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IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. ROBERT FRANKLIN FLOYD, Respondent.	Case No. SC14-2162 District Court Case No. 1D11-4465

ANSWER BIEF OF THE RESPONDENT

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C. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the Case and Course of Proceedings Below.

Robert Franklin Floyd (hereinafter "Respondent Floyd") was charged in Santa Rosa County with second-degree murder and shooting at an occupied vehicle. (R6-1147).[1] The offenses allegedly occurred in February of 2010. At trial,[2] Respondent Floyd's defense was self defense/defense of others pursuant to Florida's "stand your ground" law. The evidence at trial established that on the night of the incident, Respondent Floyd held a bonfire party at his residence. A dispute arose among those in attendance (and the dispute began in Respondent Floyd's absence). Respondent Floyd heard his friend T.J. Cassady asking someone to leave, and he saw that the person was not leaving. As Respondent Floyd approached the dispute, he heard one

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[1] References to the pleadings portion of the First District Court of Appeal record will be made by the designation "R" followed by the appropriate volume number and page number. References to the supplemental volumes of the record will be made by the designation "SR" followed by the appropriate volume number and page number. References to the transcript of the jury selection proceeding will be made by the designation "JS" followed by the appropriate volume number and page number. References to the trial transcripts will be made by the designation "T" followed by the appropriate volume number and page number. References to the transcript of the sentencing hearing will be made by the designation "S" followed by the appropriate volume page number.

[2] At trial, Respondent Floyd was represented by Bryan D. McLeod, Esquire. The State was represented by Assistant State Attorney Robert C. Elmore. The Honorable Gary L. Bergosh presided over the trial.

of the individuals who was refusing to leave, whom he did not know, talking about whether he should "do it" or not while reaching his hand behind his back. Respondent Floyd walked up and pushed Gerald Banton, the individual who was reaching behind his back. When Respondent Floyd pushed Mr. Banton, Mr. Banton pulled out a pistol. Respondent Floyd turned his back on Mr. Banton and warned his friends and family of the gun, and Respondent Floyd retrieved a rifle. Meanwhile Mr. Banton got in his vehicle with a companion. Respondent Floyd and Mr. Banton exchanged gunfire as Mr. Banton was driving through the Floyd residence and out of the driveway. Getyron Benjamin, a passenger in Mr. Banton's vehicle, was struck by a bullet, causing his death.

At trial,[3] Respondent Floyd asserted that he was justified in using deadly force to protect his friends and family from Mr. Banton. The State contended that because Respondent Floyd pushed Mr. Banton first, he "initially provoked" Mr. Banton to pull out a gun. The State further argued that according to section 776.041, Florida Statutes, after Respondent Floyd pushed Mr. Banton, he no longer had a right to continue to stand his ground and meet Mr. Banton's use of force with force, but had to exhaust every reasonable means to escape Mr. Banton's use of force before again asserting force in return.

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[3] The trial jury was selected on May 2, 2011. (JS1-1). The trial began on May 3, 2011, and concluded on May 11, 2011.

When instructing the jury, the trial court stated the following (consistent with Florida's "stand your ground" law):

> If the defendant was not engaged in any 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 another, or to prevent the commission of a forceable felony.

(T14-1843) (emphasis added). However, the trial court also gave the following instruction to the jury:

> However, the use of deadly force is not justifiable if you find:
>
> 1. Robert Franklin Floyd initially provoked the use of force against himself, unless.
>
> A. The force asserted toward the defendant was so great that he reasonably believed that he was in imminent danger of death or great bodily harm and *had exhausted every reasonable means to escape the danger* other than using deadly force. Or.
>
> B. In good faith the defendant withdrew from physical contact with another person and clearly indicated to that person that he wanted to withdraw and stop the use of deadly force. But that person continued or resumed the use of force.

(T14-1842) (emphasis added). At the conclusion of the trial, the jury found Respondent Floyd guilty as charged for both offenses. (T14-1868-69; R11-2269-70).

Respondent Floyd was sentenced on July 26, 2011. For the second-degree murder count, the trial court sentenced Respondent Floyd to thirty years' imprisonment (with a twenty-five-year minimum mandatory sentence) followed by ten years' probation. (S-39; R11-2327). For the shooting at an occupied vehicle

count, the trial court sentenced Respondent Floyd to fifteen years' imprisonment (with the sentence to be served concurrently with the sentence for the second-degree murder count). (S-40; R11-2327).

On direct appeal, Respondent Floyd argued that the trial court's conflicting jury instructions amounted to fundamental error because they negated Respondent Floyd's self-defense/defense of others defense. In a unanimous opinion written by Judge Van Nortwick, the First District agreed:

> Floyd's only defense at trial was that he had used deadly force to defend himself and others. The conflicting jury instructions negated each other in their effect, and therefore negated their possible application to Floyd's only defense.

Floyd v. State, 151 So. 3d 452, 454 (Fla. 1st DCA 2014). The First District reversed Respondent Floyd's convictions and remanded this case for a new trial. The First District certified the following question to this Court:

> DOES FLORIDA STANDARD JURY INSTRUCTION (CRIMINAL) 3.6(f) PROVIDE CONFLICTING INSTRUCTIONS AS TO THE DUTY TO RETREAT?

This Court subsequently accepted this case for review in order to answer the certified question.

2. Statement of the Facts.

a. The State's Case in Chief.

James Ates. Mr. Ates testified that he was present at the party at the Floyd

residence on February 26, 2010. (T1-75). Mr. Ates stated that at one point during the evening, T.J. Cassady asked two men to leave the party. (T1-81). Mr. Ates testified that he observed Respondent Floyd push one of the men. (T1-82). Mr. Ates stated that he then heard someone say "gun" and people started running. (T1-84). Mr. Ates testified that he later observed Respondent Floyd with a rifle and he heard Respondent Floyd ask "what car are they in," to which someone responded "the white car." (T1-87-88). Mr. Ates stated that Respondent Floyd subsequently fired two shots toward the car, but when asked whether Respondent Floyd was "leveled onto the car or firing in the air," Mr. Ates responded "[i]t didn't look to be level." (T1-91-92). Mr. Ates testified that gunshots were then fired from the car and he stated that Respondent Floyd returned fire. (T1-92-94). When specifically asked about the second time that Respondent Floyd shot the rifle (i.e., when he returned fire after the gunshots were fired from the car), Mr. Ates explained that he thought Respondent Floyd hit the car: "I just figured if he was trying to hit the car, he would that time." (T1-94-95).

