IN THE SUPREME COURT OF FLORIDA

ANTONIO GARRETT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-2110

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Antonio Garrett, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of eight volumes, which will be referenced as the Record on Appeal and by appropriate volume, followed by any appropriate page number. "IB" will designate Petitioner's Initial Brief. "DCA IB" will designate Petitioner's brief in the district court. "R. Supp." will designate the supplemental record volume. "PJB" will designate Petitioner's jurisdictional brief. Each symbol will be followed by the 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 accepts Defendant's statement of the case and facts as generally supported by the record, subject to the following supplementation and corrections:

1. The sole evidence provided to support the assertion that Petitioner's use of force was justified was a recorded interview of Petitioner speaking with investigators. Petitioner indicated he was aware he was being questioned for a homicide, and when asked to explain what happened, he informed the investigators that "the guy" kept getting in his face and Petitioner kept

trying to avoid him. Each time Petitioner came back to the house, "the guy came back with something new." (VII 438). After continuing like this for an hour, Petitioner said, "I'm not asking you anymore. I'm telling you." (VII 438).

2. Petitioner indicated after he had returned to the victim's home for the final time, the victim went inside his house and grabbed a gun. (VII 448-449). Petitioner stated that the victim came out of the house with a .22 long rifle by his side and then pointed it at Petitioner. (VII 448-449). In response, Petitioner pulled out his gun. (VII 447-448).

3. Petitioner also stated that when the victim exited his home, he came so close to Petitioner as to be nose-to-nose. (VII 447-449). Later in the interview, Petitioner changed his story so that the event which triggered him pulling out his firearm was the victim merely pulling his rifle to cock, instead of actually pointing the rifle at Petitioner. (VII 449). When confronted with the reality that the police knew his version of events was not true, Petitioner defaulted again to the version where the victim merely cocked the rifle, instead of aiming it. (VII 452).

3. Petitioner claimed that after he pulled out his own firearm, the victim began to run away. (VII 448). Only after the victim began to run away did Petitioner fire his weapon. (VII 448). When one of the questioning officers repeated these facts to Petitioner, and implied that the victim was not pointing a gun at Petitioner because he was running away, Petitioner mentioned for the first time that the victim was trying to cock the rifle while he was running. (VII 447-448).

4. Petitioner clarified that it was only when the victim had run so far from the sidewalk as to reach the first step onto his porch that Petitioner initially fired upon him. (VII 450). Petitioner stated after he fired, the victim dropped his gun, but Petitioner persisted in firing again, despite his victim being completely unarmed. (VII 450). In total, he claimed he fired seven or eight times. (VII 450). The autopsy of the victim revealed three gunshot wounds and the cause of death was multiple gunshot wounds. (VII 321, 324-325).

5. Eyewitness testimony established that Petitioner walked up to the victim's house, where he was peacefully sitting on the porch, and opened fire on the victim without provocation. (VII 252-256).

6. Petitioner's proposed instruction on justifiable use of deadly force informed the jury that they must consider if he had a duty to retreat if he was engaged in unlawful activity. (R. Supp. 5).

7. Petitioner argued in the First District Court of Appeal that, "[i]t was error to instruct the jury that possession of a firearm by a convicted felony[sic] constitutes unlawful activity and **therefore the jury must consider whether appellant had a duty to retreat.**" (DCA IB)(emphasis added).

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to consider this case. The State charged Petitioner with First Degree Murder, and pursuant to Petitioner's request, instructed the jury on self defense, including an instruction that he had no duty to retreat if he was not engaged in unlawful activity. Petitioner claims on appeal that this was error as he had no duty to retreat before using deadly force under Florida's "Stand Your Ground", regardless of whether he was engaged in unlawful activity, and so the jury instructions fundamentally erred by telling the jury to consider whether unlawful activity on his part required him to retreat, unless retreat was not a viable option. The First District found that although the instruction was erroneous, it did not rise to the level of fundamental error under the specific facts of this case. The decision in the instant case, that the alleged error was not fundamental, was driven by controlling facts different from those in Rios v. State, 143 So.3d 1167 (Fla. 4th DCA 2014), and Dorsey v. State, 149 So.3d 144 (Fla. 4th DCA 2014)(Dorsey II), rendering the decision incapable of being in express and direct conflict with those cases.

Additionally, this case is a poor candidate for discretionary review, as Petitioner waived the issue by affirmatively requesting the jury instruction which he now complains was fundamental error to allow the jury to consider. Specifically, Petitioner proposed an instruction on justifiable use of force that informed the jury that Petitioner had a duty to retreat if he was engaged in unlawful activity, the exact language Petitioner now considers to be fundamentally erroneous for his jury to have considered.

Even if jurisdiction existed and the issue was not waived, no fundamental error occurred. The First District acted in accordance with this Court's precedent in determining that the circumstances of the instant case did not allow the alleged error to reach into the validity of the trial to the extent that the verdict of guilty could not have been obtained without the assistance of the alleged error. The facts and the remaining instructions indicated that if the jury believed Petitioner's story, they would also have found retreat to be futile, in which case they were instructed to find that Petitioner did not have a duty to retreat. Regardless of whether the allegedly erroneous instruction was considered by the jury, it did not affect the jury's ability to consider Petitioner's defense. Additionally, Petitioner's defense was extremely weak, as it was contradicted both by independent evidence and itself, and an error in such a defense cannot be fundamental, according to this Court.

