IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

EDDIE RILEY,

Respondent.

CASE NO. SC08-2116

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Parties (such as the State and Respondent, Eddie Riley), emphasis, and the record on appeal will be designated as in the Initial Brief, and "IB" will designate Petitioner's Initial Brief, "AB," will designate Respondent's Answer Brief, each followed by any appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The State relies on the facts contained in the Initial Brief.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

Before it can properly review a decision of a lower tribunal, an appellate court must articulate the appropriate standard of review. See *N. Fla. Women's Health & Counseling Servs. v. State*, 866 So. 2d 612, 626 (Fla. 2003):

> An appellate court's first obligation when reviewing a lower court's decision is to articulate its standard of review--i.e., its criterion for assessing the validity of the lower court's ruling. This requirement serves two functions: it informs the parties of the extent of the review and, most important, reminds the appellate court of the limitations placed on its own authority by the appellate process.

In his Initial Brief, the appellant mistakenly claims that a "*stare decisis* standard" of review applies. See AB-5 ("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.". However, no "*stare decisis*" standard of appellate review exists under Florida law. See Phillip J. Padovano, *Florida Appellate Practice §18:1* (2009 ed.):

> The phrase "standard of review" is used in appellate practice to describe the criteria employed by an appellate court to evaluate a decision by a lower tribunal... As a practical matter, standards of review describe levels of deference for different kinds of decisions.

See also *Ibid*, *§18:3*:

> Although there are certain exceptions, nearly all trial level decisions can be classified within the following three general types: (1) conclusions of law; (2) discretionary decisions; and, (3) findings of fact...
>
> A decision that is based on a conclusion of law is reviewed on appeal by the de novo standard of review...
>
> The applicable rule is that a discretionary decision of the lower tribunal cannot be reversed on appeal unless the party seeking review has shown that it was an abuse of discretion...
>
> Findings of fact are reviewable by the competent substantial evidence test.

The phrase "*stare decisis*" more accurately connotes the legal standard, not the standard of appellate review, applicable when an appellant seeks reversal of precedent. See generally *Estate of Despain v. Avante Group, Inc.*, 900 So. 2d 637, 639 (Fla. 5th DCA 2005):

> Next, we must determine the appropriate *standard of review* that will guide us in our application of the *legal standard* to the record evidence and the proffer presented by Despain so we can decide whether it is sufficient to establish a reasonable basis to plead a claim for punitive damages.

> Once *these two standards* are determined, we can resolve the issue on appeal and arrive at a conclusion. (Emphases added)

Thus, the *de novo* standard of appellate review applies in the case *sub judice*.

MERITS

To overcome the presumption in favor of *stare decisis*, the party seeking reversal of precedent must consider the following three factors: (1) workability; (2) reliance; and, (3) original justification. See *Valdes v. State*, 3 So. 3d 1067 (Fla. 2009):

> [T]he presumption in favor of stare decisis may be overcome upon a consideration of the following factors:
>
> > (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?

Workability

The State argued in its Initial Brief that this Court's decisions in *Abreau* and *Bruns* rely on premises unsupported by sound legal reasoning (i.e. "legal fictions"). See IB-36:

> 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").

See also IB-37-38:

> 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... 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... 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.

Hence, *Abreau* and *Bruns* rely upon premises unsupported by reason. In other words, both decisions prove unworkable due to reliance on impractical legal fictions. See *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995), superseded on other grounds by *section 782.051, Florida Statutes*, ("The legal fictions required to support the intent for felony murder are simply too great."). Therefore, they constitute erroneous decisions unprotected by the doctrine of *stare decisis*. See *Smith v. Department of Ins.*, 507 So. 2d 1080, 1096 (Fla. 1987) (Ehrlich, J., concurring in part, dissenting in part) ("Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the Court.").