Rana Martin. Ms. Martin testified that she was present at the party at the Floyd residence on February 26, 2010. (T1-109). Ms. Martin stated that at one point during the evening, T.J. Cassady directed two men to leave the party. (T1-119). Ms. Martin testified that she observed Respondent Floyd push one of the men and the man

proceeded to pull out a pistol – which caused everyone to take "off running." (T1-126-29). Ms. Martin stated that she later observed Respondent Floyd with a rifle. (T1-135). Ms. Martin testified that she subsequently heard gunshots from two separate guns (and she believed that the first shot came from a rifle). (T1-137-39).

Brittnay Hammac. Ms. Hammac testified that she was present at the party at the Floyd residence on February 26, 2010. (T1-150-52). Ms. Hammac stated that at one point during the evening, T.J. Cassady told her that Gerald Banton and Gus Benjamin had to leave the party. (T1-157). Ms. Hammac testified that she then heard someone say "gun" and people started running. (T1-159-60). Ms. Hammac stated that she later heard gunshots. (T1-162).

Andrea Minyard. Dr. Minyard, a medical examiner, stated that she performed an autopsy on Gus Benjamin's body. (T1-183). Dr. Minyard opined that Mr. Benjamin died from a single "gunshot wound to the back." (T1-193).

Jeffrey Lynn McKnight. Mr. McKnight, a deputy with the Santa Rosa County Sheriff's Office, testified that he responded to the Floyd residence on February 27, 2010. (T2-203). When Mr. McKnight arrived, Respondent Floyd approached Deputy McKnight and explained that he had been involved in a shooting on his property. (T2-204). Deputy McKnight stated that he proceeded to place Respondent Floyd in handcuffs. (T2-205). Deputy McKnight subsequently obtained

a written statement from Respondent Floyd. (T2-206).

Crystal Bozard. Ms. Bozard, a deputy with the Santa Rosa County Sheriff's Office, testified that she responded to the Floyd residence on February 26, 2010. (T2-211-12). When she arrived at the scene, Deputy Bozard found "[f]ive gold freshly-spent rifle casings." (T2-213).

William Dunsford. Mr. Dunsford, a sergeant with the Santa Rosa County Sheriff's Office, testified that he responded to the Floyd residence during the early morning hours of February 27, 2010. (T2-216). After his arrival, Sergeant Dunsford helped to secure the scene. (T2-217).

Charlie Peters. Mr. Peters, the supervisor of the crime scene unit for the Santa Rosa County Sheriff's Office, testified that he responded to the Floyd residence on February 27, 2012, and he supervised other law enforcement officials as they took photographs of the residence/property and collected evidence. (T2-228-32). Mr. Peters stated that he subsequently conducted gunshot residue testing on Gerald Banton. (T2-237-38).

David Whittle. Mr. Whittle, a communication dispatch shift leader with the Santa Rosa County Sheriff's Office, testified that shortly after midnight on February 27, 2012, he received a call regarding a shooting from a dispatcher with the Brewton Police Department. (T3-321-25). Mr. Whittle stated that soon after receiving the call

from the Brewton Police Department, Respondent Floyd called 911 and reported the incident. (T3-327-30). The 911 call was played for the jury during Mr. Whittle's testimony. (T3-340-45).

Gerald Banton. Mr. Banton testified that he was present at the party at the Floyd residence on February 26, 2010; he went to the party with Gus Benjamin, Justin Smith, and Tiffani Pate. (T3-352-53). Mr. Banton drove the others to the party in his car (a Dodge Avenger). (T3-351). Mr. Banton had not met Respondent Floyd prior to February 26, 2010 (he heard about the party from Stacey Scott). (T3-350, 358). Mr. Banton stated that at one point during the evening, "[a] guy came up, pointed his fingers and told us we got such and such – ten seconds to leave." (T3-359). Mr. Banton stated that another man (Respondent Floyd) then pushed him, and Mr. Banton claimed that he turned to Mr. Benjamin and said "let's go." (T3-359). Mr. Banton said that after he was pushed, he "pulled" a pistol (a .38 revolver) out of his pants. (T3-361). Mr. Banton testified that he observed Respondent Floyd run towards a truck and he said that he (Mr. Banton) and Mr. Benjamin "started heading towards [his] car." (T3-362). Mr. Banton stated that he, Mr. Benjamin, Mr. Smith, and Ms. Pate got into his car and started to drive away (Mr. Banton was driving, Ms. Pate was in the front passenger seat, and Mr. Benjamin and Mr. Smith were in the backseat). (T3-370-71). Mr. Banton claimed that as he was driving away, he heard two

gunshots, and Mr. Benjamin said that he had been hit. (T3-372). Mr. Banton admitted that he reached his arm out of the window of the car and began shooting (and he alleged that he shot into the air). (T3-373-74). Mr. Banton stated that he then exited the Floyd property and drove Mr. Benjamin to the hospital (and he called a friend/police officer on the way). (T3-376-79). Mr. Banton conceded that he "tossed" his pistol in the bushes after he arrived at the hospital. (T3-380). Mr. Banton admitted that he got rid of his pistol because he "thought that maybe I was in the wrong for doing something." (T3-380). Mr. Banton further conceded that as he was driving to the hospital, he discarded the empty casings from his pistol. (T3-382-83). Finally, Mr. Banton admitted that when he was interviewed by law enforcement officials following the incident, he lied and said that he did *not* have a pistol at the time of the incident (and he continued to lie when subsequently questioned on other dates about whether he had a pistol at the time of the incident). (T3-385-88).

Justin Smith. Mr. Smith testified that he was present at the party at the Floyd residence on February 26, 2010; he went to the party with Gerald Banton, Gus Benjamin, and Tiffani Pate. (T3-416). Mr. Smith stated that during the evening, someone pushed Mr. Banton and Mr. Banton told Mr. Smith that they needed to leave the party. (T3-423). Mr. Smith testified that he, Mr. Banton, Mr. Benjamin, and Ms. Pate got into Mr. Banton's car and they began to drive away. (T3-430-31). Mr. Smith stated that he subsequently heard gunshots and Mr. Benjamin was hit by a

bullet. (T3-431). Mr. Smith acknowledged that Mr. Banton also fired a pistol. (T3-432-33). Notably, Mr. Smith admitted that when he was previously questioned about the incident, he lied and claimed that Mr. Banton did not have/fire a gun. (T3-441).

Jerick Cooper. Mr. Cooper, an officer with the Brewton Police Department, stated that he was contacted by telephone during the early morning hours of February 27, 2010, by Gerald Banton; Mr. Banton stated that his friend had been shot and he needed an escort to the hospital. (T3-468). Officer Cooper proceeded to relay the message to dispatch. (T3-468).

