IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

EDDIE RILEY,

Respondent.

CASE NO. SC08-2116

PETITIONER'S INITIAL BRIEF

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COUNSELS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Eddie Riley, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of one volume, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State of Florida charged the Respondent by amended information with one count of sexual battery by digital penetration committed upon a person (S.H.) less than 12 years of age (Count I), one count of lewd and lascivious molestation committed upon S.H. (Count II), and three counts of sexual battery committed upon J.D., a child over 12 years of age but less than 18 years of age by a person in familial or custodial authority (Counts III-V). This appeal pertains to Count I, which alleged capital sexual battery. See *Riley*

v. State, 2008 Fla. App. LEXIS 16428 (Fla. 1st DCA Oct. 22, 2008) ("[Respondent] was charged in Count I of an amended information with capital sexual battery committed between November 1, 2002, and May 1, 2003, in violation of *section 794.011(2)(a), Florida Statutes*.").

During the trial, the Respondent's defense counsel requested, as to Count I, that the jury receive an instruction on simple battery as a lesser included offense of the charged crime of capital sexual battery. See *Riley v. State*, supra ("The matter proceeded to trial, and as to Count I, defense counsel requested that the jury be instructed on simple battery as a lesser included offense."). The trial court denied the Respondent's request, reasoning that the crime of capital sexual battery, unlike the crime of simple assault, does not require the State to prove lack of consent; therefore, simply battery fails to qualify as a necessarily lesser included offense of capital sexual battery. See *Riley v. State*, supra:

> The trial court denied that request, opining that simple battery was not a lesser included offense because it requires a touching against the will of the victim, whereas sexual battery committed on a victim under 12 does not require a lack of consent, nor was lack of consent alleged in the amended information.

At the conclusion of a trial, a jury returned a verdict of guilty as charged on all counts. The trial court then sentenced the Respondent to life in prison on Count I. See *Riley v. State*, supra ("As a consequence, the jury was instructed only on the charged

offense and attempted capital sexual battery, and returned a verdict finding petitioner guilty as charged on Count I.").

On direct appeal, the Respondent's appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), representing that he was unable to make a good faith argument that reversible error occurred in the trial court. See *Riley v. State*, supra ("Riley's counsel on direct appeal filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967)."").

The Respondent then filed a *pro se* brief raising seven claims of error, none of which alleged that the trial court committed reversible error when it denied the Respondent's request for a jury instruction on the offense of simple battery. See *Riley v. State*, supra, n.1, citing *Jackson v. State*, 946 So. 2d 83 (Fla. 4th DCA 2006); *Barber v. State*, 918 So. 2d 1013 (Fla. 2nd DCA 2006) ("The fact that Riley could have raised the jury instruction issue in a pro se brief does not foreclose him from now seeking relief on a claim of ineffective assistance of appellate counsel.").

The First District Court of Appeals affirmed the judgment and sentence, per curiam, without a written decision. See *Riley v. State*, 926 So. 2d 4 (Fla. 1st DCA 2006) (hereinafter, "*Riley I*").

The Respondent filed a timely petition for writ of *habeas corpus* in the First District Court of Appeal, alleging the ineffective assistance of appellate counsel. The District Court granted the Respondent's petition as to Count I, reversed the Respondent's

conviction and sentence for Count I, and remanded the case for a new trial. See *Riley v. State*, 2008 Fla. App. LEXIS 16428 (Fla. 1st DCA Oct. 22, 2008) (hereinafter, "*Riley II*"). ("Accordingly, the petition alleging ineffective assistance of appellate counsel is GRANTED, petitioner's conviction and sentence for Count I are REVERSED, and the matter is REMANDED for a new trial as to that count.").

Perceiving that this Court "has demonstrated a trend to limit the concept of per se reversible error," the First District Court of Appeal certified the following question as one of great public importance:

> 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 II. In a concurring opinion, Judge Wolf slightly modified the question certified by the majority by adding a clause at the end:

> 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 **WHERE NO REASONABLE JURY COULD HAVE RETURNED A VERDICT FOR THE LESSER OFFENSE**? (Emphasis added)

Riley II.

On 3 November 2008, the State filed with this Court a Notice to Invoke Discretionary Jurisdiction. On 19 December 2008, this Court accepted jurisdiction in the case *sub judice*.

SUMMARY OF ARGUMENT

ISSUE.

State v. Abreau, 363 So. 2d 1063 (Fla. 1978) represents a "legal coelacanth", bypassed with the evolution of the harmless error doctrine, yet somehow surviving in the dark waters of the deep – its existence nothing more than a living preservation of the fossil record. Therefore, this Court should overrule *Abreau* to the extent necessary to allow the State, as the purported beneficiary of an instructional error, to prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986), citing *Chapman v. California*, 386 U.S. 18, 24 (1967).

In addition to falling out of step with the development of the harmless error doctrine, *Abreau's* faulty reasoning presents another basis for overturning the decision. Following *Abreau's* rationale, when the trial court fails to instruct on "B", the trial court unfairly precludes the jury from rendering a partial acquittal based upon mercy and therefore forces the jury to render a verdict based upon its oath and the instructions on the law. In other words, *Abreau* finds that *per se* reversible error occurs when a trial court shapes the judicial landscape in such a way as to cajole the jury into following the law. Importantly, however, *Abreau* relies upon an illogical premise: a

jury will initially and irrationally decline to convict on "A", will determine that "C" remains too low to honor its desire to exercise mercy, and ultimately will conclude that "A" more closely resembles what the jury irrationally considers the true crime committed. Thus, *Abreau* expresses a concern that a jury might irrationally arrive at the most rational of conclusions (guilt as to "A").

Additionally, *State v. Bruns*, 429 So. 2d 307 (Fla. 1983) applies faulty reasoning that provides a basis for overturning its holding that "An attempt instruction does not provide a 'step' within the meaning of *Abreau*." *Bruns* at 309. To demonstrate this point, *Bruns* rationally concludes that attempt offenses remain separate and distinct from lesser included offenses; hence, a jury can exercise its pardon power properly only when it receives an instruction on the appropriate lesser included offense. *Ibid* ("The application of the *Abreau* "step" analysis should only be made in cases where both the instruction that was given and the omitted instruction relate to a lesser-included offense. "). This reasoning, however, begs a very simple question: If a jury necessarily must disregard its instructions when it exercises its pardon power, why does it matter that those instructions "technically" list attempts as separate from true lesser included offenses? In truth, it does not matter; an attempted offense adequately affords an irrational jury the opportunity to render a verdict based on mercy, not reason.

ARGUMENT

ISSUE

IN A PROSECUTION FOR CAPITAL SEXUAL BATTERY, DID THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE NEXT LESSER INCLUDED OFFENSE OF SIMPLE BATTERY CONSTITUTE HARMLESS ERROR?

STANDARD OF REVIEW

The *de novo* standard of appellate review applies to the issue presented, as the State raises a legal challenge in a case involving undisputed facts. See *Williams v. State*, 957 So. 2d 595, 598 (Fla. 2007), citing *State v. Florida*, 894 So. 2d 941, 945 (Fla. 2005) ("Because these matters involve solely legal determinations based on undisputed facts, our review of the Second District's decision is de novo.").

