory, at best. We decline to address them in light of the controlling precedent.")); *Koile v. State*, 934 So. 2d 1226, 1230 n.1 (Fla. 2006) (declining to answer petitioner's various "unanswered questions" as they were "beyond the scope of the certified questions" and limiting opinion to the certified questions).

In this case, this Court should refrain from reaching beyond the question certified, and limit its ruling to the certified question and the issues that are germane to that question. *See Zirin*, 128 So. 2d 594. The State offered its own certified question of great public importance. Likewise, the concurring opinion below presented a modified question. Notably, the State is asking for this Court not only to overrule *Abreau*, but to also to overrule *Bruns*, 429 So. 2d 307, ostensibly because the decision also regards one of the limited instances where *per se* review is preserved. Here, however, those questions and issues have not been certified by the First District Court of Appeal as matters of great public importance through the "crucible of the jurisdictional process set forth in article V, section 3, Florida Constitution." *Major League Baseball*, 790 So. 2d at 1080 n.26. As such, neither question nor the extraneous issues – such as hauling the *Bruns* decision into this

review – are properly before this Court. Unless this Court can rationalize a basis through which extraneous issues are deemed germane to the express certified question this Court should continue its discretionary practice of restraining the scope of its review on this limited constitutional basis.

B. This Court should reconsider its review of this case and discharge jurisdiction.

Moreover, in light of the arguments above, this Court should reconsider its review of this matter and discharge jurisdiction.

This Court has often accepted cases for review and upon reconsideration determined that discretionary review of the certified question or other issue is not necessary or runs afoul of precedent, and thereafter discharged jurisdiction over the case. *See Chames*, 972 So. 2d at 862 ("The passage of time has not changed that concern. We therefore apply the doctrine of stare decisis and reaffirm our holdings…."); *Gee v. Seidman & Seidman*, 653 So. 2d 384 (Fla. 1995) ("We find that review was improvidently granted in this case as the question certified by the district court does not reflect the issue actually ruled upon by the court."); *State v. Whitby*, 975 So. 2d 1124, 1125 (Fla. 2008) (Pariente, J., concurring) ("I concur in the discharge because the majority of this Court has determined that there is no reason to recede from our precedent…."); *Revitz v. Baya*, 355

So. 2d 1170, 1171 (Fla. 1977); *see also Cleveland v. Miami*, 263 So. 2d 573, 576 (Fla. 1972) (refraining from answering certified question).

Here, the certified question regards precedent of this Court and the Petitioner has failed to meet its burden in demonstrating to the Court that the *stare decisis* standard is met. *See* Part I(B), *supra*. For the foregoing authorities and arguments, this Court should not recede from *Abreau*, and review of the certified question should be reconsidered and denied and this matter discharged.

Furthermore, this Court should decline to answer the certified question because it was not considered by the First District Court of Appeal. *Gee*, 653 So. 2d 384. In *Gee*, the Third District Court of Appeal presented a certified question to this Court pursuant to article V, section 3(b)(4) of the Florida Constitution. This court found that "review was improvidently granted in this case as the question certified by the district court does not reflect the issue actually ruled upon by the court." *Id*. at 385. As such, this Court ruled that "[b]ecause the district court specifically stated that it did not address the issue contained in the question certified to this Court, we are without jurisdiction to entertain the question." *Id*. (citing *Revitz*, 355 So. 2d 1170).

Similarly here, the First District Court of Appeal did not engage the reasoning of *Galindez* to analyze whether it affected this Court's ruling in *Abreau* or otherwise affected the standard of review of a trial court's refusal to instruct on the next lesser-included offense. There is no discussion of *Galindez* in majority's opinion, save the court's statement that "in light of recent supreme court precedent, however, it is unclear whether the reasoning behind this precedent is still valid." *Riley*, 2008 Fla. App. LEXIS 16428 *1-2. In his concurring opinion, however, Judge Wolf discusses *Galindez* and encourages this Court to recede from *Abreau*. *Id*. at *8-13 (Wolfe, J., concurring). Despite this discussion in the concurring opinion, the majority reached its holding without analyzing or directly regarding *Galindez* or harmless error analysis. *See id*. The question has not been fully subjected to the crucible of the district court and this Court should decline to hear it at this time.

CONCLUSION

For all of the foregoing arguments and authorities, Respondent respectfully requests that the certified question be answered in the negative, alternatively, that the certified question not be answered and jurisdiction discharged, and that the decision below be affirmed, that the stay entered as to Respondent's new trial be lifted, and directing the trial court to conduct the new trial for Respondent as to Count I.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Trisha Megges Tate, Esq. and Michael T. Kennett, Esq., Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050 by U.S. Mail on this 7th day of April, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies compliance with the requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

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