Travis Shoumake. Mr. Shoumake, a sergeant with the Brewton Police Department, stated that he was dispatched to the hospital on February 27, 2010. (T3-471). After he arrived at the hospital, Sergeant Shoumake observed a car pull up to the hospital and Justin Smith proceeded to carry Gus Benjamin into the hospital. (T3-473). Sergeant Shoumake subsequently searched the car but he did not find any weapons in the car. (T3-474).

Tiffani Pate. Ms. Pate testified that she was present at the party at the Floyd residence on February 26, 2010; she went to the party with Gerald Banton, Gus Benjamin, and Justin Smith. (T4-489). Ms. Pate stated that at one point during the evening, someone told Mr. Banton and Mr. Benjamin to leave the party and she observed Respondent Floyd push Mr. Banton. (T4-490-93). Ms. Pate testified that

Mr. Banton then "pulled his pants up," but she did not see what he was displaying. (T4-493-94). Ms. Pate stated that she heard Respondent Floyd say "I got something for ya'll" and he started running towards a vehicle. (T4-494). Ms. Pate testified that she, Mr. Banton, and Mr. Benjamin went to their car and started driving away, and she then heard gunshots. (T4-495). Ms. Pate stated that Mr. Banton then fired his pistol. (T4-496). Notably, Ms. Pate admitted that when she was previously questioned about the incident, she lied and claimed that Mr. Banton did not have/fire a gun. (T4-498-99). In fact, Ms. Pate stated that Mr. Banton told her that "it was best that we didn't" tell law enforcement officials that he had a gun. (T4-499).

Toni Griggers. Ms. Griggers testified that she was present at the party at the Floyd residence on February 26, 2010. (T4-518). Ms. Griggers stated that during the evening, she observed T.J. Cassady directing Gerald Banton and Gus Benjamin to leave the party. (T4-525). Ms. Griggers testified that Respondent Floyd pushed Mr. Banton and somebody said "gun." (T4-527-29). Ms. Griggers stated that she then observed Respondent Floyd with a rifle. (T4-531-32). Ms. Griggers testified that she subsequently heard gunshots (and she opined that the first gunshot came from Respondent Floyd's rifle). (T4-534-36).

Savannah Bonner. Ms. Bonner testified that she was present at the party at the Floyd residence on February 26, 2010. (T4-558). Ms. Bonner stated that during

the evening, she observed T.J. Cassady directing two men to leave the party. (T4-561-64). Ms. Bonner testified that Respondent Floyd pushed one of the men and that man then said that he had a gun. (T4-565-66). Ms. Bonner stated that she then observed Respondent Floyd with a rifle. (T4-567). Ms. Bonner testified that she subsequently heard gunshots (a loud shot followed by softer shots). (T4-568-69).

Lea Crain. Ms. Crain testified that she was present at the party at the Floyd residence on February 26, 2010. (T4-579). Ms. Crain stated that at one point during the evening, she observed T.J. Cassady directing two men to leave the party. (T4-582). Ms. Crain testified that she then saw one of the men display a pistol, and she stated that Respondent Floyd proceeded to push that man (i.e., the man who displayed the pistol). (T4-583-84). Ms. Crain testified that Respondent Floyd subsequently obtained his rifle from his truck. (T4-586). Ms. Crain stated that she lost sight of Respondent Floyd, but she later heard gunshots from two different guns. (T4-587).

Christopher Bardin. Mr. Bardin testified that he was present at the party at the Floyd residence on February 26, 2010. (T4-599). Mr. Bardin stated that at one point during the evening, two men were told to leave the party. (T4-601). Mr. Bardin testified that Respondent Floyd pushed one of the men and that man then pulled up his shirt and displayed a pistol. (T4-604). Mr. Bardin stated that he subsequently heard gunshots and he believed that two different guns were fired. (T4-610-12).

Kathy Hines. In February of 2010, Ms. Hines worked as a crime scene technician for the Santa Rosa County Sheriff's Office. (T5-632-33). Ms. Hines stated that she responded to the Floyd residence on February 27, 2010. (T5-633). Ms. Hines testified that she found five gunshot casings at the scene. (T5-634). Ms. Hines stated that she also attended the autopsy of Gus Benjamin and she recovered a bullet that was found in Mr. Benjamin's body (.243 caliber). (T5-638-39). Finally, Ms. Hines testified that she tested Mr. Benjamin's hands for gunshot residue. (T5-644).

Charlie Peters (recalled). Mr. Peters stated that he conducted a second examination of the Dodge Avenger and the second evaluation confirmed two bullet strikes (the trunk and the left rear door) and the presence of gunshot residue. (T5-654-56).

Scott Jones. Mr. Jones, a detective with the Santa Rosa County Sheriff's Office, testified that he responded to the hospital on February 27, 2010, and he collected some clothing that belonged to Gus Benjamin. (T5-692-93).

Daniel Radcliffe. Mr. Radcliffe, a crime laboratory analyst with the Florida Department of Law Enforcement ("FDLE"), testified that a trace amount of gunshot residue was detected on the gunshot residue kits collected from Gerald Banton and Gus Benjamin. (T5-716).

Jeffrey Foggy. Mr. Foggy, a firearm analyst with FDLE, testified that he tested Respondent Floyd's rifle and the rifle functioned properly. (T5-741). Mr. Foggy opined that five of the projectiles found at the Floyd residence were fired from the rifle. (T5-750). Mr. Foggy further opined that the projectile removed from Gus Benjamin's body was the same caliber projectile as the projectiles found at the Floyd residence. (T1-756).

Barney Ward. Mr. Ward testified that he was present at the party at the Floyd residence on February 26, 2010. (T5-771). Mr. Ward stated that at one point during the evening, he heard seven or eight gunshots. (T5-776-77). Mr. Ward testified that he later observed Respondent Floyd in possession of a rifle. (T5-780).

Matthew Rees. Mr. Rees testified that he was present at the party at the Floyd residence on February 26, 2010. (T5-810). Mr. Rees stated that at one point during the evening, someone directed Gerald Banton and Gus Benjamin to leave the party. (T6-818-19). Mr. Rees testified that Respondent Floyd then pushed Mr. Banton and Mr. Banton responded by pulling out a pistol. (T6-821). Mr. Rees stated that Respondent Floyd subsequently obtained a rifle and discharged it. (T6-823-24). Mr. Rees testified that after Respondent Floyd discharged his rifle, three shots were fired from a different gun. (T6-825).