Despite the foregoing, the Respondent argues that *Abreau* enjoys harmonious application, and therefore proves workable as controlling

precedent. See AB-18 ("The rule of *Abreau* is well-settled and well-known, and there is no disharmony in its application."). A recent decision of the First District Court of Appeal, however, clearly demonstrates the difficulty some courts experience in attempting to apply *Abreau's* harmless error holding. See *Montgomery v. State*, No. 1D-7-4688 (Fla. 1st DCA Feb. 12, 2009), review pending, *State v. Montgomery*, No. SC09-332. Specifically, *Montgomery* illustrates the First District's divergent application of *Abreau's* "one-step" language to a case involving a claim of unpreserved, *fundamental* error. See *Ibid*:

> [Appellant] contends the trial court fundamentally erred in giving the standard jury instruction for manslaughter by act, as it erroneously suggests that intent to kill is an element of that crime. We agree with Appellant because the standard instruction imposed an additional element on the crime of manslaughter by act, and that offense was *one step removed from the crime for which Appellant was convicted*. (Emphasis added)

Cf. *Acensio v. State*, 497 So. 2d 640, 642 (Fla. 1986) ("*Abreau* stands for the rule that a refusal to instruct on a lesser included offense two steps removed from the offense for which defendant is convicted is *harmless* error.") (Emphasis added); cf. also *Cooper v. State*, 905 So. 2d 1063, 1064 (Fla. 4th DCA 2005):

> Appellant was charged with attempted first degree murder. Following a jury trial, he was convicted of attempted second degree murder. He contends it was fundamental error for the trial court to give the following, unobjected-to jury instruction [on attempted manslaughter]:
>
> In order to convict - to be guilty of attempted manslaughter, it is not necessary for the State to prove that the defendant has a premeditated intent to cause

> death, but, the State must prove that the actions of Mr. Cooper amount to culpable negligence.
>
> Attempted manslaughter by culpable negligence is a nonexistent crime. See *State v. Brady*, 685 So. 2d 984 (Fla. 5th DCA 1977); *Taylor v. State*, 444 So. 2d 931 (Fla. 1983). Appellant argues that it is fundamental error to instruct the jury that it may find the defendant guilty of the crime of attempted manslaughter by culpable negligence. See *Reid v. State*, 656 So. 2d 191 (Fla. 1st DCA 1995).
>
> The state distinguishes *Reid* on the basis that, in this case, appellant was not convicted of the non-existent crime and the conviction of attempted second degree murder, a higher degree of crime, is supported by the record. See *Murray v. State*, 491 So. 2d 1120 (Fla. 1986) (holding that although it was error to instruct on manslaughter by culpable negligence, the error did not require a new trial because there was sufficient evidence to support the conviction). We agree.
>
> Because there was sufficient evidence to support the higher degree of crime of which appellant was convicted, and the appellant has cited no authority that this instruction was fundamental error under these circumstances, we affirm.

As demonstrated by the below table, the facts of *Montgomery* and *Cooper* remain strikingly similar:

	Montgomery	*Cooper*
Offense charged ("A")	First degree murder	Attempted first degree murder
Crime of conviction ("B")	Second degree murder	Attempted second degree murder
Next lesser included offense ("C")	Manslaughter	Attempted manslaughter

In both cases, the reviewing courts determined that the instruction on the next lesser included offense contained an error: in *Montgomery*, the First District concluded that the standard jury

instruction on manslaughter by act "erroneously suggests that intent to kill is an element of that crime"; in *Cooper*, the Fourth District followed the precedent of this Court and concluded that the instruction on attempted manslaughter by culpable negligence erroneously stated that such a crime even exits. However, rather than focusing on whether the erroneous instruction on the offense one step removed from the crime of conviction precluded the jury from considering that lesser offense, *Cooper* conducted a review of the record to determine whether sufficient evidence supported the crime of conviction. *Ibid*; see also generally *Murray v. State*, 491 So. 2d 1120, 1122 (Fla. 1986):

> First, the issue of the jury instructions had not been properly preserved for appeal through specific objection below. Second, and equally fundamental, a review of the record disclosed ample and sufficient evidence to support the conclusion that the shooting of the victim "was the result of an act of petitioner done with the requisite criminal intent and was not mere culpable negligence." (Internal citations omitted)

Cf. *Hankerson v. State*, 831 So. 2d 235, 237 (Fla. 1st DCA 2002) ("[I]nsertion 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."). Thus, in contrast to the Fifth District in *Cooper*, the First District in *Montgomery* (1) declined to conduct a review of the record and (2) applied *Abreau's*

"one step removed" language to a case involving a claim of fundamental error.[1]

Although it involves a purportedly erroneous instruction (as opposed to the complete absence of an instruction), *Montgomery* appears to conflict with prior decisions of the First District. See *Morris v. State*, 658 So. 2d 155, 156 (Fla. 1st DCA 1995), citing *Jones v. State*, 484 So. 2d 577 (Fla. 1986) ("In non-capital cases, failure to instruct as to necessarily lesser-included offenses is not fundamental error."); see also *Holland v. State*, 634 So. 2d 813, 818 (Fla. 1st DCA 1994) (Webster, J., dissenting) (internal citations omitted):

> It is clear that a trial court must instruct on necessarily lesser-included offenses when a request is made that it do so. However, it is equally clear that failure to instruct on necessarily lesser-included offenses in a non-capital case is not fundamental error. To preserve such an error for appellate review, the defendant must request such an instruction and object to the trial court's failure to give one.