Moreover, it was not error at all to allow the jury to consider whether Petitioner had a duty to retreat if engaged in unlawful activity. The legislature cannot have been more clear when it recently clarified that it had always intended unlawful activity to preclude application of the protections of the "Stand Your Ground" law, including the ability to stand one's ground and not retreat, even when retreat is a viable option. The complained-of instruction is consistent with the legislature's interpretation of its own law, and therefore the jury was correctly instructed.

ARGUMENT

ISSUE: WHETHER THE JUSTIFIABLE USE OF FORCE INSTRUCTION AMOUNTED TO FUNDAMENTAL ERROR WHERE PETITIONER AFFIRMATIVELY REQUESTED THE INSTRUCTION, WHERE THE INSTRUCTION DID NOT AFFECT THE JURY'S ABILITY TO CONSIDER THIS PARTICULAR CLAIM OF SELF DEFENSE, AND THE INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW (RESTATED)

Jurisdiction

The State maintains its position that this Court lacks jurisdiction to consider the instant case. The decision in the instant case was driven by controlling facts different from those in Rios v. State, 143 So.3d 1167 (Fla. 4th DCA 2014), and Dorsey v. State, 149 So.3d 144 (Fla. 4th DCA 2014)(Dorsey II), rendering the decision incapable of being in express and direct conflict with those cases. Moreover, the Fourth District has relied upon the instant case as authority without receding from Rios or Dorsey, indicating that the Fourth District does not believe these cases are irreconcilable so as to be expressly and directly in conflict.

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

> The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Therefore, the determination of conflict jurisdiction

distills to whether the District Court's decision reached a result so opposite that of Rios v. State, 143 So.3d 1167 (Fla. 4th DCA 2014), and Dorsey v. State, 149 So.3d 144 (Fla. 4th DCA 2014), that it can be said that they are irreconcilable. See Crossley v. State, 596 So.2d 447, 449 (Fla. 1992)(holding that express and direct conflict arose from decisions reaching opposite results on the substantially the same controlling facts).

In the instant case, the First District held that it was error for the jury to be instructed, as part of the law on justifiable use of force, that a defendant has a duty to retreat prior to using force if they are engaged in unlawful activity. Garrett v. State, 148 So.3d 466, 471 (Fla. 1st DCA 2014). However, the First District also considered the instruction that Petitioner did not have a duty to retreat if faced with an imminent danger of death or great bodily harm and retreating would have increased his danger, as well as the evidence which could have indicated Petitioner faced such a danger and obviated any duty to retreat. Id. at 472. The court stated the following regarding the evidence in the case:

> The State's theory of the case was that the victim, Jerry Ford, was sitting on the front porch of his duplex late one night, unarmed and minding his own business. Earlier the same day, during Ford's intermittent arguments with Garrett, Garrett left the premises several times and then returned, with their disagreement renewed. When Ford's girlfriend tried to reduce the tensions, Ford told her to go inside. Shortly after midnight, Garrett completely lost patience and was ready to put an end to the dispute. Holding a firearm behind his back, Garrett returned to the scene and, standing on the sidewalk outside the front gate of the residence, repeatedly fired the weapon in Ford's direction. As Ford rose from his porch chair to try to save himself, the gunshots took him to the ground. After the shooting, Garrett walked away with the gun in his hand and was heard to remark: "I told you about f—ing with me." Ford died several hours later. Garrett's identity as the shooter was not at issue. A neighbor who witnessed the events leading up to the

> episode did not see anything in Ford's hands, and law enforcement found no firearm on Ford's body.
>
> The defense's theory was that Ford and Garrett had both consumed alcohol and attended a party in a neighbor's yard earlier that day, although they were not seen at the party at the same time. Ford was sitting on his front porch for much of the day and spent some of that time talking to Garrett. Garrett became increasingly annoyed by Ford's conduct as the night fell. During a confrontation, Ford was observed softly pushing Garrett. About thirty minutes later, gunshots were heard. The evidence indicated that Garrett discharged a .45-caliber semi-automatic pistol multiple times toward Ford's porch. Defense counsel argued, however, that Garrett was not the only person armed. A rifle was found in the yard of the duplex after the shooting.
>
> After being read his rights, Garrett gave an interview to the police following the shooting. Garrett stated that Ford had kept "digging at" him and putting his hands in Garrett's face, despite Garrett's begging Ford to back off and leave him alone. Garrett admitted repeatedly leaving the scene of the bickering and walking around the corner, only to return each time.
>
> Garrett described to the police the events that immediately preceded the firing of shots. Upon seeing Garrett return to the scene, Ford left his porch, went into his residence, grabbed a .22-caliber long rifle, and came back out with the rifle by his side. Garrett was standing on the sidewalk outside the gate. Garrett told the police that after Ford pointed his rifle at him, Garrett pulled out his own gun and fired multiple shots as Ford ran back toward the porch. As Ford was running, he was trying to cock his rifle at the same time. Garrett admitted continuing to shoot even after Ford dropped his rifle.

Id. at 467-468. The First District held that, "in the context of the other instructions given, along with the evidence adduced in the case," the instructions still allowed the jury to consider Petitioner's self-defense claim. Id. Such a holding is inherently specific to the interplay between the specific facts and instructions in the case.

In Rios, 143 So.3d 1167 at 1170, the Fourth District also held that it was error for the jury to be instructed that a defendant has a duty to retreat if they are engaged in unlawful activity. As to whether such an error was

fundamental, the court analyzed the evidence that Rios had an opportunity to escape, the instruction that the Rios had no duty to retreat if that increased his danger, and the prosecution's mention that Rios could have left with his friends. Id. at 1170-1171. The court concluded that all those factors rendered the error fundamental. Id.