Jimmy Sims. Mr. Sims testified that he was present at the party at the Floyd

residence on February 26, 2010. (T7-861). Mr. Sims stated that at one point during the evening, he heard someone shout "somebody's got a gun." (T7-867). Mr. Sims testified that Respondent Floyd subsequently obtained a rifle and he saw a car leaving the property. (T7-868-70). Mr. Sims stated that he later heard gunshots and he saw a "muzzle flash" in the dark, and he believed the first shot came from the rifle. (T7-871-72). Mr. Sims testified that when he heard the gunshot and saw the "muzzle flash," the "taillights had done disappeared" and the car was "already down the driveway." (T7-872).

Jennifer Beal. Ms. Beal testified that she was present at the party at the Floyd residence on February 26, 2010. (T7-885). Ms. Beal stated that at one point during the evening, she observed T.J. Cassady directing two men to leave the party. (T7-890-91). Ms. Beal testified that she later observed one of the men shooting a pistol from his car (driver's side) as the car was driving away and she observed Respondent Floyd shooting a rifle. (T7-897-900).

Elijah Odom. Mr. Odom testified that he was present at the party at the Floyd residence on February 26, 2010. (T7-920). Mr. Odom stated that at one point during the evening, he heard someone tell Gerald Banton, Gus Benjamin, and Justin Smith to leave the party. (T7-923-24, 938). Mr. Odom testified that he observed Respondent Floyd shove one of the men and the man proceeded to "flash" a pistol.

(T7-925-26). Mr. Odom stated that Respondent Floyd subsequently obtained his rifle. (T7-926). Mr. Odom testified that he later heard gunshots from two different guns – but he heard the rifle fire first. (T7-929-30).

Christopher Lambeth. Mr. Lambeth testified that he was present at the party at the Floyd residence on February 26, 2010. (T7-953). Mr. Lambeth stated that at one point during the evening, he heard someone tell Gerald Banton and Gus Benjamin to leave the party. (T7-958). Mr. Lambeth testified that he observed Respondent Floyd shove one of the men and Mr. Banton proceeded to "flash" a pistol. (T7-960). Mr. Lambeth stated that Respondent Floyd subsequently obtained his rifle and he heard Mr. Banton and Mr. Benjamin say "let's leave." (T7-961-62). Mr. Lambeth testified that he later heard gunshots from two different guns – but he heard the rifle fire first. (T7-963-65).

T.J. Cassady. Mr. Cassady testified that he was present at the party at the Floyd residence on February 26, 2010. (T7-981). Mr. Cassady stated that at one point during the evening, he asked Gerald Banton and Gus Benjamin to leave the party. (T7-986). Mr. Cassady testified that after he asked the two men to leave, one of the men said "should I do it," and the other said "Yeah, do it." (T7-988). Mr. Cassady stated that Respondent Floyd then pushed one of the men and the man proceeded to pull out a pistol. (T7-988).

Gary Baney. Mr. Baney, a detective with the Santa Rosa County Sheriff's Office, testified that he responded to the Floyd residence during the early morning hours of February 27, 2010. (T8-999). After he arrived at the scene, Detective Baney took a recorded statement from Respondent Floyd. (T8-1000). The recorded statement was played for the jury during Detective Baney's testimony. (T8-1008-19).

At the conclusion of Detective Baney's testimony, the State rested. (T8-1030).

b. Respondent Floyd's Case in Chief.

Jonathan King. Mr. King testified that he was present at the party at the Floyd residence on February 26, 2010. (T8-1053). Mr. King stated that at one point during the evening, two men were asked to leave the party. (T8-1063). Mr. King testified that one of the men proceeded to pull up his shirt and Mr. King heard someone yell "he ha[s] a gun." (T8-1063). Mr. King stated that someone fired a pistol from a vehicle and he observed Respondent Floyd fire back with his rifle. (T8-1065-70).

David Ramsey. Mr. Ramsey testified that he was present at the party at the Floyd residence on February 26, 2010. (T8-1103). Mr. Ramsey stated that at one point during the evening, two men were asked to leave the party. (T8-1106). Mr. Ramsey testified that he heard one of the men say to the other "Are you sure you want to do this?" and the other man responded "yes." (T8-1108-09). Mr. Ramsey stated that one of the men proceeded to "pick his shirt up like he was showing off a gun."

(T8-1109). Mr. Ramsey testified that he heard someone yell "he ha[s] a gun." (T8-1111). Mr. Ramsey stated that Respondent Floyd subsequently obtained his rifle. (T8-1112). Mr. Ramsey testified that he lost sight of Respondent Floyd, but he later heard gunshots from two different guns – but he heard the pistol fire first. (T8-1113-14).

Dillon Barnes. Mr. Barnes testified that he was present at the party at the Floyd residence on February 26, 2010. (T8-1130). Mr. Barnes stated that at one point during the evening, two men were asked to leave the party. (T8-1133). Mr. Barnes testified that he heard one of the men say to the other "Are you ready to do this?" and the other man responded "yes." (T8-1138). Mr. Barnes stated that one of the men proceeded to pull up his shirt and display a pistol. (T8-1138). Mr. Barnes testified that he heard someone yell "he's got a gun." (T8-1139). Mr. Barnes stated that he later heard gunshots from two different guns – but he heard the pistol fire first. (T8-1141-43).

Joshua Holloway. Mr. Holloway testified that he was present at the party at the Floyd residence on February 26, 2010. (T9-1174). Mr. Holloway stated that at one point during the evening, he observed T.J. Cassady requesting two men to leave the party. (T9-1181). Mr. Holloway testified that he then observed one of the men pull a pistol out of his waistband (and display it in a threatening manner), which

caused people to run and hide. (T9-1182-85). Mr. Holloway stated that he saw the two men get into a vehicle and start to drive away, but the vehicle subsequently stopped. (T9-1186). Mr. Holloway testified that he observed the vehicle's brake lights and then he saw a "muzzle flash" emanate from one of the windows of the vehicle and he heard the gunshots of a pistol (i.e., Mr. Holloway believed that the first gunshots came from the vehicle). (T9-1188-89). Mr. Holloway stated that after he heard the gunshots from the vehicle, he heard the sound of a rifle "shoot back." (T9-1190).

Brittany Holloway. Ms. Holloway testified that she was present at the party at the Floyd residence on February 26, 2010. (T9-1231-32). Ms. Holloway stated that at one point during the evening, she observed T.J. Cassady directing two men to leave the party. (T9-1235). Ms. Holloway testified that she later heard someone "scream that they had a gun." (T9-1239). Ms. Holloway stated that she subsequently heard gunshots and she believed that two different guns were fired. (T9-1242). Ms. Holloway opined that the smaller gun was shot first. (T9-1256).