Montgomery also appears to conflict with decisions of this Court. See *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 *Jones v. State*, 484 So. 2d 577, 578 (Fla. 1986):

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[1]Unfortunately, the First District's decision in *Montgomery* lacks any citation to authority for its use of the phrase "one step removed from the crime for which Appellant was convicted."

> We have for review *Jones v. State*, 459 So. 2d 475 (Fla. 5th DCA 1984), in which the district court of appeal affirmed Jones' conviction of aggravated battery and certified to this Court the following question as one of great public importance:
>
> > *Harris v. State*, 438 So. 2d 787 (Fla. 1983), recognizes a constitutional right of an accused in a capital case to have the jury instructed as to necessarily lesser included offenses and that the violation of that right constitutes fundamental error, a waiver of which, to be effective, must be made on the record knowingly and intelligently by the accused personally rather than by counsel. Do those charged with non-capital crimes enjoy this constitutional right as well as those charged with capital crimes?
>
> 459 So.2d at 476. We have jurisdiction, article V, section 3(b)(4), Florida Constitution, and answer the question in the negative.

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. (Emphasis added)

But see also *Lucas v. State*, 630 So. 2d 597, 599 (Fla. 1st DCA 1993) ("We admit that we have found our efforts to reconcile *Rojas* and *Miller* with *Delva*... somewhat troubling."). Thus, *Montgomery's* use of the phrase "one step removed from the crime for which Appellant was convicted" in a case involving a claim of fundamental error directly

refutes Respondent's assertion the harmless error holding of *Abreau* enjoys harmonious application, and therefore proves workable as controlling precedent.

Reliance

While reliance provides an important consideration, the doctrine of *stare decisis* does not mandate blind allegiance to past precedent. *State v. Gray*, supra, at 554 ("Yet stare decisis does not command blind allegiance to precedent."). Where, as here, the need to correct an erroneous decision outweighs the need to preserve stability in the law, *stare decisis* should not preclude reversal. See *Brown v. State*, 719 So. 2d 882, 890 (Fla. 1998) (Wells, J., dissenting):

> Although I do not adhere to blind allegiance to precedent, I do believe that intellectual honesty continues to demand that precedent be followed unless there has been a clear showing that the earlier decision was factually or legally erroneous or has not proven acceptable in actual practice.

In the case *sub judice*, the true injustice flows not from any reliance on *Abreau's* holding but from the possibility that reviewing courts will erroneously reverse an indeterminate number of convictions in cases where an instructional error truly qualifies as harmless. See IB-22:

> 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.").

Thus, any injustice stemming from a temporary disruption to the stability of the law must surrender to the injustice that, absent reversal, will forever flow from the erroneous decision. See generally *Haag v. State*, 591 So. 2d 614, 618 (Fla. 1992):

> Moreover, as we have said before, stare decisis is not an ironclad and unwavering rule that the present always must bend to the voice of the past, however outmoded or meaningless that voice may have become. It is a rule that precedent must be followed except when departure is necessary to vindicate other principles of law or to remedy continued injustice.

Despite *DiGuilio's* warning that the lack of harmless error analysis will result in the unnecessary reversal of an indeterminate number of convictions, the Respondent argues that the number of citations to *Abreau* necessarily merits indefinite perpetuation of the decision. See AB-21 ("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.”). However, unlike the case cited by the Respondent, the case *sub judice* does not involve women making decisions about their sexual behavior contingent upon an understanding of their reproductive rights under the current state of the law. See *N. Fla. Women's Health & Counseling Servs. v. State,* at 638:

> [T]he extent of reliance on [*In re T.W.*, 551 So. 2d 1186 (Fla. 1989)] unquestionably has been great. During the past fourteen years, Floridians have organized their personal and family relationships based on the constitutional right articulated in that decision, and a generation of Florida women has matured during that period and has had an opportunity to participate equally in the social and economic life of this State due in part to the ability to make personal decisions based on *T.W*.