MERITS

In 1978, this Court issued an opinion declaring that the failure to instruct the jury on the next immediate lesser-included offense (one step removed) constitutes *per se* reversible error. See *State v. Abreau*, 363 So. 2d 1063, 1064 (Fla. 1978) ("Only the failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible."); see also *Reddick v. State*, 394 So. 2d 417, 418 (Fla. 1981) ("The failure to instruct on the next immediate lesser included offense (one step removed) constitutes error that is per se reversible."). An important caveat, courts gauge the next immediate lesser-included

offense from the crime of conviction, not the crime charged. *Rigdon v. State*, 621 So. 2d 475, 478 (Fla. 4th DCA 1993):

> Because the failure to instruct on a necessarily lesser included offense one step removed (simple assault) from the crime for which a defendant was convicted (aggravated assault with a firearm) constitutes reversible error per se, we reverse appellant's conviction and remand for a new trial.

See also *Stephens v. State*, 396 So. 2d 741, 742 (Fla. 5th DCA 1981) ("The refusal to give an instruction on a lesser included offense one step removed from the crime for which a defendant is convicted is reversible error."). As a result, the existence of *per se* reversible error may not become apparent until after the jury renders its verdict. See *Gallo v. State*, 1981 Fla. App. LEXIS 21023 (Fla. 3rd DCA, Sept. 3, 1981):

> What the dissent overlooks is that the very heart of the *Terry-Lomax-Abreau* analysis is that the failure to instruct on the lesser offense is error. That error is transformed into per se reversible error of harmless error, depending on the jury verdict thereafter rendered. Thus, if the trial court chooses to speculate that its error in refusing to give a requested instruction will become harmless because the jury will convict of a higher offense two steps removed, it is it which runs the risk of its prediction. When its prediction turns out to be wrong, as in the present case, it is the trial court's lack of foresight, not, as the dissent suggests, our hindsight, that causes reversal.

By announcing a *per se* rule in *Abreau*, this Court declined to adopt the harmless error approach articulated a decade earlier by the United States Supreme Court. See *Chapman v. California*, 386 U.S. 18, 22 (1967):

> We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

Abreau's per se rule remains grounded in a concern that juries should enjoy the opportunity to exercise their "pardon power." See *State v. Holmes*, 929 So. 2d 719, 721 (Fla. 5th DCA 2006), quoting *Abreau*, supra:

> The rationale for the rule requiring reversal when a trial court fails to instruct on a lesser offense one step removed from the conviction is that the jury must be "given a fair opportunity to exercise its inherent 'pardon' power by returning a verdict of guilty as to the next lower crime."

See also *State v. Bruns*, 429 So. 2d 307, 310 (Fla. 1983) ("The basis of this Court's holding in *Abreau* was the desire to preserve the jury's "pardon" power."). Using an "A" (charged offense), "B" (one step removed), and "C" (two steps removed) example, this Court reasoned that a resort to harmless error analysis remains unnecessary as the reviewing court cannot determine whether the jury, if properly instructed, would have exercised that pardon power. *Ibid*:

> If, however, the jury only receives instructions on "A" and "C" and returns a conviction on "A", the error cannot be harmless because it is *impossible to determine* whether the jury, if given the opportunity, would have "pardoned" the defendant to the extent of convicting him on "B" (although it may have been unwilling to make the two-step leap downward to "C").
> (Emphasis added)

In support of the *per se* rule, subsequent courts echoed *Abreau's* concern that the unpredictable nature of jury pardons render the application of the harmless error test extremely difficult. See e.g. *Hill v. State*, 788 So. 2d 315, 319 (Fla. 1st DCA 2001), overruled on other grounds by *Sanders v. State*, 847 So. 2d 504, 508 (Fla. 1st DCA 2003):

> It is entirely reasonable that the [*Chapman v. California*, 386 U.S. 18 (1967)] test is not satisfied where a trial court has improperly failed to honor a defense request for an instruction on a lesser included offense. Because we know that jury pardons are occasionally awarded by aberrant juries, *it would be difficult* for an appellate court to conclude beyond a reasonable doubt that a jury in a particular case, given the opportunity, would not disobey the law and grant a pardon. (Emphasis added)

The direct appeal context greatly contrasts with the post-conviction arena; in the latter, the speculative nature of jury pardons works against the appellant and in favor of the State. See *Sanders v. State*, 946 So. 2d 953, 959-960 (Fla. 2006), quoting *Sanders v. State*, 847 So. 2d 504, 507 (Fla. 1st DCA 2003):

> However, any finding of prejudice resulting from defense counsel's failure to request an instruction on lesser-included offenses necessarily would be based on a faulty premise: that a reasonable probability exists that, if given the choice, a jury would violate its oath, disregard the law, and ignore the trial court's instructions. As did the district court in *Sanders*, we, too, "have difficulty accepting the proposition that there is even a substantial possibility that a jury which has found every element of an offense proved beyond a reasonable doubt, would have, given the opportunity, ignored its own findings of fact and the trial court's instruction on the law and found a defendant guilty of only a lesser included offense."

Admittedly, when the State claims harmless error, it bears the burden on direct appeal to prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986). In contrast, however, an appellant alleging ineffective assistance of counsel bears the burden to show: (1) "that counsel's performance was deficient"; and, (2) "that the deficient performance prejudiced the defendant." *Strickland v. Washington*, 466 U.S. 668, 687 (U.S. 1984). This burden distinction may explain why appellate courts view jury pardons differently in the direct appeal and post-conviction contexts. But see *Gragg v. State*, 429 So. 2d 1204, 1207 (Fla. 1983):

> Collateral estoppel does not depend on whether there is any evidence to support the view that the jury may have exercised its pardon power. Practically every jury verdict of acquittal is susceptible to such an interpretation. A jury's verdict may possibly be based upon a defendant's demeanor or other matters not reflected by the record. For this reason courts should not speculate on whether the jury has reached its verdict through compassion or compromise. In determining whether collateral estoppel applies, a court should limit its inquiry to whether there was a factual basis, rather than an emotional basis, upon which the jury's verdict could have rested.

Nonetheless, reviewing courts remain unable to conduct a comprehensive review of the record on direct appeal because the *Abreau* decision constrains appellate courts from determining whether the

failure to instruct on a necessarily lesser included offense one step removed from the crime of conviction qualifies as harmless error. See *Sanders v. State*, 847 So. 2d 504, 510 (Fla. 1st DCA 2003) (Ervin, J., concurring and dissenting), approved by *Sanders v. State*, 946 So. 2d 953 (Fla. 2006):

> Thus, much of the discussion in [*Hill v. State*, 788 So. 2d 315 (Fla. 1st DCA 2001)] regarding the *Chapman v. California*, 386 U.S. 18 (1967), harmless error test, applicable to direct appeals but not to collateral proceedings, is immaterial in a case such as that now before us in which the offense is necessarily included, because if claimant's counsel had timely requested an instruction on robbery with a weapon and the trial court had refused it, the refusal would have been reversible on appeal without any consideration of whether the error was harmless.