Tad Floyd. Tad Floyd, Respondent Floyd's cousin, testified that he was present at the party at Respondent Floyd's residence on February 26, 2010. (T9-1267). Tad Floyd stated that at one point during the evening, he observed Respondent Floyd push a man. (T9-1273). Tad Floyd testified that the man appeared

to reach for “something” and then someone said “he’s got a gun.” (T9-1274). Tad Floyd stated that he later observed Respondent Floyd with a rifle and he subsequently heard gunshots. (T9-1277-78). Tad Floyd opined that the pistol was fired first and the rifle was fired second. (T9-1279).

Ryan Odom. Mr. Odom testified that he was present at the party at the Floyd residence on February 26, 2010. (T9-1307). Mr. Odom stated that at one point during the evening, he heard someone telling two men to leave the party. (T9-1314-15). Mr. Odom testified that he heard someone yell “he’s got a gun.” (T9-1316). Mr. Odom stated that he subsequently heard two guns being fired, and he opined that a pistol was fired first and a rifle was fired second. (T9-1317-20).

Jessica Odom. Ms. Odom testified that she was present at the party at the Floyd residence on February 26, 2010. (T9-1340). Ms. Odom stated that at one point during the evening, she heard T.J. Cassady tell two men to leave the party. (T9-1342-43). Ms. Odom testified that she later observed Respondent Floyd walking behind the two men (which she assumed was to ensure that the two men left the party), and then she heard someone yell “he’s got a gun” and she saw Respondent Floyd run past her. (T9-1344). Ms. Odom stated that she subsequently heard two guns being fired. (T9-1346).

Keith Floyd. Keith Floyd, Respondent Floyd’s father, testified that he was

inside his residence for the entire evening of February 26, 2010 (i.e., during the party). (T10-1362). Keith Floyd stated that at one point during the evening, he initially heard two or three gunshots, followed by "at least 10" gunshots. (T10-1364-65).

Andrew Floyd. Andrew Floyd, Respondent Floyd's brother, testified that he was present at the party at his residence on February 26, 2010. (T10-1373). At one point during the evening, Andrew Floyd observed a dispute/argument between Respondent Floyd and two men. (T10-1376). Andrew Floyd stated that Respondent Floyd pushed one of the men, and that man proceeded to pull out a pistol. (T10-1378-79). Andrew Floyd testified that after the man pulled out his pistol, Respondent Floyd ran to his truck to retrieve a rifle. (T10-1380-81). Andrew Floyd stated that the two men proceeded to get into a car and drive away, but before driving away, "they started shooting and [Respondent Floyd] returned fire." (T10-1382).

Nickolas Sizemore. Mr. Sizemore testified that he was present at the party at the Floyd residence on February 26, 2010. (T10-1404). Mr. Sizemore stated that at one point during the evening, he heard someone say that two men had a gun. (T10-1412). Mr. Sizemore stated that after this was said, Respondent Floyd retrieved his rifle. (T10-1412-13). Mr. Sizemore testified that he subsequently heard gunshots (and he opined that two different guns were fired). (T10-1415-17).

Respondent Floyd.[4] Respondent Floyd testified that there was a party at his residence on the evening of February 26, 2010. (T11-1450). Respondent Floyd stated that prior to the party, he had never met Gerald Banton or Gus Benjamin. (T11-1454). At one point during the evening, Respondent Floyd heard T.J. Cassady tell Mr. Banton and Mr. Benjamin that they needed to leave the party. (T11-1457). Respondent Floyd stated that the following occurred when he approached Mr. Cassady, Mr. Banton, and Mr. Benjamin:

> And as I walked up, I was trying to hear what they were saying. I could tell they were conversating [sic]. They were turned towards one another saying something. So I was trying to listen to them. And the shorter one, what I know to be Gus now, was saying, "Are you going to do it?" And the taller one said, "Do you think I should do it?" They were kind of – they weren't turned toward T.J. or anybody, "Do you think I should do it?" He said, "Yeah, go on and do it." And he was kind of – he was turned this way with his hands over here like (Indicating) I – "You think I should do it?" So I walked up and pushed him, said, "Come on," like I'm thinking in my mind, "What is – going to do what?" I was going to defuse the situation before something happened.

(T11-1458). Respondent Floyd stated that after he pushed Mr. Banton, Mr. Banton grabbed a pistol out of his waistband and he "swung it around" towards Respondent Floyd. (T11-1458-59). Respondent Floyd explained that he told everyone else at the party that Mr. Banton had a gun (because he was scared for them) and he proceeded

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[4] Respondent Floyd was twenty-two years old at the time of his testimony. (T11-1448).

to run to his truck to grab his rifle and then run back to where Mr. Banton had been standing. (T11-1460-61). Respondent Floyd stated that it took him "probably less than 10 seconds" to retrieve his rifle and return to where Mr. Banton had been standing. (T11-1462). Respondent Floyd testified that when he returned with his rifle, he did not see Mr. Banton, so he proceeded to the driveway and he saw a "muzzle flash come from a car." (T11-1462-63). Respondent Floyd stated that he fired his rifle into the air. (T11-1463).[5] Respondent Floyd testified that he observed another muzzle flash coming from the car, so he fired over the car, but he continued to observe muzzle flashes coming from the car so he fired his rifle at the car. (T11-1463-64).[6] Respondent Floyd stated that the car eventually left the driveway and drove away. (T11-1469). Later, when Respondent Floyd discovered that Mr. Benjamin had been shot, Respondent Floyd called the police. (T11-1469). Respondent Floyd stated that his focus at the time of the incident was on "protect[ing] the people there at [his] house." (T11-1471).

At the conclusion of Respondent Floyd's testimony, the defense rested. (T12-1567).

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[5] Respondent Floyd said that he fired his rifle at the car because he "wanted them to stop shooting." (T11-1513).

[6] Respondent Floyd explained that he fired one shot into the air, two shots over the car, and two shots at the car. (T11-1465-66).

c. The State's Rebuttal.

Brandon Lewis. Mr. Lewis stated that on February 26, 2010, he observed Respondent Floyd with a rifle in his hands running "towards his home place or truck." (T12-1569-72). Mr. Lewis stated that he yelled at Hunter Floyd to grab Respondent Floyd, but he was not sure whether Hunter Floyd heard him say this. (T12-1570-71). Mr. Lewis testified that he also yelled out "Stop, let them go," but he did not know whether Respondent Floyd heard him say this. (T12-1572, 1575).

Samantha Jackson. Ms. Jackson testified that she observed Respondent Floyd with a rifle in his hand on February 26, 2010, and she yelled at him to "stop" in "the midst of the gunfire." (T12-1578-80). However, Ms. Jackson acknowledged that she did not know whether Respondent Floyd heard her because he was "a pretty good distance away" from her. (T12-1581).