Dorsey, 149 So.3d 144, also involves a jury being erroneously instructed that a defendant who is engaged in an unlawful activity has a duty to retreat. In reaching the conclusion that this error was fundamental, the court relied on its prior holding in Rios, stating that, "[a]s in *Rios*, the instruction's reference to the defendant's 'duty to retreat' was 'not necessary because Defendant did not have a duty to retreat under Florida's Stand Your Ground law,' and it 'effectively eliminated Defendant's sole affirmative defense.'" Id. at 147. By stating, "[a]s in *Rios*," without any other application of the law to the facts, the court did nothing more than adopt the rationale of Rios for the holding of Dorsey. Dorsey, therefore, adds nothing to the holding of Rios.

The determination of fundamental error in the instant case turns on facts that did not exist in Rios, and so is distinguishable from Rios. Specifically, the instant case lacks an obvious opportunity for Petitioner to have escaped. Garrett, 148 So.3d 466 at 472.

Given such a lack of parity in the relevant facts, Rios and the instant case are not irreconcilable, and so cannot be in express and direct conflict. Similarly, given that Dorsey provided no fundamental error analysis other than a blanket comparison to Rios, it cannot be said that an express and direct

conflict exists between Dorsey and the instant case when such a conflict is lacking with Rios. Without an express and direct conflict, this Court does not have jurisdiction to hear the instant case.

Moreover, the Fourth District is seemingly in full agreement with the decision of the First District in the instant case. In Pean v. State, 154 So.3d 1171 (Fla. 4th DCA 2015), the court relied exclusively on Garrett to affirm the lower court in a citation PCA which read as follows:

> *Affirmed. See Garrett v. State*, 148 So.3d 466, 472 (Fla. 1st DCA 2014) (finding there was no fundamental error in giving instructions on a duty to retreat because "[t]here was ample evidence presented for the jury to find that from the beginning of the incident, [the defendant] did not have a reasonable belief that deadly force was necessary to prevent an imminent threat against him, especially after [the victim] dropped his rifle and [the defendant] continued to shoot").

Pean v. State, 154 So. 3d 1171 (Fla. 4th DCA 2015). The parenthetical the Fourth included indicates they are in agreement with the First District on this point, and apparently do not consider the instant case to conflict with any cases from the Fourth.

It is worth noting that Petitioner's argument in favor of jurisdiction is based on a misapprehension of the First District's decision. Petitioner represents the decision as holding that since the evidence "belied an imminent threat" the jury could not have acquitted Petitioner. (PJB 7-8). The opposite is actually true, as the First District specifically stated that, "[u]nder the complete set of instructions given, the jury could have found that Garrett's use of deadly force was justified and he had no duty to retreat because retreating would be futile given the 'imminence' of the danger he faced." Garrett, 148 So.3d 466 at 472. Based on this misapprehension,

Petitioner argues that conflict exists because the First District decided for itself that there was no imminent threat. (PJB 8). Given that this claim of express and direct conflict is entirely based on a misreading of the decision in the instant case, it cannot support a claim of jurisdiction.

Even if an express and direct conflict did exist, this Court should not exercise its discretion to keep jurisdiction. As discussed below, Petitioner affirmatively requested the very instruction of which he now complains, and therefore has waived any argument on the issue. Any substantive issue that this case might have presented is therefore precluded from consideration, rendering this case a poor candidate for discretionary review.

Standard of Review

The decision of a trial court regarding a jury instruction is reviewed for an abuse of the trial court's discretion. Sheppard v. State, 659 So.2d 457, 459 (Fla. 5th DCA 1995). However, if a defendant fails to preserve an issue, the review for fundamental error is de novo. Elliot v. State, 49 So.3d 269 (Fla. 1st DCA 2010).

Consequently, a claim of unpreserved fundamental error concerning jury instructions typically submits to the more favorable *de novo* standard of appellate review a claim that is entitled to significant deference if Petitioner properly preserves the error. As a result, this Court should strictly apply its fundamental error analysis in order to encourage parties to research, study, and correct possible errors as soon as possible and to

discourage possible "sandbagging" and "gamesmanship" in the future.[1] See Thompson v. State, 949 So.2d 1169, 1179 n.7 (Fla. 1st DCA 2007), citing Black's Law Dictionary 1342 (7th ed. 1999) ("Sandbagging is defined as '[a] trial lawyer's remaining cagily silent when a possible error occurs at trial, with the hope of preserving an issue for appeal if the court does not correct the problem.'"); see also J.B. v. State, 705 So.2d 1376, 1378 (Fla. 1998), citing Davis v. State, 661 So.2d 1193, 1197 (Fla. 1995) ("[The contemporaneous objection rule] prohibits counsel from attempting to gain a tactical advantage by allowing unknown errors to go undetected and then seeking a second trial if the first decision is adverse to the client.").

Burden of Persuasion

Petitioner bears the burden of demonstrating prejudicial error. Section 924.051(7), Fla. Stat. (2008), provides:

> In a direct appeal ..., the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

"In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla.

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[1] The State does not suggest that the Petitioner in the case *sub judice* engaged in "sandbagging" or "gamesmanship". Rather, the State simply notes that a failure to strictly apply fundamental error analysis in the case at bar might encourage such behavior in future cases.

1979). Moreover, because the trial court's decision is presumed correct, "the appellee can present any argument supported by the record even if not expressly asserted in the lower court." Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 645 (Fla. 1999); see Robertson v. State, 829 So. 2d 901, 906-907 (Fla. 2002).