Unfortunately, *Abreau's* inflexible approach can lead to ridiculous results. See *Riley v. State*, 2008 Fla. App. LEXIS 16428 (Fla. 1st DCA Oct. 22, 2008) (Wolf, J., concurring):

> No reasonable jury would have issued a jury pardon in this case and returned a verdict of simple battery.
>
> This case demonstrates the very folly in having an inflexible per se reversible error rule and not allowing courts to consider the circumstances of a particular case to determine whether harmful error occurred.

See also *Neder v. United States*, 527 U.S. 1, 18 (1999), quoting R. Traynor, *The Riddle of Harmless Error* 50 (1970):

> [The erroneous admission of evidence in violation of the Fifth Amendment's guarantee against self-incrimination and the erroneous exclusion of evidence in violation of the right to confront witnesses guaranteed by the Sixth

> Amendment], no less than the failure to instruct on an element in violation of the right to a jury trial, infringe upon the jury's factfinding role and affect the jury's deliberative process in ways that are, strictly speaking, not readily calculable. We think, therefore, that the harmless-error inquiry must be essentially the same: Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error? To set a barrier so high that it could never be surmounted would justify the very criticism that spawned the harmless-error doctrine in the first place: "*Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.*" (Emphasis added)

Finally, *Abreau's* inflexible approach fails to promote the fair administration of justice. See generally *State v. Marshall*, 476 So. 2d 150, 153 (Fla. 1985):

> [T]he harmless error rule is a preferred method of promoting the administration of justice. It makes no sense to order a new trial, because of a nonfundamental error committed at trial, when we know beyond a reasonable doubt that the defendant will be convicted again. Our trial courts are already excessively burdened. An additional and unnecessary trial in such an instance might affect the rights of others to a fair and expeditious trial.

Development of the Law

Developments in the law over the last thirty years call into question the continued viability of the reasoning underlying this Court's decision to adopt, in lieu of any harmless error analysis, a *per se* rule of reversal with regard to the type of instructional error present in *Abreu*. To begin with, this Court repeatedly has expressed a reluctance to adopt an inflexible, *per se* reversal approach to various types of judicial errors. See *Riley v. State*,

2008 Fla. App. LEXIS 16428 (Fla. 1st DCA Oct. 22, 2008) ("We recognize, however, as set out in Judge Wolf's concurring opinion, that the supreme court has demonstrated a trend to limit the concept of per se reversible error."). Similarly, the United States Supreme Court expressed a preference for harmless error analysis over inflexible, *per se* approaches. See e.g. *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991):

> Since this Court's landmark decision in *Chapman v. California*, 386 U.S. 18 (1967), in which we adopted the general rule that a constitutional error does not automatically require reversal of a conviction, the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless.

See also *United States v. Hasting*, 461 U.S. 499, 509 (1983) ("Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations."). Finally, this Court recently lamented the role that jury pardons play in our criminal justice system. See *Sanders v. State*, 946 So. 2d 953, 958 (Fla. 2006):

> Notwithstanding its role in the criminal justice system, however, the jury pardon remains a device without legal foundation...
>
> [D]espite their suspect pedigree, jury pardons have become a recognized part of the system...

As a direct result of the foregoing developments, a reviewing court should enjoy the power to conduct a comprehensive review of the complete record of a case in order to determine whether it remains

clear beyond a reasonable doubt that a rational trier of fact would have found the defendant guilty absent the instructional error. See *DiGuilio*, supra, at 1135:

> Application of the [harmless error] test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

See generally *Martinez v. State*, 981 So. 2d 449, 455 (Fla. 2008) ("*Upon our review of the complete record in this case*, we conclude that the erroneous forcible-felony instruction did not deprive Martinez of a fair trial and, therefore, fundamental error did not occur.") (Emphasis added).

Reluctance to Adopt *Per Se* Reversal Approaches[1]

Since deciding *Abreau*, this Court repeatedly expressed a preference for harmless error analysis over inflexible, *per se* reversal approaches to various types of judicial errors. See e.g. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986), quoting *Chapman v. California*, 386 U.S. 18, 23 (1967):

> *Per se reversible errors are limited to those errors which are "so basic to a fair trial that their infraction can never be treated as*

[1]The State duly recognizes the distinction between fundamental error and harmless error analysis. However, for the purposes of this section of the Initial Brief, the State cites to cases involving both types of error (fundamental and "not harmless") in order to illustrate an expressed reluctance by the U.S. and Florida Supreme Courts to adopt an inflexible, *per se* reversal approach to various types of judicial errors.

> *harmless error."* In other words, those errors which are always harmful. The test of whether a given type of error can be properly categorized as per se reversible is the harmless error test itself. If application of the test to the type of error involved will always result in a finding that the error is harmful, then it is proper to categorize the error as per se reversible. If application of the test results in a finding that the type of error involved is not always harmful, then it is improper to categorize the error as per se reversible. If an error which is always harmful is improperly categorized as subject to harmless error analysis, the court will nevertheless reach the correct result: reversal of conviction because of harmful error. *By contrast, if an error which is not always harmful is improperly categorized as per se reversible, the court will erroneously reverse an indeterminate number of convictions where the error was harmless*.
> (Emphases added)

See also *Martinez v. State*, 981 So. 2d 449, 457 (Fla. 2008):

> In conclusion, we hold that it is error for a trial court to read the forcible-felony instruction to the jury where the defendant is not charged with an independent forcible felony. However, the erroneous reading of this instruction constitutes fundamental error *only when it deprives the defendant of a fair trial*... [W]e disapprove of those district court decisions which hold that an erroneous reading of the forcible-felony instruction *always* constitutes fundamental error. (Emphasis in original)

See also *State v. Schopp*, 653 So. 2d 1016, 1020 (Fla. 1995), citing *DiGuilio*, supra ("While the courts may establish a rule of per se reversal for certain types of errors, a per se rule is appropriate only for those errors that always vitiate the right to a fair trial and therefore are always harmful."); see also *Pender v. State*, 700 So. 2d 664, 666 (Fla. 1997):

> In *Schopp*, we overruled *Smith v. State*, 500 So. 2d 125 (Fla. 1986), and found the failure to conduct a *Richardson* hearing was no longer per se reversible but could be harmless error if there was no reasonable possibility that the discovery violation procedurally prejudiced the defense.

See also *Galindez v. State*, 955 So. 2d 517, 524 (Fla. 2007) ("[W]e hold that harmless error analysis applies to *Apprendi* and *Blakely* error."); see also *Barclay v. Fla.*, 463 U.S. 939, 958 (1983), quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983):

> Cases such as *Lewis v. State*, 398 So. 2d 432 (Fla. 1981), *Williams v. State*, 386 So. 2d 538 (Fla. 1980), and *Dobbert v. State*, 375 So. 2d 1069 (Fla. 1979), indicate that the Florida Supreme Court does not apply its harmless-error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless. There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance. "What is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." (Emphasis in original)

See also *McDuffie v. State*, 970 So. 2d 312, 322 (Fla. 2007), citing *Scipio v. State*, 928 So. 2d 1138, 1146 (Fla. 2006) ("Although we no longer adhere to a strict standard of per se reversible error and a harmless error analysis is proper, we will analyze this error cumulatively with the other errors that we conclude also occurred."); see also *Scoggins v. State*, 726 So. 2d 762, 768 (Fla. 1999):

> We agree with the district court that Brasfield's [*Brasfield v. United States*, 272 U.S. 448 (1926)] inflexible per se reversal

> approach should not be applied where, as here, the circumstances surrounding the inquiry do not indicate any actual improper influence on the jury. A finding of fundamental error is warranted only where the totality of the circumstance indicate a likelihood that the jury was actually improperly influenced by the court's inquiry into rendering a verdict. In that situation, the court's inappropriate inquiry would constitute fundamental error because its occurrence genuinely calls into question the basis upon which the jury's verdict was predicated. However, where the circumstances indicate no improper coercive influence on the jury's deliberations, such error should not be considered fundamental to the court's obligation to ensure a fair trial.

