IN THE SUPREME COURT OF FLORIDA

JESSIE CLAIRE ROBERTS,

Petitioner,

v. CASE NO. SC15-1320

STATE OF FLORIDA,

Respondent.

_____/

ON PETITION FOR DISCRETIONARY REVIEW
OF A DECISION OF THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

MARIA INES SUBER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 539538
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
ines.suber@flpd2.com

ATTORNEY FOR PETITIONER

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PRELIMINARY STATEMENT

Jessie Claire Roberts was the Appellant and Defendant in the First District Court of Appeal and in the Circuit Court of the Fourth Judicial Circuit in and for Duval County. In this Initial Brief, she will be referred by her proper name, "Ms. Roberts," or as "Petitioner." Respondent, the State of Florida, was both Appellee and the prosecution below, and will be referred to herein as "Respondent" or as "the state." The record on appeal consists of seven volumes, and one supplemental volume. Citations to the record will appear as "R," and "SR," followed by the appropriate volume and page number, in parentheses. E.g., (R,I,3; SR,I,2).

STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND

By amended information filed September 17, 2012, Petitioner was charged with Attempted Second-Degree Murder, Sale or Possession with Intent to Sell Cannabis while Armed, Carrying a Concealed Firearm, Failure of Defendant on Bail to Appear, and Possession of Less than 20 Grams of Cannabis. (R,I,86) Prior to trial, Petitioner pled guilty to Carrying a Concealed Firearm and Possession of less than 20 grams of Cannabis. (R,I,l86)

A jury trial on the remainder counts was held on December 2 and 3, 2013. (R,IV, 1-200; V,201-400, VI, 401-600, VII, 601-657). The jury found Petitioner guilty of Attempted Second- Degree Murder, with actual possession and discharge of a firearm causing great bodily harm. The jury also found Petitioner guilty, as charged, of Sale or Possession with Intent to Sell Cannabis while armed, and Failure of a Defendant on Bail to Appear. (R,II, 205,207,208).

Petitioner was adjudicated guilty of the charges, and she was sentenced to the Department of Corrections for 35 years as a minimum mandatory for Attempted Second-Degree Murder; to l5 years in prison for Sale or Possession of Cannabis with Intent to Sell, and to 5 years in prison for the Failure of a Defendant on Bail to Appear. Petitioner was also adjudicated guilty of Carrying a Concealed Firearm, and Possession of Less than 20 grams of Cannabis, and she was

sentenced to five years in prison, and 365 days in jail, respectively. All the sentences to be served concurrently. (R,II, 250-260). A Notice of Appeal was timely filed. (R,II,266)

On Appeal to the First District Court of Appeal, Petitioner raised three issues. Petitioner argued that fundamental error was committed when the trial court failed to instruct on attempted manslaughter as the lesser included offense, one-step removed, of attempted second-degree murder when the mens rea was disputed (Initial Brief of Appellant, pages 12-24); that fundamental error occurred when the trial court instructed the jury on justifiable use of deadly force because the instructions as given negated Petitioner's only defense (Initial Brief of Appellant, pages 25-30); and, that the trial court erred in denying Petitioner's motion for judgment of acquittal as to Count 1 of the Information, attempted second- degree murder (Initial Brief of Appellant, pages 31-35).

The First District Court of Appeal, in an opinion dated June 18,2015, affirmed Petitioner's judgment of conviction and sentence for attempted second-murder, discussing only two issues. **Roberts v. State**, 168 So.3d 252 (Fla. 1st DCA 2015). The First District Court of Appeal affirmed Petitioner's judgment of conviction and sentence for attempted second-degree murder, and held that since failure to instruct the jury on a necessarily lesser included offense is not a

fundamental error in a non-capital cases, no fundamental error occurred when the court failed to instruct Petitioner's jury on the lesser included offense, one step removed, of attempted manslaughter as the necessarily lesser included offense of attempted second-degree murder. **Roberts**, 168 So.3d at 255-258.

Moreover, the First District Court of Appeal, also affirmed Petitioner's judgment of conviction and sentence for attempted second-degree murder on the issue concerning the self-defense jury instructions. Although the First District Court of Appeal found that portions of the jury instruction dealing with self-defense were incorrect statements of the law, it held that it was not fundamental error because it did not negate Ms. Roberts' theory of defense. **Roberts**, 168 So.3d at 260-262.