Preservation / Waiver

Petitioner has waived any argument that the jury was instructed it must consider if he had a duty to retreat if it found he was engaged in unlawful activity. Petitioner actually **proposed** the exact language of which he now complains, that the jury should consider whether Petitioner had a duty to retreat if he was engaged in unlawful activity. (VII 525-528, 533-536; R. Supp. 5). This affirmative request for the instruction waived any claim of error on this point, even a claim of fundamental error. Armstrong v. State, 579 So.2d 734, 735 (Fla. 1991); see also Calloway v. State, 37 So.3d 891, 896-897 (Fla. 1st DCA 2010); Joyner v. State, 41 So.3d 306, 307 (Fla. 1st DCA 2010); United States v. Macias, 387 F.3d 509, 521 (6th Cir. 2004)(noting that taking affirmative actions typically constitute invited error and admission of such evidence cannot later be questioned by the acting party). As this Court has stated,

> Any other holding would allow a defendant to intentionally inject error into the trial and then await the outcome with the expectation that if he is found guilty the conviction will be automatically reversed.

Id.

By proposing the exact instruction of which he now complains, Petitioner cannot now take the opposite position that inclusion of his proposed

instruction constituted fundamental error. It is worth repeating the following legal adage:

> "[T]he general rule is that a party cannot occupy inconsistent positions in the course of a litigation. It may be also laid down as a general proposition that where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it is to the prejudice of the party who has acquiesced in the position taken by him."

McPhee v. State, 254 So.2d 406, 409-10 (Fla. 1st DCA 1971) (quoting Fla. Jur. Estoppel and Waiver § 51). Petitioner's current position is directly opposite that which he took at trial by affirmatively requesting that which he now finds fundamentally flawed for the jury to have considered, and so has waived any argument on this issue.

Merits

1. The instruction on justifiable use of deadly force was not fundamentally erroneous.

Petitioner complains that the First District erred in its fundamental error analysis by assessing the weight of the evidence regarding Petitioner's affirmative defense of justifiable use of deadly force.[2] Petitioner has misapprehended the decision in the instant case. The First District's analysis centered instead on recognizing that any error in instructing the jury on Petitioner's unlawful activity did not force the jury to find he had a

[2] While the State addresses the question of fundamental error by assuming error occurred, the State does so for the sake of argument, and maintains below that Petitioner's proposed instruction regarding unlawful activity was correct.

duty to retreat under the unique facts of the instant case, and therefore did not deprive Petitioner of his defense. While the court also recognized the ample evidence for factually rejecting Petitioner's version of events, specifically the idea that he faced any imminent threat at all, this was done in the context of demonstrating how unlikely it was that the jury would believe the defense, even if correctly instructed. Most importantly, the court did not just consider that Petitioner had claimed self defense in general. The court considered Petitioner's specific defense which had to do with the reasonableness of the use of force and did not hinge on the duty to retreat. Such a recognition has been prescribed by this Court as wholly proper when evaluating claims of fundamental error in an instruction on an affirmative defense.

As a general rule, any error cannot amount to fundamental error when it is not part of what the jury **must** consider to convict. See State v. Delva, 575 So.2d 643, 644-45 (Fla. 1991). Similarly, any error cannot be fundamental unless the verdict **could not have been** reached without its assistance. See Martinez v. State, 69 So.3d 1062, 1063 (Fla. 3d DCA 2011)(holding that any alleged error would have to reach "down into the validity of the trial itself to the extent that the verdict of guilty **could not have been** obtained without the assistance of the alleged error."), quoting Delva, 575 So.2d 643 at 644-45 (emphasis added). Thus, a requirement for the finding of any fundamental error is certainty that the verdict was only reached because of the error. To say that an error possibly or even likely affected a verdict does not suffice, for that falls short of establishing that a verdict **could not have been**

obtained without the error.

The facts and circumstances of a case can show that a jury would have reached the same decision regardless of the alleged error. For example, in Pena v. State, 901 So.2d 781 (Fla. 2005), the defendant was charged and convicted of first-degree murder by drug distribution, and the definition of justifiable and excusable homicide was erroneously omitted, without objection, from the definition of the lesser-included offense of manslaughter. This Court noted that there was no evidence to support justifiable and excusable homicide, and that the charged crime did not require the State to prove a number of the usual elements associated with a homicide offense, such as intent and knowledge. Id. at 786-787. This Court reasoned that the factual context of Pena rendered justifiable and excusable homicide immaterial to what the jury had to consider. Because the verdict could have been obtained without the assistance of the error, the error was not fundamental.

Similarly, the First District's analysis focused on whether the "unlawful activity" language forced the jury to consider that Petitioner had a duty to retreat before using deadly force. The instruction at issue was as follows:

> A person is justified in using deadly force if he reasonably believes that such force is necessary to prevent:
>
> 1. imminent death or great bodily harm to himself or another, or
>
> 2. the imminent commission of Attempted Murder in the Second Degree and/or Aggravated Battery, against himself or another.
>
> . . .
>
> If Antonio Garrett was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed that it was necessary

> to do so to prevent death or great bodily harm to himself or to prevent the commission of a forcible felony.
>
> However, if you find that Antonio Garrett was engaging in unlawful activity then you must consider if Antonio Garrett had a duty to retreat.
>
> Antonio Garrett cannot justify the use of force likely to cause death or great bodily harm unless he used every reasonable means within his power and consistent with his own safety to avoid the danger before resorting to that force. The fact that Antonio Garrett was wrongfully attacked cannot justify his use of force likely to cause death or great bodily harm if, by retreating, he could have avoided the use of that force. However, if Antonio Garrett was placed in a position of imminent danger of death or great bodily harm and it would have increased his own danger to retreat then his use of force likely to cause death or great bodily harm was justifiable.
>
> Possession of a firearm by a convicted felon constitutes unlawful activity.