See also *Busby v. State*, 894 So. 2d 88, 106 (Fla. 2004) (“This historical examination also will show that post-*Trotter v. State*, 576 So. 2d 691 (Fla. 1991), developments remove any firm legal basis to support a per se reversible error rule.”); see also *Knowles v. State*, 848 So. 2d 1055, 1059 (Fla. 2003), quoting *DiGuilio*, supra, at 1137:

> Although the admission of testimony in violation of a defendant's attorney-client privilege and privilege against self-incrimination creates a high probability of harm, "high risk that an error will be harmful is not enough . . . to justify categorizing the error as always harmful (per se)."

See also *Chavez v. State*, 832 So. 2d 730, 760 (Fla. 2002) (“No court has held that it is per se reversible error to allow the jurors' faces to be photographed in a controversial criminal trial. It is ultimately the fairness of the proceedings which determines the appropriateness of limitations on media access.”); see also *Enterprise Leasing Co. v. Jones*, 789 So. 2d 964, 967 (Fla. 2001):

> Similarly, in *Koon v. State*, 463 So. 2d 201 (Fla. 1985), when ruling on the admission of evidence that was covered by the husband-wife privilege, this Court did not make a per se pronouncement of reversible error but reversed based on the fact that privileged information was not harmless when viewed with the other evidence in the record.

But see *Tennis v. State*, 2008 Fla. LEXIS 2380 (Fla. Dec. 11, 2008) ("Under our clear precedent, and that of the district courts of appeal, the trial court's failure to hold a *Faretta* hearing in this case to determine whether Tennis could represent himself is per se reversible error."); but see also *State v. DiGuilio*, 491 So. 2d 1129, 1137 (Fla. 1986) ("Denial of counsel is always harmful, regardless of the strength of the admissible evidence, and can be properly categorized as per se reversible."); but see also *State v. Merricks*, 831 So. 2d 156, 161 (Fla. 2002), quoting *Ivory v. State*, 351 So. 2d 26, 28 (Fla. 1977):

> In sum, we agree with the Second District that the bailiff's improper communication in this case constituted per se reversible error under *Ivory* and its progeny. To apply a harmless error analysis to such improper communications as the State proposes would "unnecessarily embroil trial counsel, trial judges and appellate courts in a search for evanescent 'harm', real or fancied."

Even in the context of jury instructions, however, this Court repeatedly expressed an unwillingness to adopt a rule requiring *per se* reversal. See *Galindez v. State*, 955 So. 2d 517, 522 (Fla. 2007) ("This Court has long applied Chapman's harmless error analysis,

which we outlined in *State v. DiGuilio*, to claims of failure to instruct on an undisputed element.") see also *Garzon v. State*, 980 So. 2d 1038, 1042 (Fla. 2008) ("We have consistently held that not all error in jury instructions is fundamental error."); see also *State v. Delva*, 575 So. 2d 643, 645 (Fla. 1991) ("Failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error and there must be an objection to preserve the issue for appeal."); see also *Glover v. State*, 863 So. 2d 236, 238 (Fla. 2003) ("Glover's claim was based upon fundamental error in the standard jury instruction. Glover's age of over eighteen years was, however, not a disputed element."); see also *Smith v. State*, 521 So. 2d 106, 108 (Fla. 1988):

> While we do not recede from our view in *Yohn v. State*, 476 So. 2d 123 (Fla. 1985), concerning the inadequacy of the old standard jury instruction on insanity, we cannot say that it was so flawed as to deprive defendants claiming the defense of insanity of a fair trial. Despite any shortcomings, the standard jury instructions, as a whole, made it quite clear that the burden of proof was on the state to prove all the elements of the crime beyond a reasonable doubt.

See also *Hunter v. State*, 2008 Fla. LEXIS 1615 (Sept. 25, 2008):

> Here, because Hunter failed to object to the use of "and/or" as it related to the murder instructions (both premeditated and felony) and the armed burglary instructions, we must determine if the error was fundamental. Under the totality of the circumstances, the error was not fundamental.

See also *Pena v. State*, 901 So. 2d 781, 788 (Fla. 2005):

> We therefore answer the certified question in the negative and hold that it is not fundamental

> error for a trial court to omit an instruction on excusable and justifiable homicide when the defendant is charged and convicted of first-degree murder by drug distribution under *section 782.04(1)(a)(3), Florida Statutes* (1999), there has been no request for such an instruction or an objection to the instructions as given, and the factual circumstances do not support any jury argument relying upon the excusable or justifiable homicide instruction.

But see *State v. Lucas*, 645 So. 2d 425, 427 (Fla. 1994):

> [A] complete instruction on manslaughter requires an explanation that justifiable and excusable homicide are excluded from the crime... [T]his case is controlled by our decisions in *Rojas v. State*, 552 So. 2d 914 (Fla. 1989), and *Miller v. State*, 573 So. 2d 337 (Fla. 1991), which stand for the proposition that failure to give a complete instruction on manslaughter during the original jury charge is fundamental error which is not subject to harmless-error analysis where the defendant has been convicted of either manslaughter or a greater offense not more than one step removed, such as second-degree murder.

What's the harm in harmless error analysis?

Subsequent to adopting a *per se* reversal approach in *Abreau*, this Court expressly rejected such an approach in a case involving improper comments on a defendant's silence. See *DiGuilio*, supra. In that case, this Court specifically determined that such comments qualify as Constitutional error. See *DiGuilio*, supra, at 1131, citing *Peterson v. State*, 405 So. 2d 997 (Fla. 3rd DCA 1981); *Thompson v. State*, 386 So. 2d 264 (Fla. 3rd DCA 1980), review denied, 401 So. 2d 1340 (Fla. 1981) ("Thus, comment on a defendant's invocation of his right to remain silent after he has answered some questions is

constitutional error."). Specifically, this Court determined that such comments infringe upon a defendant's Fifth Amendment rights. *Ibid*. Nonetheless, this Court refused to hold that Constitutional error (Fifth Amendment) necessarily translates into *per se* reversible error. *Ibid* at 1137 ("[We] hold that comments on a defendant's silence are subject to harmless error analysis as set forth herein.").

In reaching its decision in *DiGuilio*, this Court found that the potential for true harm lies in the failure to conduct harmless error test itself. See *DiGuilio*, supra, at 1135:

> If an error which is always harmful is improperly categorized as subject to harmless error analysis, the court will nevertheless reach the correct result: reversal of conviction because of harmful error. By contrast, if an error which is not always harmful is improperly categorized as per se reversible, the court will erroneously reverse an indeterminate number of convictions where the error was harmless.