Tamara Lewis. Ms. Lewis testified that she observed Respondent Floyd with a rifle in his hand on February 26, 2010, and she yelled at him to "stop." (T12-1586). However, Ms. Lewis conceded that it was very loud at the time and she was not able to get Respondent Floyd's attention. (T12-1588-89).

At the conclusion of Ms. Lewis' testimony, the State rested. (T12-1590).

d. Verdict.

The parties gave their closing arguments (T13-1662-1795; T14-1797-1826)

and the trial court instructed the jury. (T14-1827-59). The jury found Respondent Floyd guilty as charged for both offenses. (T14-1868-69; R11-2269-70).

D. SUMMARY OF ARGUMENT

Florida Standard Jury Instruction (Criminal) 3.6(f) provides conflicting instructions as to the duty to retreat. At trial, when instructing the jury, the trial court stated the following (consistent with Florida's "stand your ground" law):

> If the defendant was not engaged in any 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 another, or to prevent the commission of a forceable felony.

(T14-1843) (emphasis added). However, the trial court also gave the following instruction to the jury (the "aggressor" instruction):

> However, the use of deadly force is not justifiable if you find:
>
> 1. Robert Franklin Floyd initially provoked the use of force against himself, unless.
>
> A. The force asserted toward the defendant was so great that he reasonably believed that he was in imminent danger of death or great bodily harm and *had exhausted every reasonable means to escape the danger* other than using deadly force. Or.
>
> B. In good faith the defendant withdrew from physical contact with another person and clearly indicated to that person that he wanted to withdraw and stop the use of deadly force. But that person continued or resumed the use of force.

(T14-1842) (emphasis added). Thus, on the one hand, the jury was told that Respondent Floyd had no duty to retreat, but on the other hand, the jury was told that Respondent Floyd had to exhaust every reasonable means to escape the danger. The

First District correctly held that these conflicting jury instructions amounted to fundamental error because the instructions negated Respondent Floyd's self-defense/defense of others defense (his sole defense at trial).

E. ARGUMENT AND CITATIONS OF AUTHORITY

Florida Standard Jury Instruction (Criminal) 3.6(f) provides conflicting instructions as to the duty to retreat.

1. Standard of Review.

In its Initial Brief, the State asserts the following regarding the standard of review in this case:

> The standard of review for fundamental error is *de novo*. *Williams v. State*, 145 So. 3d 997, 1002 (Fla. 1st DCA 2014), citing, *Elliot v. State*, 49 So. 3d 269, 270 (Fla. 1st DCA 2010). Furthermore, the standard of review for whether a jury instruction is a correct statement of law is also *de novo* which is the real issue in this case. *United States v. Hill*, 643 F.3d 807, 850 (11th Cir. 2011), citing *United States v. Chandler*, 996 F.2d 1073, 1085 (11th Cir. 1993).

Initial Brief at 8-9. Respondent Floyd agrees that the Court's standard of review of the issue in this case is *de novo*.

2. Respondent Floyd did not "waive" his jury instruction claim.

In its Initial Brief, the State cites portions of the charge conference and then argues that Respondent Floyd waived this claim because defense counsel agreed to the instructions that were given by the trial court. *See* Initial Brief at 9-10. In *Fussell v. State*, 154 So. 3d 1233, 1235 n.4 (Fla. 1st DCA 2015), the First District recently explained that

> [a]cquiescence in the giving of a jury instruction, *as opposed to an affirmative request for the instruction*, does not amount to inviting error and does not preclude relief in the event of fundamental error. *Compare* *Williams v. State*, 145 So. 3d 997, 1003 (Fla. 1st DCA 2014)

> (concluding error in jury instructions was not affirmatively waived where "defense counsel did not request the defective instruction" and the "record . . . reflect[ed] nothing more than unknowing acquiescence"), *with Smith v. State*, 76 So. 3d 1056, 1058 (Fla. 4th DCA 2011) ("The specific issue of whether 'and/or' was appropriate was extensively discussed between the court and the attorneys, and Smith asked for the instruction that he now claims negated his entire defense . . . . Where the defendant asks for the instruction that he claims on appeal was erroneous, he cannot raise its error on appeal.").

(Emphasis added). In the instant case, defense counsel did not "affirmatively request" the improper/conflicting instructions. Rather, the defense counsel merely "acquiesced" to the giving of the instructions. Accordingly, Respondent Floyd did not waive this claim.

3. Argument.

The First District certified the following question to this Court:

> DOES FLORIDA STANDARD JURY INSTRUCTION (CRIMINAL) 3.6(f) PROVIDE CONFLICTING INSTRUCTIONS AS TO THE DUTY TO RETREAT?

For the reasons expressed below, the First District correctly concluded that Florida Standard Jury Instruction (Criminal) 3.6(f) provides conflicting instructions as to the duty to retreat.

At trial, Respondent Floyd's defense was self defense/defense of others pursuant to Florida's "stand your ground" law. When instructing the jury, the trial court stated the following (consistent with Florida's "stand your ground" law):

> If the defendant was not engaged in any 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 another, or to prevent the commission of a forceable felony.

(T14-1843) (emphasis added). However, the trial court also gave the following instruction to the jury (the "aggressor" instruction):

> However, the use of deadly force is not justifiable if you find:
>
> 1. Robert Franklin Floyd initially provoked the use of force against himself, unless.
>
> A. The force asserted toward the defendant was so great that he reasonably believed that he was in imminent danger of death or great bodily harm and *had exhausted every reasonable means to escape the danger* other than using deadly force. Or.
>
> B. In good faith the defendant withdrew from physical contact with another person and clearly indicated to that person that he wanted to withdraw and stop the use of deadly force. But that person continued or resumed the use of force.

(T14-1842) (emphasis added). Thus, on the one hand, the jury was told that Respondent Floyd had no duty to retreat, but on the other hand, the jury was told that Respondent Floyd had to exhaust every reasonable means to escape the danger.

On direct appeal, Respondent Floyd argued that the "aggressor"instruction negated his "stand your ground" defense. The First District agreed with Respondent Floyd's argument. In a unanimous opinion written by Judge Van Nortwick, the First District held that the trial court's conflicting jury instructions negated Respondent Floyd's self-defense/defense of others defense:

> On appeal, Floyd argues that one part of the instruction negated

the other, such that while the jury was told that Floyd had no duty to retreat, the jury was also told that Floyd had to exhaust every reasonable means of escaping danger. The State maintains that, when read as a whole, the jury instructions are not so confusing as to constitute fundamental error. We disagree.