Rather, this case involves an individual who admitted that he touched his step-daughters’ breasts and vaginas; but, he claimed that instead of fondling them for his own arousal, he simply checked his pre- and early pubescent step-daughters for cancer and sexual activity. Clearly, he did not undertake such behavior contingent upon an understanding of the current state of the law with respect to jury instructions on lesser included offenses. Thus, the number of citations to *Abreau* remains largely irrelevant given the unnecessary reversal in cases, such as the present, which involve instructional errors that, if given the chance, would clearly qualify as harmless. 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.

Justification

The State agrees with the Appellee that *Abreau* "is not a fact-driven case." See AB-24. Nonetheless, the State notes the evolution of the law with respect to both harmless error and (by analogy) ineffective assistance of counsel. See IB-28-29 ("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."); see also IB-32 ("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.*"); but see *N. Fla. Women's Health & Counseling Servs. v. State*, 866 So. 2d 612, 638 (Fla. 2003):

> And third, no premise of fact has changed in the intervening years so as to render T.W.'s holding utterly without legal justification. Although federal case law indicates that, due to scientific advancements, there may have been slight changes in (a) the safety of abortions and (b) the point at which a fetus becomes viable, both the former and latter were anticipated in [*In re T.W.*, 551 So. 2d 1186 (Fla. 1989)] and were expressly factored into that decision. Further, both those changes are of a technical or *evolutionary nature* and are not the type of precipitous factual upheaval that would be required in order to render

> a prior decision of this Court utterly without legal justification. (Emphasis added)

Final analysis

At present, Florida case law contains disparate applications of *Abreau's* "one-step removed" language. The First District applied that language to an unpreserved claim of fundamental error, whereas the Fourth District did not. See *Montgomery*, *Cooper*, supra. Additionally, this Court applied that language to an unpreserved claim of fundamental error in the context of the jury instruction on justifiable and excusable homicide. *Miller*, *Lucas*, supra. However, the State remains unaware of any other decision in which this Court extended *Abreau's* "one-step removed" language to a fundamental error claim that did not involve the instruction on justifiable and excusable homicide. Nonetheless, *Lucas's* broad language leaves that door wide open. See *Lucas* at 427 ("[T]he failure to give a complete initial instruction on manslaughter constitutes *fundamental reversible error* when the defendant is convicted of either manslaughter or a greater offense *not more than one step removed*."); but see *Pena v. State*, 901 So. 2d 781, 788 (Fla. 2005):

> [W]e find that the facts in this case and the unusual form of felony murder charged here distinguish this case from those cited by Pena. 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.

Given that *Abreau* incorporates a *per se* rule requiring reversal, such disparate applications inevitably result in needless confusion that unnecessarily increases the risk of injustice. See generally *Kegan v. Biltmore Terrace Associates*, 154 So. 2d 825, 827 (Fla. 1963):

> The fine line of distinction, if indeed there is any, between confusion and conflict is more than difficult to establish. However since, as we held in [*Sunad, Inc. v. Sarasota*, 122 So. 2d 611 (Fla. 1960)], obiter dictum which creates uncertainty and confusion in the case law of Florida is a proper basis for the exercise of our jurisdiction on the conflict theory, the conclusion is inescapable that we should, for the sake of consistency and uniformity here and now hold that we may exercise our jurisdiction to avoid confusion in the law in those cases where there appears to be a real and urgent reason to clear up such confusion in order to promote the efficient administration of justice and provide stability and certainty in the law.

Additionally, *Abreau* presents an even greater risk of injustice that, absent reversal, will forever flow: the erroneous reversal of an indeterminate number of convictions in cases where, if given the opportunity, the State could prove beyond a reasonable doubt that the error did not contribute to the conviction obtained. See *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986), citing *Chapman v. California*, 386 U.S. 18, 23 (U.S. 1967):

> The harmless error test, as set forth in *Chapman* and progeny, places the burden on the state, as the beneficiary of the 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. Application of the 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.

To reconcile *Abreau* holding with *DiGuilio* warning, this Court should apply "Pascal's wager" to the case *sub judice* and afford the State the opportunity to prove that any instructional error remains harmless.

CONCLUSION

Based on the foregoing discussion and the discussion in the Initial Brief, 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 April 29th, 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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