In essence, this Court applied reasoning roughly akin to Pascal's Wager: if a court applies harmless error analysis to an error that does not always qualify as harmful, justice is served (regardless of the result); if a court applies harmless error analysis to an error that always qualifies as harmful, justice will still be served because the State will not be able to establish beyond a reasonable doubt that the error did not contribute materially to the conviction. See B. Pascal, *Pensées* #233 ("If you gain, you gain all; if you lose, you lose nothing."). To further prove the point, this Court provided a

specific example that clearly illustrates the folly of an inflexible rule. *Ibid* at 1137:

> In the case at hand, if the accused had taken the stand and confessed guilt during cross examination, we could say beyond a reasonable doubt that the officer's comment on post-arrest silence did not affect the jury's verdict. Yet the dissenters would have us declare in that instance that the comment is per se reversible error and requires a retrial.

Faulting the dissenters for espousing antiquated notions of form over substance, this Court echoed sentiments expressed four decades earlier by the U.S. Supreme Court. See *DiGuilio* at 1136 ("The union which the dissenters urge substitutes mechanics for judgment in the style of nineteenth century English and American appellate courts where error, no matter how harmless, equaled reversal."); see also *Kotteakos v. United States*, 328 U.S. 750, 760 (1946):

> So great was the threat of [technical] reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained.
>
> In the broad attack on this system great legal names were mobilized, among them Taft, Wigmore, Pound and Hadley, to mention only four. The general object was simple: To substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record.

Thus, true harm lies in the refusal to conduct the harmless error test, as such a refusal needlessly and unfairly creates the potential for a technical reversal that clearly would fail to serve the interests of justice.

A fourteen year-old decision out of the Fifth District Court of Appeal presents the closest example for the application of the *DiGuilio's* harmless error test to a jury pardon deprivation claim under *Abreau*. See *Delvalle v. State*, 653 So. 2d 1078 (Fla. 5th DCA 1995). In that case, the trial court provided appropriate instructions on lesser included offenses but failed to provide a verdict form that accurately reflected those instructions. *Delvalle* at 1079 ("In the instant case, the trial judge properly instructed on the next immediate lesser included offense; the problem was the typographical omission in respect to that offense in the verdict forms."). On direct appeal, the defendant claimed an *Abreau* violation. *Ibid*:

> Delvalle now contends that he is entitled to a new trial because the typographical omission, which escaped notice by trial counsel and the trial judge prior to the jury verdict, deprived him of the possibility of a jury pardon in the form of a conviction of the "next immediate lesser included offense, one step removed from the offense charged."

Distinguishing *Abreau*, the Fifth District applied *DiGuilio's* harmless error test, focusing on the typographical error present on the verdict form. *Ibid* ("Given the evidence adduced at trial, the error also was harmless, since it is inconceivable that any rational jury could have returned a verdict finding that there was no firearm

involved in the commission of the charged offenses."). Of note, the Fifth District never addressed whether the erroneous verdict form would have precluded an *irrational* jury from rendering a verdict based on mercy, not reason.

Although it involved fundamental error and not the harmless error test, a recent decision of this Court supports *DiGuilio's* concerns regarding technical reversals that fail to serve the interests of justice. See *Martinez v. State*, 981 So. 2d 449 (Fla. 2008). In that case, the defendant claimed that an erroneous forcible felony instruction deprived him of his right to a fair trial. This Court agreed that the instruction qualified as erroneous and added that its circular logic most likely confused the jury. *Ibid* at 453:

> Thus, to instruct the jury on the forcible-felony exception in this circumstance amounted to informing the jury that although it might conclude that Martinez acted in self-defense when he committed an *aggravated battery* or *attempted murder* against Rijo, the use of deadly force was *not justifiable* if the jury found that Martinez committed *attempted murder* or *aggravated battery*. This circular logic would most probably confuse jurors because the apparent result is that the instruction precludes a finding of self-defense and amounts to a directed verdict on the affirmative defense. (Emphasis in original)

Nonetheless, this Court conducted a comprehensive review of the record and determined that the erroneous forcible-felony instruction did not deprive the defendant of a fair trial. *Ibid* at 455 ("Upon our review of the complete record in this case, we conclude that the

erroneous forcible-felony instruction did not deprive Martinez of a fair trial and, therefore, fundamental error did not occur."). Importantly, this Court specifically considered the evidence of record when analyzing the effect of the error on the outcome of the case. *Ibid* at 456 ("Given such damning facts, we conclude that even if the forcible-felony instruction had not been read to the jury, the possibility that the jury would have found Martinez not guilty of attempted murder by reason of self-defense is minimal at best."). Additionally, this Court refused to follow the District Courts of Appeal and expressly declined to adopt a *per se* reversal approach. *Ibid* at 457 ("[W]e disapprove of those district court decisions which hold that an erroneous reading of the forcible-felony instruction *always* constitutes fundamental error.") (Emphasis in original). In a similar fashion, this Court should overrule its prior decision and specifically consider the evidence of record when analyzing the effect of an instructional error on the outcome of a case alleging jury pardon preclusion.

The Evolution of Harmless Error Doctrine

Before reaching its conclusion in *DiGuilio*, this Court recognized a long line of Florida cases that previously held that comments on a defendant's silence merit *per se* reversal. For comments on a defendant's failure to testify, see *DiGuilio* at 1131, citing *Gordon v. State*, 104 So. 2d 524 (Fla. 1958); *Trafficante v. State*, 92 So. 2d 811 (Fla. 1957); *Way v. State*, 67 So. 2d 321 (Fla.

1953); *Rowe v. State*, 87 Fla. 17, 98 So. 613 (1924) ("Florida has long followed a per se reversal rule when a prosecutor comments on a defendant's failure to testify."); for comments on a defendant's right to remain silent, see *Ibid*, citing *Jones v. State*, 200 So. 2d 574 (Fla. 3rd DCA 1967):

> The per se reversal rule for comments on the right to remain silent was first adopted in *Jones v. State*, 200 So. 2d 574 (Fla. 3rd DCA 1967). This Court adopted Jones and the per se rule in *Bennett v. State*, 316 So. 2d 41 (Fla. 1975), and has approved the rule in other cases. E.g., *Donovan v. State*, 417 So. 2d 674 (Fla. 1982); *Shannon v. State*, 335 So. 2d 5 (Fla. 1976).

Indeed, the lower court in *DiGuilio* relied on that long line of cases in deciding that *per se* reversible error occurred in the trial court. *Ibid* at 1130 ("Applying *Donovan*, *Shannon*, and *Bennett*, the district court found the comment to be per se grounds for reversal."). Despite the long line of Florida *per se* reversal cases, however, *DiGuilio* expressly recognized the U.S. Supreme Court's two-decades old decision regarding harmless error analysis. *Ibid* at 1134 ("*Chapman* holds that comment on failure to testify is not constitutionally subject to automatic reversal because it does not always vitiate the right to a fair trial and the harmless error analysis should be applied.").

As an important consideration, this Court expressly recognized in *DiGuilio* that it failed, initially, to adopt *Chapman's* "correct rule." *Ibid*:

> It was not until we issued *State v. Marshall*, 476 So. 2d 150 (Fla. 1985), and *State v. Murray*, 443

> So. 2d 955 (Fla. 1984), that we adopted the correct rule from [*Chapman v. California*, 386 U.S. 18 (1967)] and [*United States v. Hasting*, 461 U.S. 499 (1983)] that constitutional errors, with rare exceptions, are subject to harmless error analysis.

