IN THE SUPREME COURT OF FLORIDA

STANLEY McCLOUD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC14-1150
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

PETITIONER'S REPLY BRIEF

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

The State argues that the jury presumably considered, and rejected, two lesser included offenses which were supported by the evidence and the jury instructions. The State presented only one of those theories to the jury, and neither theory is in fact supported by the record. Even if those lesser offenses were supported, the State has presented no persuasive reason why an error which prevented the jury from considering the sole defense at trial probably did not contribute to the verdict. Since neither the State nor the DCA has adequately explained why the instructional error should be deemed harmless, this court should hold based on the full record now before it that the error was fundamental and that it warrants a new trial.

ARGUMENT

IN REPLY: THE DISTRICT COURT'S HARMLESS ERROR CONCLUSION IS NOT SUPPORTED BY THE RECORD. THIS COURT SHOULD HOLD THAT FUNDAMENTAL ERROR TOOK PLACE AT TRIAL, OR HOLD THAT THE RECORD CONTAINS NO BASIS TO FIND HARMLESS ERROR, OR REMAND FOR THE DCA TO SET OUT THE BASIS FOR ITS HARMLESS ERROR CONCLUSION.

In the State's view of this case, the jury presumably considered, and rejected, two lesser included offenses which were "completely supported by the evidence and the instructions." (Answer Brief at 17) The State presented only one of those theories to the jury; it did not argue in closing for a verdict of involuntary manslaughter based on culpable negligence. Its current reliance on a culpable-negligence theory depends in part on the fact the parties agreed to a plea to that offense vis-à-vis the children. It was Petitioner's intention *toward his wife* that was at issue at trial, and the fact that the State charged, and accepted a plea to, a different charge as to different victims should not dispose of the question before this court.

The State's current culpable-negligence theory - that the defendant intended only to scare his wife, and carelessly handled the gun - also depends on the assumption that the lights were on when he raised the gun. However, the defendant in his pretrial statement told the detective three times that he shot in the

dark after the television blinked off, and the victim's 20-year old son, who heard the shot and investigated, was never asked if he had to turn the lights on to see what had happened in the bedroom. (XI 500, 502, 514; X 375-81) The assumption that the lights were on also underlies the State's theory that the jury probably considered and rejected a third-degree felony-murder theory based on aggravated assault. Neither theory is supported by the evidence, and accordingly this court need not reach the question left unanswered in Haygood v. State, 109 So. 3rd 735 (Fla 2013), i.e., whether reading the flawed manslaughter instruction amounts to fundamental error where the evidence supports a voluntary manslaughter verdict but also supports one or more additional verdicts lesser than second-degree murder.

If this court disagrees, and holds that the record does support more than one lesser included offense in this case, this court should nevertheless hold that the instructional error was harmful and therefore fundamental. The "steps removed" analysis set out in State v. Abreau, 363 So. 2d 1063 (Fla. 1978), should have no application at all here: Mr. McCloud has never argued for a jury pardon, but instead has correctly argued he was entitled to jurors who were comprehensibly instructed that voluntary manslaughter is a possible verdict. However, even if the rule of Abreau is applied here, applying that rule only yields the conclusion that

harmless-error analysis is appropriate, not that any error was, or must have been, harmless. Abreau, 363 So. 2d at 1064; see Pena v. State, 901 So. 2d 781, 787 (Fla. 2005) and Daniel v. State, 137 So. 3rd 1181 (Fla. 3rd DCA 2014).

As to harm, the State posits generally that "at some point the lesser offense becomes so far removed from the crime for which the defendant was convicted that deeming the error harmful...is absurd." (Answer brief at 13) That position may make sense in another case, but not in this case. In Martinez v. State, 981 So. 2d 449 (Fla. 2008), in the similar context of incorrect jury instructions on a theory of defense, this court held that fundamental-error analysis should include examination of the entire record, including evidence and the parties' argument. 981 So. 2d at 455-57. This court found no fundamental error in that case, although the self-defense instruction was flawed, since Martinez had relied on scattershot defenses and since his self-defense theory depended on the jury believing the victim had gotten stabbed in the back by falling on scissors. Id. at 456-47. Cf. Alexander v. State, 121 So. 3rd 1185 (Fla. 1st DCA 2013) (instructional error fundamental where it vitiated sole defense); Vowels v. State, 32 So. 3rd 720 (Fla. 5th DCA 2010) (same). Here the sole defense raised at trial was amply supported by evidence. As Mr. McCloud has argued throughout these appellate proceedings, the jury in this case had to consider his sole defense in order to reach a verdict,

and the instructional error cannot reasonably be deemed harmless for that reason. See Martinez, 981 So. 2d at 455, *citing* State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991).

The State further urges this court to accept the DCA's unelaborated conclusion that no harm resulted from the instructional error. The State warns that "this Court would create a dangerous precedent" if it does *not* accept the DCA panel's conclusion. This court remanded this case to the DCA "for reconsideration upon application of our decision in Haygood." McCloud v. State, 137 So. 3rd 1021 (Fla. 2014). It poses no danger to any legitimate interest for this court to require the DCA, in this procedural posture, to set out *why* this court's new precedent requires no action. The State's position is at odds with the language from Ventura v. State, 29 So. 3rd 1086 (Fla. 2010) quoted in Petitioner's merit brief at 17-18; this court should reject the State's position, determine the harmless-error question on the full record now before this court, and remand this case for retrial.

CONCLUSION

This court should quash the Fifth DCA's decision affirming Petitioner's second-degree murder conviction on the basis of fundamental error, and remand for a new trial.

If that relief is not granted, Petitioner asks this court to remand for the Fifth DCA to set out on what basis it found harmless error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the foregoing reply brief has been electronically delivered to Assistant Attorney General Kristen L. Davenport, at kristen.davenport@myfloridalegal.com and crimappdab@myfloridalegal.com, and mailed to the Appellant on this 1st day of April, 2015.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

Nancy Ryan

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