(I 106-107). The First District reasoned that if the jury believed from Petitioner's version of events that he faced an imminent threat, he would also have established from that version that any retreat would have been futile. Garrett, 148 So.3d 466 at 471-473. Specifically, the court held:

> According to Garrett's version of events, Ford was armed with a .22-caliber long rifle and had just pointed it at Garrett. Garrett pulled out his own gun and fired it in Ford's direction as Ford ran off while trying to cock his weapon. To prevail on his claim of self-defense, Garrett needed to establish that he had a reasonable belief that his use of deadly force was necessary to prevent the imminent danger presented by Ford. While the improper instruction required the jury to consider whether Garrett had a duty to retreat, the jury was also instructed that if Garrett "was placed in a position of *imminent* danger of death or great bodily harm and it would have increased his own danger to retreat then his use of force likely to cause death or great bodily harm was justifiable." (emphasis added).
>
> Under the complete set of instructions given, the jury could have found that Garrett's use of deadly force was justified and he had no duty to retreat because retreating would be futile given the "imminence" of the danger he faced. Although the challenged sentence in the instruction raised a "duty to retreat" question, in considering the effect of the instruction in the context of the other instructions given, along with

> the evidence adduced in the case, we find that the jury was sufficiently instructed on Garrett's theory of self-defense. There was ample evidence presented for the jury to find that from the beginning of the incident, Garrett did not have a reasonable belief that deadly force was necessary to prevent an imminent threat against him, especially after Ford dropped his rifle and Garrett continued to shoot. That the jury ultimately rejected Garrett's claim of self-defense does not mean that the challenged instruction constituted fundamental error.

Id. at 471-72. The First District having concluded that the error "did not affect the jury's ultimate responsibility . . . irrespective of whether he was engaged in unlawful activity," the answer was that the error did not reach down in the validity of the trial to that extent. Id. at 472-473.

This analysis is hardly unusual when considering fundamental error, as its ultimate end is to determine whether the verdict could have been obtained without the assistance of the error under the totality of the circumstances, including the evidence presented at trial. See Morgan v. State, 127 So.3d 708, 714-715 (Fla. 5th DCA 2013); see also Neal v. State, 169 So.3d 158 (Fla. 4th DCA 2015); Martinez v. State, 69 So.3d 1062, 1065 (Fla. 3d DCA 2011); Barrientos v. State, 1 So.3d 1209, 1219 (Fla. 2d DCA 2009); Smith v. State, 76 So.3d 379, 386 (Fla. 1st DCA 2011). The district courts are united in considering the evidence, the instructions, and all other aspects of the record to determine whether an error is fundamental.

Although the First District's decision focused on a traditional fundamental error analysis, this Court has specifically considered at least some circumstances in which an error is not fundamental when it relates to an instruction on an affirmative defense. When the error relates to an instruction on an affirmative defense, as it did here,

> [F]undamental error only occurs where a jury instruction is 'so flawed as to deprive defendants claiming the defense ... of a fair trial.' Additionally, the fundamental error doctrine 'should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a *compelling demand* for its application.'

Martinez v. State, 981 So. 2d 449, 455 (Fla. 2008) quoting Smith v. State, 521 So. 2d 106, 108 (Fla. 1988) citing Ray v. State, 403 So.2d 956, 960 (Fla. 1981). If an affirmative defense is extremely weak, an error instructing on that defense may or may not be fundamental error, depending on other factors involved in the case. Martinez, 981 So.2d 449 at 456. Indeed, many of the district court decisions cited above which discuss taking into account the totality of the circumstances when analyzing fundamental error expressly rely on this Court's decision in Martinez.

In Martinez, the defendant was charged with both attempted premeditated murder and aggravated battery with a deadly weapon for the stabbing his girlfriend. 981 So. 2d at 450. At trial, he claimed self-defense, along with several other defenses. Id. The court read an erroneous forcible-felony instruction, as part of the instruction on justifiable use of deadly force, without objection. Id. The jury subsequently convicted the defendant of first-degree murder. Id.

After reviewing the complete record in that case, this Court found that the erroneous forcible-felony instruction did not deprive the defendant of a fair trial for two reasons: (1) self-defense was not the only asserted defense, and (2) Martinez's claim of self-defense was "extremely weak." Id. at 456. Regarding the second reason, the Court noted:

> It is clear from the disturbing facts of this case that Martinez's claim that he had to fight for his life and did not have an opportunity to leave the room strained even the most remote bounds of credulity. When police arrived at the crime scene, Rijo was covered in blood and had multiple stab wounds and lacerations to her face, arm, and chest. Rijo had even been stabbed in the back, and this wound punctured her lung. Conversely, when the officers detained Martinez, the only injury suffered by Martinez was a 1/4-inch cut to his pinky finger, which required merely a bandage. Additionally, during trial, Martinez changed his testimony with regard to the weapon that Rijo wielded when she allegedly attacked him. Specifically, during direct examination, Martinez testified that Rijo attacked him with a razor; however, on cross-examination he stated that she attacked him with scissors and contended that he never said she attacked him with a razor. Martinez also provided additional inconsistent testimony. To explain why he was not more severely injured, he testified that he saw Rijo approaching him with the scissors and was able to block many of her attempts to stab him. However, when Martinez was later asked if Rijo bled more than he did from the injuries inflicted during the struggle, he stated the following: "It was dark in the room. You couldn't see in the room." Finally, although Martinez denied stabbing Rijo in the back, he also acknowledged that she did not stab herself in the back. Instead, he raised the very questionable hypothesis that Rijo slipped in blood and managed to fall on the scissors in such a manner, and with such force, that her lung was punctured. 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.