This remains an important point, as this Court decided *Abreau* after *Chapman* but before *Marshall* and *Murray*. Hence, it remains possible that this Court decided *Abreau* before the Federal and State courts fully defined the precise contours of the harmless error test articulated in *Chapman*. As an additional consideration, this Court decided *Abreau* before the U.S. Supreme Court commanded the appellate courts to conduct comprehensive reviews of the trial record to look for harmless error. See *United States v. Hasting*, 461 U.S. 499, 509 (1983) ("Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations."). Far from dicta ignored by the courts, the Florida Supreme Court duly noted *Hasting's* commandment. See *State v. Marshall*, 476 So. 2d 150, 152 (Fla. 1985):

> The [United States Supreme] Court emphasized that appellate courts can and should conserve judicial resources by applying harmless error rules and echoed the *Chapman* concern that per se rules of reversal allow courts to retreat from their responsibilities.

In essence, *Abreau* represents a "legal coelacanth", bypassed with the evolution of the harmless error doctrine, yet somehow surviving in

the dark waters of the deep – its existence nothing more than a living preservation of the fossil record.

An evolutionary analogy in the law

An analogous situation evolved in the post-conviction context with regard to the ineffective assistance of counsel and jury pardons. See *Sanders v. State*, 847 So. 2d 504, 506 (Fla. 1st DCA 2003), approved by *Sanders v. State*, 946 So. 2d 953 (Fla. 2006):

> As recently explained in *Hill v. State*, 788 So. 2d 315 (Fla. 1st DCA 2001), review denied, 807 So. 2d 655 (Fla. 2002), many decisions from this and other district courts of appeal hold that a defendant states a colorable basis for relief under rule 3.850 when he asserts that his trial counsel incompetently failed to request an instruction as to a one-step-removed lesser included offense of the crime of which the defendant has been convicted. The first of these decisions was *Bateson v. State*, 516 So. 2d 280 (Fla. 1st DCA 1987), decided just three years after the seminal decision on ineffective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984). Although *Bateson* makes no reference to *Strickland*, we assume that the *Bateson* panel was aware of the *Strickland* decision. However, it must be acknowledged that the *precise contours* of the holding in *Strickland* are much more clearly defined now than they were just three years after *Strickland* was decided.
> (Emphasis added)

Despite the existence of a case directly on point and adverse to the position taken by the State, the First District referenced the years of experience that helped clarify the holding of *Strickland*. *Ibid*:

> We are confronted in the present case with an issue materially indistinguishable from the issue presented in *Bateson*, but the knowledge gained from eighteen years of experience in applying *Strickland* to postconviction ineffective assistance of counsel claims persuades us that *Bateson* was wrongly decided.

> We are now convinced that the type of claim involved in *Bateson*, in *Hill*, and in the present case cannot satisfy the prejudice prong of *Strickland*.

The *Bateson/Sanders* analogy works well, especially when comparing the certified question in *State v. Bruns*, 429 So. 2d 307 (Fla. 1983) with the certified question (from the concurring opinion) and facts[2] of the case *sub judice*. Compare *State v. Bruns*, 429 So. 2d 307, 308 (Fla. 1983):

> If a defendant is convicted by overwhelming evidence of a greater offense, and the jury is instructed on an attempt to commit that offense, is the failure to instruct on the next lesser included offense, which carries a penalty less than the attempt, harmless error under *State v. Abreau*, 363 So. 2d 1063 (Fla. 1978)?

with *Riley v. State*, 2008 Fla. App. LEXIS 16428 (Fla. 1st DCA Oct. 22, 2008) (Wolf, J., concurring):

> 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 where no reasonable jury could have returned a verdict for the lesser offense?

[2]As in *Bruns,* the trial court instructed the jury on the attempt to commit the crime charged. See *Riley v. State*, 2008 Fla. App. LEXIS 16428 (Fla. 1st DCA Oct. 22, 2008) ("As to Count I, the jury was instructed only on the charged offense and attempt, and as the court observed in *Bruns*, an attempt to commit the charged offense does not constitute a 'step' under *Abreau*.").

Both *Bruns* and the case at bar involve an attempt instruction as a lesser included offense; and, both cases involve overwhelming evidence of guilt.[3] See *Riley v. State*, 2008 Fla. App. LEXIS 16428 (Fla. 1st DCA Oct. 22, 2008) (Wolf, J., concurring):

> The undisputed facts show that appellant repeatedly molested his girlfriend's two daughters by fondling and putting his fingers into their vaginas. Appellant gave an inane version of these events, saying he was inspecting the girls' breasts and vaginas for breast cancer and to determine if they were virgins. Appellant admitted to the police that he conducted numerous inspections. The mother testified that she never gave appellant the right to conduct these inspections. No reasonable jury would have issued a jury pardon in this case and returned a verdict of simple battery.

Despite overwhelming evidence of guilt, *Bruns* declined to conduct any harmless error analysis, choosing instead to apply a *per se* rule apparently based on speculation about how the jury *might have* decided the case in the absence of an instruction on the lesser included offense one step removed from the crime of conviction. See *Bruns* at 310:

> In the case sub judice the lack of opportunity for the jury to consider both attempt and larceny along with robbery was crucial. The jury *might have* returned the robbery verdict simply because they believed that a larceny was consummated but robbery was a closer choice than attempted robbery or not guilty. (Emphasis added)

Focusing on speculation and ignoring the overwhelming evidence of guilt in the case, this Court concluded that the jury effectively

[3] *Bruns* does not contain a discussion of the facts, but the certified question ("convicted by overwhelming evidence") strongly suggests that the facts remained in the State's favor.

lacked the ability to exercise its pardon power. *Ibid* ("In effect, the jury was not able to exercise its inherent 'pardon' power by returning a verdict of guilty as to the next lower crime."). By so concluding, this Court expressly declined to consider whether the State could prove beyond a reasonable doubt that the instructional error did not contribute to the conviction. In other words, the State did not get an opportunity to argue that "No reasonable jury would have issued a jury pardon in this case..." *Riley* (Wolf, J., concurring). Hence, just as *Bateson* failed to properly apply *Strickland*, so too did *Abreau* and *Bruns* fail to properly consider *Chapman*. Thus, just as *Sanders* overruled *Bateson*, so too should this Court overrule *Abreau.*

What is a Jury Pardon?

Bruns' failure to understand the nature of a jury pardon renders the decision largely unpersuasive. At its core, a "jury pardon" involves an aberration – a refusal by the jury to follow its oath as well as the instructions provided by the trial court. See *Sanders v. State*, 946 So. 2d 953, 958 (Fla. 2006):

> Notwithstanding its role in the criminal justice system, however, the jury pardon remains a device without legal foundation. It is, as Judge Klein aptly noted below, "essentially 'a not guilty verdict rendered contrary to the law and evidence' and is an aberration." *Willis v. State*, 840 So. 2d 1135, 1138 (Fla. 4th DCA 2003) (Klein, J., concurring specially) (quoting *State v. Wimberly*, 498 So. 2d 929, 932 (Fla. 1986) (Shaw, J., dissenting)).