In determining whether the jury instructions constituted fundamental error, we must consider "the effect of the erroneous instruction in the context of the other instructions given, the evidence adduced in the case, and the arguments and trial strategies of counsel." *Smith v. State*, 76 So. 3d 379, 383 (Fla. 1st DCA 2011). As indicated above, the jury was instructed that if the use of deadly force is necessary to prevent imminent death or great bodily harm to oneself or others, then deadly force is justified without regard to any effort to retreat so long as the defendant is not engaged in unlawful activity. A defendant may not use deadly force if the defendant provoked another showing force; however, if the defendant provoked another, who then uses force so great as to put the defendant in fear of death or great bodily harm, then the defendant may use deadly force, but only if the defendant has first exhausted every means of escape. In effect, the jury instruction here provided that Floyd did not have to retreat before meeting deadly force with deadly force if in fear of death or great bodily harm and did have a duty to try to retreat before using deadly force if in fear of death or great bodily harm.

As noted, Floyd's only defense at trial was that he had used deadly force to defend himself and others. The conflicting jury instructions negated each other in their effect, and therefore negated their possible application to Floyd's only defense. As the court in *Carter v. State*, 469 So. 2d 194, 196 (Fla. 2d DCA 1985), explained:

> [W]here, as here, a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant.

See also Richards v. State, 39 So. 3d 431 (Fla. 2d DCA 2010) (holding that the erroneous use of an outdated jury instruction on the justifiable use of deadly force requiring the defendant to retreat if possible negated defendant's claim of self-defense and rose to the level of fundamental

> error); *Grier v. State*, 928 So. 2d 368 (Fla. 3d DCA 2006) (explaining that fundamental error exists when incorrect jury instructions negate defendant's sole defense).
>
> We therefore reverse Floyd's convictions, vacate his sentences, and remand for a new trial on both counts. On remand, the trial court is reminded that discretionary costs must be orally pronounced at sentencing before such may be imposed in a written sentence. *See Nix v. State*, 84 So. 3d 424, 426 (Fla. 1st DCA 2012).

Floyd v. State, 151 So. 3d 452, 454 (Fla. 1st DCA 2014). Respondent Floyd requests the Court to approve the First District's well-reasoned analysis.

In its Initial Brief, the State contends that because Respondent Floyd shoved Mr. Banton first, he was the initial aggressor and he therefore had a duty to retreat. *See* Initial Brief at 13. In making this argument, the State quotes (and emphasizes) the "unlawful activity" provision of section 776.013(3), Florida Statutes. *See* Initial Brief at 11 ("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 in original). Respondent Floyd notes that every district court in Florida has now held that although a defendant engaged in unlawful activity could not claim immunity under section 776.013(3), he or she could assert immunity under

section 776.012, Florida Statutes, prior to 2014 because that statute had no "unlawful activity" exception. *See McGriff v. State*, 40 Fla. L. Weekly D847 (Fla. 1st DCA Apr. 8, 2015); *Little v. State*, 111 So. 3d 214, 222 (Fla. 2d DCA 2013); *Pages v. Seliman-Tapia*, 134 So. 3d 536, 539 (Fla. 3d DCA 2014); *Rios v. State*, 143 So. 3d 1167 (Fla. 4th DCA 2014); *Miles v. State*, 40 Fla. L. Weekly D372 (Fla. 5th DCA Feb. 6, 2015).[7]

Contrary to the State's argument that Respondent Floyd had a duty to retreat, Respondent Floyd's mere act of pushing Mr. Banton – a justifiable act and an act of mere *non-deadly force* – did not deprive Respondent Floyd of the right to stand his ground and defend himself and others at his residence when Mr. Banton responded *by pulling out a firearm*. *See Weiand v. State*, 732 So. 2d 1044, 1049 n.4 (Fla. 1999) ("There is no duty to retreat recognized when the defendant uses non-deadly force in self-defense.") (citations omitted). The evidence at trial was that before Respondent Floyd pushed Mr. Banton, he heard Mr. Banton being told to leave, he saw Mr. Banton refusing to leave, he heard Mr. Banton talking about whether he should "do it" or not, and he saw Mr. Banton reaching for something behind his back.[8] But,

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[7] Following the trial in the instant case, the Florida Legislature amended section 776.012 (effective June 20, 2014) to grant immunity only to a person "not engaged in criminal activity." § 776.012, Fla. Stat. (2014). As noted in *Rios*, this substantive change in the law does not affect the instant case.

[8] Joshua Holloway testified that when Respondent Floyd initially approached Mr. Banton, Mr. Banton was acting in an "aggressive manner." (T9-1199).

before Mr. Banton could pull the firearm out, Respondent Floyd pushed him. Mr. Banton then pulled the firearm out on Respondent Floyd.

In light of these facts, Respondent Floyd had the right to stand his ground and defend himself and others at his residence.[9] The version of section 776.012 in effect at the time of the incident stated in relevant part:

> 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 ....*

(Emphasis added). *See also* § 776.031, Fla. Stat. (explaining that there is no duty to retreat when using force to defend others). Pursuant to sections 776.012 and 776.031, Respondent Floyd was justified in retrieving his rifle after Mr. Banton pulled out a firearm, and Respondent Floyd had no duty to retreat before doing so. Section

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[9] *See, e.g., Mobley v. State*, 132 So. 3d 1160, 1164-65 (Fla. 3d DCA 2014) (explaining that when determining whether immunity attaches pursuant to section 776.032, Florida Statutes, the applicable "standard requires the court to determine whether, based on circumstances as they appeared to the defendant when he or she acted, a reasonable and prudent person situated in the same circumstances and knowing what the defendant knew would have used the same force as did the defendant") (citations omitted). In *Mobley*, the defendant shot the alleged victim after the defendant observed the alleged victim reach under his shirt – a movement that the defendant interpreted as the alleged victim reaching for a weapon. The Third District granted the defendant's petition seeking immunity from prosecution.