A Notice to Seek the Discretionary Jurisdiction of the Supreme Court was filed on July 20, 2015. On July 28,2015, this Court stayed the proceedings pending disposition of **Garrett v. State**, SC14-2110.[1] On June 9, 2016, this Court issued an Order to Show Cause as to why in light of the Court's decision to discharge jurisdiction in **Garrett v. State**, SC14-2110, it should not also decline to accept jurisdiction in the case. Petitioner filed a Response to the Order to Show

[1] **Garrett v. State**, 148 So.3d 466 (Fla. 1st DCA 2014), **jurisdiction granted**, 171 So.3d 116 (Fla. 2015), **jurisdiction dismissed**, 192 So.3d 470 (Fla.2016).

Cause on June 24, 2016. Petitioner's Jurisdictional Brief was filed on September 20, 2016.

On January 25,2017, this Court accepted jurisdiction in this cause.

STATEMENT OF THE FACTS

Petitioner went to trial on three charges: Attempted Second- Degree Murder, Sale or Possession with Intent to Sale Cannabis, and Failure of a Defendant on Bail to Appear. The following is a summary of the evidence introduced at trial.

Catrina Howard and Ashley Mackey were friends. Through Mackey, Howard met Petitioner. (R,V,276,278) On May 4, 2010, Mackey called to request a ride. Howard and her cousin, Jason Marks, went to the Publix parking lot to pick Mackey up. (R,V,280) When Howard arrived, she saw Petitioner and Mackey by the bus stop. Mackey got in her car but as they got ready to pull off, Mackey got out of the car and returned to the bus stop because Petitioner had one of her items. Howard turned around to pick Mackey up. (R,V,281,283,300)

According to Howard, Marks asked Mackey if Petitioner had any cannabis. Although Howard did not witness this, Mackey went to Petitioner and obtained the cannabis and returned to the car. (R,V,285,286,300) Mackey gave the cannabis to Marks who asked if he could get it on credit. Mackey called Petitioner to the car. Petitioner did not agree to provide the cannabis on credit and a discussion ensued, albeit cordial. (R,V,303) Petitioner told Marks that he needed either to pay or return the cannabis, but Marks kept insisting. (R,V,286,287,300) Based on her

face demeanor, Howard testified Petitioner got mad and pulled out a gun and placed it by her side. (R,V,287,303) Howard wanted to know why Petitioner pulled the gun out, and eventually, Howard punched Petitioner on the face. (R,V,290,291,304,306) When Petitioner was punched, Petitioner raised the gun up, Howard raised her left hand, and Petitioner shot her once. (R,V,291,292) Howard was shot through her hand and through her neck. Howard was scared. Howard got back into her car and Marks took her to the hospital. (R,V,296) She remained in the hospital for five days. The injuries left scars which Howard displayed to the jury. (R,VI,296,298)

According to Howard, she and Petitioner were within ten feet of each other when the shooting took place, and testified the shooting happened after Howard punched Petitioner on the face. Howard thought the firearm was a revolver, a .38, because Petitioner had sent a text to her phone with a picture of the firearm. (R,V,288,293) In addition, Howard testified that in the past, she and Petitioner had an argument on the phone over Mackey. (R,V,279)

Howard admitted that when she confronted Petitioner and the two started arguing, Mackey got in between the two. (R,V,307,346) When Howard hit Petitioner, Petitioner had not threatened Howard in any way; and, Howard testified Petitioner shot her as a reaction to her punch. (R,V,308) Howard

estimated a couple of seconds passed between Howard's punch and Petitioner's shooting her. (R,V,314) Howard also admitted that Mackey used her phone, therefore, she was not sure if the text with the picture of the firearm was meant for Mackey. (R,V, 316)

James Marks testified that he also met Petitioner through Mackey. (R,V,322) Marks stated that when Mackey went back to retrieve the item from Petitioner at the bus stop, he could tell that the two engaged in a little argument. Mackey returned to the car and told Marks that Petitioner had cannabis. (R,V,326) Marks wanted to see the cannabis and Mackey went back and got the cannabis from Petitioner. By the look and the smell of it, Marks knew it was cannabis, but he never tested it. (R,V,327,340,342)

Marks testified he attempted to get the cannabis for free in exchange for the car rides. However, Petitioner became upset at the suggestion and approached the car. (R,V,327,328) Petitioner looked angry and told Marks to either pay or return the cannabis. In the midst of bargaining with her, Petitioner pulled a gun and placed it by her side. (R,V,328,343) The gun had been concealed under Petitioner's shirt. (R,V,328)

Marks described the firearm as a revolver and before he could even react to the sight of the firearm, Howard exited the vehicle and started arguing with