By definition, jury pardons violate the oath jurors must take before trial, as well as the instructions the trial court gives them. In Florida, all jurors must swear to "truly try the issues between the State . . . and the defendant and render a true verdict *according to the law and the evidence*." *Fla. R. Crim. P. 3.360* (emphasis added). After administering the oath, the trial court instructs the jury that its "verdict must be *based solely on the evidence, or lack of evidence, and the law*." *Fla. Std. Jury Instr. (Crim.) 2.1* (emphasis added). The court also apprises the jury of its "responsibility to decide what the facts of [the] case may be, and to *apply the law to those facts*." *Id.* (emphasis added). Before the jury retires to deliberate, the court again reminds it that

> it is important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case. *Even if you do not like the laws that must be applied, you must use them*. For two centuries we have lived by the constitution and the law. No juror has the right to violate rules we all share. *Fla. Std. Jury Instr. (Crim.) 3.13* (emphases added).

Although the jury also is instructed about lesser-included offenses, the instruction specifically allows the jury to consider a lesser-included offense *only* if it "decide[s] that the main accusation has not been proved beyond a reasonable doubt." *Fla. Std. Jury Instr. (Crim.) 3.4.* The United States Supreme Court restates these instructions as a simple duty: "Jurors . . . take an oath to follow the law as charged, and they are expected to follow it." *United States v. Powell*, 469 U.S. 57, 66 (1984) (citing *Adams v. Texas*, 448 U.S. 38 (1980)).

As shown above, the jury must anchor its verdict in, and only in, the applicable law and the evidence presented. Nothing else may influence its decision. When a jury convicts a defendant of a criminal offense, it has decided that the

> evidence demonstrated beyond a reasonable doubt that the defendant committed the crime charged.

Essentially, a jury pardon constitutes an irrational act – a refusal to apply pure reason coupled with a conscious decision to substitute, in reason's place, some form of mercy. See *Sanders v. State*, 946 So. 2d 953, 957 (Fla. 2006), quoting *Potts v. State*, 430 So. 2d 900, 903 (Fla. 1982):

> The typical motivation for use of this power is mercy or leniency: "In its ultimate wisdom [the jury] has been given the power to 'temper . . . justice with mercy.' If such be warranted, it can reduce the charge. . . . This is commonly known as [the] jury pardon."

Cf. *Sanders v. State*, 847 So. 2d 504, 511-514 (Fla. 1st DCA 2003) (Erwin, J., concurring and dissenting):

> I therefore strongly question the assumption made in *Hill*, and adopted by the majority, that a jury's decision to pardon is one made irrationally, aberrantly, or in an unlawful manner...
>
> The *Sanders/Hill* postulate that a jury would act irrationally if it found a defendant guilty of a lesser-included offense to that charged, regardless of the degree of proof supporting the conviction for the higher offense, overlooks the crucial nature of a jury's province...
>
> After all, juries, like judges, have the authority to dispense mercy. To label a jury as irrational or lawless in so acting reflects a fundamental misunderstanding of a jury's responsibilities.

Ideally, lesser instructions allow the jury to return a guilty verdict when the jury expressly finds that the State failed to prove the charged offense with proof beyond a reasonable doubt. Hence, rather than a compromise or an exercise of mercy, such a verdict

reflects a rational decision by the jury to follow its oath and the instructions provided. Borrowing from *Abreau*'s "A", "B", "C", example, "A" represents the charged offense. In contrast with a jury pardon scenario, though, "B" represents: (1) a lesser offense; (2) the highest crime supported by proof beyond a reasonable doubt; (3) the crime for which the jury should return a verdict of guilty if it follows its oath and the instructions on the law; and, (4) the crime of conviction. In this scenario, jury pardon concerns arguably remain, but only if the trial court fails to instruct on "C", an offense lesser than both "A" and "B".

The proper use of lesser included offense instructions contrasts greatly with a true jury pardon situation. Again borrowing *Abreau*'s "A", "B", "C", example, in a true jury pardon scenario "A" represents: (1) the charged offense; (2) the highest crime supported by proof beyond a reasonable doubt; and, (3) the crime for which the jury should return a verdict of guilty if it follows its oath and the instructions on the law. Continuing with the example, "B" represents: (1) a lesser offense; (2) the crime of conviction; and, (3) the crime that best matches the jury's desire to exercise mercy. Thus, the jury chooses emotion (the crime that best matches the jury's desire to exercise mercy) over reason (the crime for which the jury should return a verdict of guilty if it follows its oath and the instructions on the law).

Following *Abreau's* rationale, when the trial court fails to instruct on "B", the trial court unfairly precludes the jury from rendering a partial acquittal based upon mercy and therefore forces the jury to render a verdict based upon its oath and the instructions on the law.[4] In other words, *Abreau* finds that *per se* reversible error occurs when a trial court shapes the judicial landscape in such a way as to cajole the jury into following the law. Importantly, however, *Abreau* relies upon an illogical premise: a jury will initially and irrationally decline to convict on "A", will determine that "C" remains too low to honor its desire to exercise mercy, and ultimately will conclude that "A" more closely resembles what the jury irrationally considers the true crime committed. Thus, *Abreau* expresses a concern that a jury might irrationally arrive at the most rational of conclusions (guilt as to "A").

At first glance, *Bruns* appears to incorporate the jury pardon concerns expressed in *Abreau*. See *Bruns* at 310 ("In the case sub judice the lack of opportunity for the jury to consider *both* attempt and larceny along with robbery was crucial.") (Emphasis in original).

Using the worst-case concerns expressed in *Bruns*, "A" (larceny) represents: (1) the charged offense; (2) the crime of conviction; (3) the highest crime supported by proof beyond a reasonable doubt; (4) the crime for which the jury should return a verdict of guilty

[4]In such a scenario, the jury would still enjoy the power to "pardon" a defendant by rendering a complete acquittal. But see generally *Keeble v. United States*, 412 U.S. 205, 213 (1973).

if it follows its oath and the instructions on the law; and, (5) an offense for which the jury received an instruction. Continuing with the example, "B" (larceny) represents: (1) a lesser offense; (2) the crime that best matches the jury's desire to exercise mercy; and, most importantly, (3) an offense for which the jury *did not* receive an instruction. Continuing with the example, "C" (attempted robbery) represents: (1) an offense less than both "A" and "B"; and, (2) an offense for which the jury received an instruction. Without citation to any controlling or persuasive authority, however, *Bruns* declares that an instruction on "C" (attempted larceny") fails to satisfy the jury pardon concerns articulated in *Abreau*. See *Bruns* at 309-310 ("An attempt instruction does not provide a 'step' within the meaning of *Abreau*... The basis of this Court's holding in *Abreau* was the desire to preserve the jury's 'pardon' power."). Missing from the analysis, *Bruns* fails to adequately explain why "C" (an attempt to commit "A") cannot match a jury's irrational desire to exercise mercy. If anything, *Bruns* unpersuasively attempts to apply reason to an entirely unreasonable outcome. See *Bruns* at 309, citing *In the Matter of the Use of Standard Jury Instructions*, No. 57,734 and 58,799 (Fla. April 16, 1981); *In re Florida Rules of Criminal Procedure*, 403 So. 2d 979 (Fla. 1981):

> It is evident from [*Brown v. State*, 206 So. 2d 377 (Fla. 1968)] that the two categories, lesser included offenses and attempts, are not interchangeable as the state argues. It is of interest to point out that the standard jury instructions and criminal rules put into effect

> after this case arose maintained the separation of necessarily included offenses and attempts.