776.041, Florida Statutes, does not negate Respondent Floyd's right to stand his ground. As explained above, Respondent Floyd was justified when he pushed Mr. Banton.[10] Moreover, the mere act of pushing Mr. Banton (non-deadly force) did not "provoke" the use of the type of force subsequently employed by Mr. Banton (i.e., pulling out a gun). *See* § 776.041, Fla. Stat. (stating that justification of force is not available to a person who "[i]nitially *provokes the use of force against himself or herself* . . . .") (emphasis added); *Gibbs v. State*, 789 So. 2d 443, 444-45 (Fla. 4th DCA 2001) (explaining that the "aggressor"/"initially provoked" language from section 776.041 should be limited to situations where the force used by the alleged victim is the same level of force used by the defendant).[11]

In support of his argument, Respondent Floyd relies on the First District's decision in *Ross v. State*, 157 So. 3d 406 (Fla. 1st DCA 2015). In *Ross*, after the defendant arrived home and discovered his home had been burglarized, he saw a

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[10] Because the trial court improperly gave the "aggressor" instruction, the jury was told that even if Respondent Floyd was justified in shoving Mr. Banton, he had to retreat and exhaust every reasonable means to escape Mr. Banton and his firearm before using deadly force in defending himself and others at his residence – simply because he initially pushed Mr. Banton. The giving of the "aggressor" instruction rendered the "no duty to retreat" provision of section 776.012 meaningless, and resulted in the jury being given circular and confusing instructions.

[11] Respondent Floyd notes that the Standard Jury Instructions state that "[b]ecause there are many defenses applicable to self-defense, give only those parts of the instructions that are required by the evidence." Fla. Std. Jury Instr. (Crim.) 3.6(f).

truck drive by his house and turn around in the cul-de-sac. Before the truck drove back by his house, Mr. Ross stepped into the street and tried to waive the truck down to determine whether the driver had seen anything concerning the burglary. However, the driver of the suspicious truck tried to run Mr. Ross over. As Mr. Ross was trying to get out of the way, he fired multiple gunshots into the truck, defending himself from the attack. A law enforcement officer investigating a string of burglaries in the area was driving the truck. Mr. Ross was convicted following a jury trial of attempted second-degree murder and shooting into an occupied vehicle. The jury in Mr. Ross' case was given the same conflicting jury instructions that were given in the instant case. On appeal, the First District reversed, finding *Ross* indistinguishable from the case under review:

> Here, as in *Floyd*, the conflicting instruction negates appellant's only theory of defense. Below, the sole defense raised by appellant's counsel was that appellant had the right to stand his ground and defend himself. However, the State argued to the jury that appellant provoked Investigator Trowbridge by stepping in front of his truck, so appellant had a duty to retreat. Thus, appellant argues that here, as in *Floyd*, the conflicting instruction negated his theory of defense. Appellant is correct.

Ross, 157 So. 3d at 409. Thus, in *Ross*, the State argued that Mr. Ross' act of stepping into the street to try to talk to the driver was what provoked the series of events. By giving the "aggressor" instruction, the jury was told that Mr. Ross was

required to retreat from the truck before using force in return, which negated Mr. Ross' self-defense theory of defense. The *Ross* case is another example of how the conflicting/circular instructions deprive a defendant of a valid self-defense/defense of others claim.

The preamble to the "Stand Your Ground" law states:

> WHEREAS, the 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, Laws of Fla. When Respondent Floyd shoved Mr. Banton, he was properly engaged in the justifiable use of non-deadly force in defense of the other guests at his residence under sections 776.012 and 776.031, just as the Legislature intended and deemed proper for a law abiding citizen to do without fear of prosecution. "The 'cardinal rule' of statutory construction is that a statute should be construed so as to ascertain and give effect to the intention of the Legislature as expressed in the statute." *Dennis v. State*, 51 So. 3d 456, 461 (Fla. 2010) (citations omitted). "[S]tatutory enactments are to be interpreted so as to accomplish rather than defeat their purpose." *Id.* (citations omitted) (alteration in original). "It is a basic rule of statutory construction that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute

meaningless." *Id*. at 463 (citations omitted). The trial court's application of section 776.041 to the instant case defeated the Legislature's intention that persons in Respondent Floyd's position would have the right 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."

Thus, Respondent Floyd requests the Court to approve the First District's holding that the conflicting instructions in this case deprived him of a fair trial. As explained by the First District, "[t]he conflicting jury instructions negated each other in their effect, and therefore negated their possible application to Floyd's only defense." *Floyd*, 151 So. 3d at 454.[12]

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[12] Respondent Floyd notes that the confusing nature of the jury instructions was compounded by the sequence in which the trial court read the instructions. The section 776.041 "aggressor" instruction was read to the jury *before* the "stand your ground"/"no duty to retreat" instruction (i.e., the instruction consistent with sections 776.012, 776.013, and 776.031). (T14-1842-43). Clearly the "stand your ground"/"no duty to retreat" instruction should have been read first. *See* § 776.041, Fla. Stat. ("The justification described in the *preceding* sections . . . .") (emphasis added). Thus, the jury was told that Respondent Floyd had to exhaust every reasonable means to escape danger, and *then* the jury was told that Respondent Floyd had no duty to retreat and the right to stand his ground. As a result of this sequence, the instructions were circular and confusing – even for the most learned in the law (not to mention the lay people on the jury).

In the standard jury instruction regarding the justifiable use of non-deadly force (Fla. Std. Jury Instr. (Criminal) 3.6(g)), the two instructions appear in the correct sequence. However, in the standard jury instruction regarding the justifiable use of deadly force (Fla. Std. Jury Instr. (Criminal) 3.6(f)), the two instructions are out of order.

Finally, in its Initial Brief, the State asserts that the instructions in this case did not amount to fundamental error. Every district court in Florida has held that an erroneous instruction constitutes fundamental error if it negates the defendant's sole defense. *See Williams v. State*, 937 So. 2d 771, 773-74 (Fla. 1st DCA 2006); *Carter v. State*, 469 So. 2d 194, 196 (Fla. 2d DCA 1985); *Barnes v. State*, 993 So. 2d 542, 544 (Fla. 3d DCA 2008); *Gregory v. State*, 141 So. 3d 651, 654 (Fla. 4th DCA 2014); *Morgan v. State*, 127 So. 3d 708, 715 (Fla. 5th DCA 2013). As explained by the First District, in the instant case:

> Floyd's only defense at trial was that he had used deadly force to defend himself and others. The conflicting jury instructions negated each other in their effect, and therefore negated their possible application to Floyd's only defense.

Floyd, 151 So. 3d at 454. Accordingly, the conflicting jury instructions in Respondent Floyd's case constituted fundamental error. The First District correctly remanded this case for a new trial due to the fundamentally erroneous jury instructions. This Court should adopt Judge Van Nortwick's well-reasoned analysis and approve the decision below.

F. CONCLUSION

Respondent Floyd respectfully requests the Court to approve the decision on review and answer the certified question in the affirmative.

G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Assistant Attorneys General Trisha Meggs Pate and Giselle D. Lylen
The Capitol, PL-01
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by email delivery this 7th day of May, 2015.

Respectfully submitted,

/s/ Michael Ufferman
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H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Answer Brief of the Respondent complies with the type-font limitation.

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