Id. at 456. Implicit in this analysis is a requirement for the reviewing court to assess the weight of the evidence, a necessary task when charged with determining whether a defense is extremely weak.

As it was with the self-defense claim in Martinez, so it is with Petitioner's claim. Petitioner's claim that he acted in self-defense strains "even the remote bounds of credulity." In sum, Petitioner's defense was that he shot at the victim once as the victim ran away while cocking his own rifle, and then fired approximately seven more times after the victim dropped that rifle and was completely helpless. This is not so much a claim of self-

defense as it is a confession to an unjustified homicide.

The sole evidence provided to support the assertion that Petitioner's use of force was justified was a recorded interview of himself speaking with investigators. Petitioner indicated he was aware he was being questioned for a homicide, and when asked to explain what happened, he informed the investigators that "the guy" kept getting in his face and Petitioner kept trying to avoid him. Each time Petitioner came back to the victim's house, "the guy came back with something new." (VII 438). After continuing like this for an hour, Petitioner said, "I'm not asking you anymore. I'm telling you." (VII 438).

After this point, Petitioner's story was substantively inconsistent. He indicated after he had returned to the victim's home for the final time, the victim went inside his house and grabbed a gun. (VII 448-449). Petitioner stated that the victim came out of the house with a .22 long rifle by his side and then pointed it at Petitioner. (VII 448-449). In response, Petitioner pulled out his gun. (VII 447-448).

However, Petitioner also stated that when the victim exited his home, he came so close to Petitioner as to be nose-to-nose. (VII 447-449). It is impossible for both of Petitioner's versions to be true, for a person who comes nose-to-nose with another simply lacks the physical space to point anything long, much less a long rifle, at their counterpart. It is worth noting that later in the interview, Petitioner changed his story so that the event which triggered him pulling out his firearm was the victim merely pulling his rifle to cock, instead of actually pointing the rifle at

Petitioner. (VII 449). When confronted with the reality that the police knew his version of events was not true, Petitioner defaulted again to the version where the victim merely cocked the rifle, instead of aiming it. (VII 452).

Petitioner's description of the subsequent events was also inconsistent. Petitioner claimed that after he pulled out his own firearm, the victim began to run away. (VII 448). Only after the victim began to run away did Petitioner fire his weapon. (VII 448). When one of the questioning officers repeated these facts to Petitioner, and implied that the victim was not pointing a gun at Petitioner because he was running away, Petitioner mentioned for the first time that the victim was trying to cock the rifle while he was running. (VII 447-448).

Even the facts in Petitioner's story which were not entirely inconsistent hurt Petitioner's defense. Petitioner clarified that it was only when the victim had run so far from the sidewalk as to reach the first step onto his porch that Petitioner initially fired upon him. (VII 450). Petitioner stated after he fired, the victim dropped his gun, but Petitioner persisted in firing again, despite his victim being completely unarmed. (VII 450). In total, he claimed he fired seven or eight times. (VII 450). The autopsy of the victim revealed three gunshot wounds and the cause of death was multiple gunshot wounds. (VII 321, 324-325).

Petitioner's defense is properly considered as being "extremely weak". It is unsurprising that the evidence in the case starkly contradicted Petitioner's story. For example, eyewitness testimony established that Petitioner walked up to the victim's house, where he was peacefully sitting on

the porch, and opened fire on the victim without provocation. (VII 252-256). There can be little doubt that there was no chance that any jury would have accepted a defense where Petitioner gives inconsistent versions of events, and ultimately still admits to firing on someone trying to escape, even after that person is completely disarmed.

While the First District did not analyze the case in terms of how the defense was extremely weak, they did recognize that there was "ample evidence" for the jury to reject Petitioner's defense and find that he faced no imminent threat.[3] Of course, pursuant to Martinez, whether the evidence was weak is an important factor in determining whether or not the error in the jury instruction was so flawed to deprive defendant of claiming the defense or of a fair trial. In the instant case, "extremely weak" is a generous descriptor; internally contradictory and impossible is more appropriate. When combined with the finding of the First District, that the error did not prevent the jury from considering Petitioner's defense, it is clear that any error cannot have been fundamental.

It is curious that while Petitioner argues primarily that the First District improperly weighed the evidence in its analysis, he also recognizes the authority of Martinez, which requires a reviewing court to do exactly what he claims is improper. His argument on appeal is therefore internally

[3] Because the party defending a judgment may raise any argument in favor of affirmance, it is immaterial that the lower court did not follow this recognition to its logical conclusion.

contradictory, as his defense was at trial, and is equally flawed. Of course, as previously discussed, Petitioner has misapprehended the import of the decision. The First District's analysis assumes for the sake of argument that the jury accepted Petitioner's defense, and analyzes the effect of the alleged error from that point of view. This is precisely the opposite of Petitioner's accusation. Petitioner has mistaken the court's recognition that there was ample evidence to contradict Petitioner's claim of self-defense, including Petitioner's own testimony that he kept firing after the victim was wholly unarmed. Garrett, 148 So.3d 466 at 472.