In other words, *Bruns* rationally concludes that attempt offenses remain separate and distinct from lesser included offenses; hence, a jury can exercise its pardon power properly only when it receives an instruction on the appropriate lesser included offense. *Ibid* (“The application of the *Abreau* "step" analysis should only be made in cases where both the instruction that was given and the omitted instruction relate to a lesser-included offense.”). This reasoning, however, begs a very simple question: If a jury necessarily must disregard its instructions when it exercises its pardon power, why does it matter that those instructions “technically” list attempts as separate from true lesser included offenses? In truth, it does not matter; an attempted offense adequately affords an irrational jury the opportunity to render a verdict based on mercy, not reason.

In addition to failing to adequately explain why “C” (an attempt to commit “A”) cannot match a jury’s irrational desire to exercise mercy, *Bruns* appears to express an additional concern that the lack of an appropriate lesser instruction on “B” (larceny) necessarily precludes the jury from considering “B” as the highest charge proven. *Bruns* at 320 (“The jury might have returned the robbery verdict simply because they believed that a larceny was consummated but robbery was *a closer choice* than attempted robbery or not guilty.”) (Emphasis added). This concern mirrors a concern addressed two decades later by the First District Court of Appeal in a case involving an erroneous

lesser instruction. See *Hankerson v. State*, 831 So. 2d 235, 236-37 (Fla. 1st DCA 2002):

> It is apparent from the jury's question *that* insertion of the additional element of intent in the lesser included offense instruction confused the jury. The instructions as given effectively precluded the jury from returning a not guilty verdict on any lesser included offense. The jury was also not given the opportunity to consider the appropriate lesser included offense of simple manslaughter which the defense had requested.

Once again borrowing *Abreau*'s "A", "B", "C", example, "A" represents: (1) the charged offense; (2) an offense for which the jury received an instruction; and, (3) the crime of conviction. However, "B" represents: (1) a lesser offense; (2) the highest crime supported by proof beyond a reasonable doubt; and most importantly, (3) an offense for which the jury *did not* receive an instruction. Continuing with the example, "C" represents: (1) an offense less than both "A" and "B"; (2) an offense for which the jury received an instruction; and, (3) the crime for which the jury should return a verdict of guilty if it follows its oath and the instructions on the law. In essence, this scenario involves a concern that the jury will "bump-up" its verdict (i.e. "over-convict") simply because the actual crime committed ("B") remains closer to the offense charged ("A") than to the lesser offense instructed ("C"). Put somewhat differently, a jury, when faced with the possibility of "over-acquitting" (guilt as to "C") or "under-acquitting" (guilt as to "A"), will decide to "under-acquit." Hence, the jury returns a verdict of guilty to the

charged offense even though: (1) the State lacks adequate proof of the crime of conviction; and, (2) the oath and the instructions demand a verdict of guilty as to the lesser instructed offense. In this scenario, jury pardon concerns remain largely absent because the evidence and the law demand that the jury return a guilty verdict as to the lesser offense ("C").

Although the above scenario merits attention, it remains far removed from the "all or nothing" situation wherein a jury can either over-convict or acquit. Again borrowing from *Abreau*, "A" represents: (1) the charged offense; (2) an offense for which the jury received an instruction; and, (3) the crime of conviction. However, "B" represents: (1) a lesser offense; (2) the highest crime supported by proof beyond a reasonable doubt; and, (3) an offense for which the jury *did not* receive an instruction. Continuing with the example, "C" now represents: (1) a complete acquittal; and, (2) the proper result should the jury follow its oath and the instructions on the law. In this example, the jury lacks the option to convict on the appropriate offense ("B") but nonetheless returns a guilty verdict as to the charged offense ("A") because the jury determines that the defendant "musta' done somthin'." See generally *Keeble v. United States*, 412 U.S. 205, 213 (1973):

> Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury

> must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, *but the defendant is plainly guilty of some offense*, the jury is likely to resolve its doubts in favor of conviction. In the case before us, for example, an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented. But the jury was presented with only two options: convicting the defendant of assault with intent to commit great bodily injury, or acquitting him outright. We cannot say that the availability of a third option -- convicting the defendant of simple assault -- could not have resulted in a different verdict. (Emphasis added)

In other words, the jury returned a verdict of guilty to the charged offense even though: (1) the State lacks adequate proof of the crime of conviction; and, (2) the oath and the instructions demanded acquittal. The "all or nothing" concerns become heightened when the charged crime represents a capital offense. See *Beck v. Alabama*, 447 U.S. 625, 637 (1980):

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury

> the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake.

As an important caveat, *Beck's* overconviction concerns remain rooted in the Eighth, not the Fifth Amendment. See *Hopper v. Evans*, 456 U.S. 605, 611 (1982) ("Our holding in *Beck*, like our other Eighth Amendment decisions in the past decade, was concerned with insuring that sentencing discretion in capital cases is channelled so that arbitrary and capricious results are avoided."); See also *Schad v. Arizona*, 501 U.S. 624, 646 (1991):

> Petitioner's second contention is that under *Beck v. Alabama*, he was entitled to a jury instruction on the offense of robbery, which he characterizes as a lesser included offense of robbery murder. *Beck* held unconstitutional an Alabama statute that prohibited lesser included offense instructions in capital cases. Unlike the jury in *Beck*, the jury here was given the option of finding petitioner guilty of a lesser included noncapital offense, second-degree murder. While petitioner cannot, therefore, succeed under the strict holding of *Beck*, he contends that the due process principles underlying *Beck* require that the jury in a capital case be instructed on every lesser included noncapital offense supported by the evidence, and that robbery was such an offense in this case.
>
> Petitioner misapprehends the conceptual underpinnings of *Beck*. Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all.

Therefore, nothing in *Beck* precludes the application of *Chapman's* harmless error test in non-capital cases.

Final Analysis

This Court should overrule *Abreau* to the extent necessary to allow the State, as the purported beneficiary of an instructional error, to prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *DiGuilio*, supra, at 1138, citing *Chapman*, supra, at 24. To begin with, this Court repeatedly expressed a preference for *Chapman's* harmless error analysis over inflexible, *per se* reversal approaches. Nonetheless, *Abreau* incorporates a *per se* rule. However, this Court decided *Abreau* before Federal and State courts clearly defined the precise contours of *Chapman* and its progeny. In an analogous situation, this Court overruled prior decisions that incorrectly interpreted *Strickland's* application to claims of prejudice resulting from the jury's inability to exercise its pardon power. Finally, *Beck's* overconviction concerns do not preclude the application of *Chapman's* harmless error test in non-capital cases.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the affirmative, the decision of the First District Court of Appeal reported at 2008 Fla.

App. LEXIS 16428 should be disapproved, and the judgment and sentence entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Mr. Joshua Spector, Esq., Perlman, Yevoli & Albright, 200 South Andrews Avenue, Suite 600, Fort Lauderdale, Florida, 33301, by MAIL on February 12th, 2009.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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