As for Petitioner's argument that the First District's decision expressly and directly conflicts with Rios and Dorsey, and that Rios and Dorsey have a superior approach, little else need be said which has not already been discussed above concerning this Court's jurisdiction. Simply because the Rios and Dorsey courts found an error fundamental under their sets of facts does not mean that error is fundamental under all other sets of facts. Fundamental error is not equivalent to an automatic "gotcha" reversal, particularly when Petitioner affirmatively requested the instruction which he now complains the jury had to consider.

This Court has stated the following about the need for wariness in holding errors to be fundamental:

> In discussing fundamental error the Court in Gibson v. State, 194 So.2d 19 (Fla.App.2d, 1967) said:
>
> 'The Florida cases are extremely wary in permitting the fundamental error rule to be the 'open sesame' for consideration of alleged trial errors not properly preserved. Instances where the rule has been permitted by the appellate Courts to apply seem to be categorized into

> three classes of cases: (1) where an involved statute is alleged to be unconstitutional, (2) where the issue reaches down into the very legality of the trial itself to the extent that a verdict could not have been obtained without the assistance of the error alleged, and (3) where a serious question exists as to jurisdiction of the trial Court.' (p. 20)

State v. Smith, 240 So.2d 807, 810 (Fla. 1970). In addition, the First District has previously stated the following regarding fundamental error:

> Appellants in criminal cases, and their attorneys, might prefer that any error they deem significant be classified as fundamental. An expansive view of fundamental error has tactical advantages for criminal defendants because it allows the defense lawyer to try a case without raising an important objection and then, if unsuccessful, have the appellate court review such objection for the first time. If the defense objects before the trial court, that court can consider the matter and make a ruling, thereby, in many cases obviating the need for any further review. In this case, for instance, had the defense objected, the trial court could have proceeded with the competency hearing and, for all anyone knows, entered an order, perfectly supported by the evidence, finding appellant competent to proceed. Because he has raised no other errors besides the competency matter, such a turn of events would have proven very bad tactically for appellant.
>
> Courts and lawyers well know the meaning of fundamental error–a mistake in a proceeding substantial enough to abrogate the need for contemporaneous objection. "[T]he error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Brown v. State,* 124 So.2d 481, 484 (Fla.1960). As the State argues in its brief, fundamental error in Florida is a structural error or an error without which a guilty verdict could not have been obtained. Such an error amounts to a denial of due process.

Thomas v. State, 894 So. 2d 1000, 1002-03 (Fla. 1st DCA 2005). This Court should continue to reject the expansive view of fundamental error in Petitioner's argument, which implicitly claims any error in an instruction on an affirmative defense demands automatic reversal, and hold that no fundamental error occurred in the instant case.

2. The instruction on justifiable use of deadly force was not fundamentally erroneous.

The State argued in the First District that it was not error at all to instruct the jury that Petitioner had a duty to retreat if engaged in an unlawful activity, as that instruction was in accordance with the "Stand Your Ground" law and the legislature's intent. While the First District rejected that argument based on Little v. State, 111 So.3d 214 (Fla. 2d DCA 2013), the Florida legislature has clarified since Little that their intent has always been to limit the "no duty to retreat" provision of the "Stand Your Ground" law to when a defendant was not engaged in unlawful activity. Consequently, it cannot be more clear that Little and its progeny were wrongly decided, and that the instruction in the instant case was not error at all.

Florida's "Stand Your Ground" law involves the interplay of several sections of Florida Statutes, two of which are relevant to the instant issue. Section 776.012, as it appeared in 2011, states, in relevant part:

Section 776.012, Florida Statutes (2011), states:

> A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat if:
>
> (1) He or she **reasonably believes** that such force is necessary to prevent **imminent death** or great bodily harm to himself or herself or another or to prevent the **imminent commission of a forcible felony**; or
>
> (2) Under those circumstances permitted pursuant to s. 776.013.

(emphasis added).

Section 776.013 (2011), home protection; use of deadly force; presumption of fear of death or great bodily harm states, in relevant part:

> (1) A person is **presumed to have held a reasonable fear** of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:
>
> (a) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
>
> (b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.
>
> (2) The **presumption** set forth in subsection (1) **does not apply** if:
>
> (a) The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person; or
>
> * * *
>
> (c) The person who uses defensive force is **engaged in an unlawful activity . . . .**
>
> * * *
>
> (3) A person **who is not engaged in an unlawful activity** and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or

> herself or another or to prevent the commission of a forcible felony.

(emphasis added).

As noted above, the duty to retreat under the "Stand Your Ground" law applies only when the person using allegedly defensive force is engaged in an unlawful activity. The privilege to stand one's ground is reserved for law-abiding citizens. §776.012, Fla. Stat.; §776.013, Fla. Stat.; see generally Dorsey v. State, 74 So.3d 521, 527 (Fla. 4th DCA 2011)(Dorsey I)("The plain language of section 776.013(3) provides that the 'no duty to retreat' rule applies only where a person 'is not engaged in an unlawful activity.'"), overruled by Dorsey II. Indeed, the legislative notes to the "Stand Your Ground" law state,

> "[T]he Legislature finds that it is proper for **law-abiding** people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." Ch.2005-27, at 200, Laws of Fla.

Peterson v. State, 983 So.2d 27, 29 (Fla. 1st DCA 2008)(emphasis added). In other words, a defendant who is engaged in an unlawful activity cannot stand their ground and meet force with force, but must retreat unless such retreat placed them in greater danger.

Prior to Little v. State, 111 So.3d 214 (Fla. 2d DCA 2013), including the time of both Petitioner's crime and trial, the interpretation of the law was uniform in that unlawful activity precluded application of the "Stand Your Ground" law's obviation of the common-law duty to retreat. See Dorsey I; see also Darling v. State, 81 So.3d 574 (Fla. 5th DCA 2012). Little, however,

held that a defendant engaged in unlawful activity was not precluded from seeking immunity under the "Stand Your Ground" law. The court stated that, "in summary, section 776.032(1) provides for immunity from criminal prosecution for persons using force as permitted in section 776.012, section 776.013, *or* section 776.031." Id. The court concluded:

> However, Little sought immunity based on the use of force as permitted in section 776.012(1). His status as a felon in illegal possession of a firearm did not preclude that claim of immunity.

Id. The court's finding in Little directly contradicts the express legislative intent in the preamble to the "Stand Your Ground" law, which provides that only law-abiding citizens may stand their ground.

Additionally, the court's reasoning in Little renders §776.013(3) meaningless and superfluous to §776.012(1). Statutory provisions are not to be construed in a way which renders them superfluous, but rather in a way which gives meaning to each word. See State v. Bodden, 877 So. 2d 680, 686 (Fla. 2004). Due to the similar ambits of both statutes, if one could assert §776.012(1) without an unlawful activity preclusion, then necessarily there is no circumstance where it would benefit a defendant to assert §776.013(3). The court in Little tried to distinguish §776.013(3) and §776.012(1) by their language, but the concurrence correctly points out the futility of such an analysis:

> Although I appreciate my colleagues' efforts to assign discrete ambits to these two statutes, I am not convinced that it is possible to do so. I have difficulty imagining that one could reasonably think it necessary to use deadly force to prevent death or great bodily harm without believing that the threatened harm is imminent.

Id. That sentiment was echoed more recently in Ford v. State, 172 So.3d 1003

(Fla. 1st DCA 2015), Kelsey, J., dissenting. That dissent acknowledges that the Florida legislature cannot have been more clear as to their intent, especially when clarifying the meaning of the law after the advent of Little, by stating:

> An interpretation of these two provisions of chapter 776 that ends up meaning the same thing for persons engaged in unlawful activity and those not so engaged improperly renders meaningless the unlawful activity exception of section 776.013(3). *See, e.g., Bretherick v. State*, 170 So.3d 766, 773 (Fla.2015) (applying in Stand Your Ground context rule of statutory construction to "avoid readings that would render part of a statute meaningless"). The Legislature stated in the preamble to the 2005 enactment of the Stand Your Ground law that it was intended to provide new rights to "law-abiding people." Ch. 2005-27, preamble, Laws of Fla. Properly interpreted, the specific unlawful activity exception of section 776.013(3) applies to the general rule stated in section 776.012. **When the Legislature amended chapter 776 in 2014 to repeat the criminal activity exception expressly within section 776.012 itself, the final bill analysis described this as a *clarifying* change, noting cases that had treated the two sections inconsistently.** Fla. H.R. Judiciary Comm., HB 89 (2014) Staff Analysis 1, 5-6 & n. 18 (final June 27, 2014) (citing *Pages*, 134 So.3d 536; *State v. Wonder*, 128 So.3d 867 (Fla. 4th DCA 2013); *Little v. State*, 111 So.3d 214 (Fla. 2d DCA 2013)).

Ford, 172 So.3d 1003 at 1005.

The recent clarifications to the "Stand Your Ground" law are especially notable in that they were enacted within a short period of time after Little was decided and its reasoning adopted by other courts. See Miles v. State, 162 So.3d 169 (Fla. 5th DCA 2014); see also Hill v. State, 143 So.3d 981 (Fla. 4th DCA 2014)(en banc). This Court has held that, "[w]hen . . . an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. Lowry v. Parole and Probation Com'n, 473 So.2d 1248, 1250 (Fla. 1985). As a

statement of what the "Stand Your Ground" law has always meant, this does not implicate retroactive application of the law. Rather, this is a legislative declaration that Little and its progeny are wrongly decided from the start and should not be followed.[4] It is quite clear that the Legislature always intended the "unlawful activity" preclusion to apply to the entirety of the Stand Your Ground law, including §776.012. As such, the instructions provided as to the justifiable use of deadly force were not improper at all, much less fundamentally so.

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[4] This is consistent with the sentiment expressed by the law's author, Representative Dennis Baxley, who stated after Little was decided that the "'stand your ground' was written for law-abiding citizens who are doing nothing wrong." McNiff, Tom, Baxley: Prosecutors Misinterpret Stand Your Ground Law, Ocala (Aug. 12, 2013), HTTP://WWW.OCALA.COM/ARTICLE/20130812/ARTICLES/130819945/1402. Baxley also said that, "I think it's perfectly clear that this doesn't apply if you're doing something illegal." Id. Additionally:

> While the law permits everyone to use deadly force if they believe it is "necessary to prevent imminent death or great bodily harm to himself … or to prevent the imminent commission of a forcible felony," Baxley noted that there is an important caveat: The law doesn't apply to you if you were engaged in "unlawful activity" when you fought back.

Id.

CONCLUSION

Based on the foregoing, the State respectfully submits that jurisdiction should be discharged. In the alternative, the State respectfully submits that the decision of the District Court of Appeal reported at 148 So.3d 466 should be approved regarding its fundamental error analysis, but disapproved as to its conclusion that error occurred at all, and the judgment entered in the trial court should be affirmed.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by electronic mail on December 11, 2015: Glen Gifford, Esq., at glen.gifford@flpd2.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

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