Petitioner. (R,V,329) Howard asked Ms. Roberts why she pulled the gun. Petitioner and Howard got close to each other, and Marks saw Howard hit Petitioner. (R,V,330,344) After the hit, and while Mackey was pulling at Ms. Roberts, Petitioner took a step back, raised the gun, and shot Howard. (R,V,331,345) Petitioner pointed the gun directly at Howard. (R,V,331) Marks testified Ms. Roberts made no efforts to run after she was hit by Howard. Instead, according to Marks, Petitioner shot Howard on the neck, looked at Marks, and took off running. (R,V,334,346) Marks put Howard in the back seat and took her to the hospital. (R,V,334) Subsequently, the police contacted him, he gave a statement, and he picked Ms. Roberts from a photo spread. (R,V,337)

Gardell Branch was leaving the Publix parking lot when the shooting occurred. Branch saw Howard and Ms. Roberts argue and saw how Petitioner pulled the gun from her waistline and shot at Howard. (R,V,359,363) After the shooting, Petitioner took off running and Branch followed her. Subsequently, Marks called the police, discontinued his pursuit of Ms. Roberts, and he returned to the scene. (R,V,365,366) Thereafter, he picked Petitioner from a photo spread. (R,VI,367) Moreover, Branch identified Petitioner in court, and testified Petitioner did not run prior to firing the gun. Branch did not witness the punch. (R,V,363,369)

Officer Kyle Custer, Jacksonville Sheriff's Office, responded to the scene. He interviewed Branch and showed him a photo spread. Branch picked Petitioner as the shooter. (R,V,379) Custer also interviewed Marks, and Marks also picked Petitioner from the photo spread. (R,V,380) Two days after the shooting, Custer talked to Marks again. Marks had a cell phone which belonged to Howard. In a text sent to Howard's phone there was a picture of a gun. The picture was sent May 1, at 10:24, and Custer confirmed the text with the picture was sent from Petitioner's phone. (R,V,381) Appellant was subsequently arrested. (R,V,381)

Officer James Carter, Jacksonville Sheriff's Office, processed the scene. Carter documented the scene via photography. He found no additional evidence. There were no shell casings and no evidence of blood. (R,V,390,391,393,394)

Dr. Kenneth King was the emergency room physician who treated Howard. Howard sustained a gunshot wound to her left palm and her right neck. The bullet entered and exited the hand and entered and exited the soft tissues of Howard's neck. It was a close contact wound, and King testified the wound to the left hand was consistent with a defensive type of injury. The trajectory was straight through the hand and into the neck and out. (R,VI,409) Howard's medical records were introduced into evidence. (R,VI, 407)

The state introduced a joint stipulation that Petitioner, who was charged

with a felony and released on bail, failed to appear for jury selection on or between November 14 and December 23, 2011. (R,VI, 431)

Petitioner took the stand on her own behalf. Ms. Roberts testified she and Mackey used to be girlfriends, howere, the two had broken up, but the two remained friends even after the break up. (R,VI, 435). On May 4, 2010, Ms. Roberts and Macked got tattoos at an establishment close to Publix. On the way back home, Petitioner and Mackey had a short argument. Mackey called Howard for a ride, and Petitioner was going to take the bus to her Godmother's home. (R,VI,443,444, 445)

According to Petitioner, Howard arrived to get Mackey. Mackey left in Howard's car but returned to the bus stop, and asked Petitioner for "weed," which she removed from her pocket. Mackey entered Howard's car, but subsequently called Petitioner over to the car. (R,VI,447) Petitioner was mad because she felt Mackey was harassing her. Petitioner stood by the passenger side where Mackey and Marks were sitting. (R,VI,448) Petitioner asked Mackey for her MP3 player, and Mackey pointed to her purse which was inside of the car. Petitioner reached over to get it from Mackey's purse but she was pushed by Marks. (R,VI,449)Petitioner pulled her gun out and held it by her side. She never threatened Marks or anyone. (R,VI,450) Marks stated he was going to call for

assistance with the situation, which aggravated Petitioner. (R,VI,459,460)

Mackey asked Petitioner to go home and Petitioner testified she started to walk toward the bus stop. However, Howard got out of the car and started to approach Appellant as if she was going to punch her. Petitioner believed Howard was going to harm her because the two had an argument and Howard had threatened to do harm to her. (R,VI,438-439; 452) Both Mackey and Howard were talking to Petitioner at the same time. Howard cussed at her and reached over Mackey and punched her. As soon as Howard hit, Petitioner raised the gun and shot Howard. (R,VI,453,497) Petitioner testified she shot at Howard as a reaction to the punch, and because she was in fear that she was going to be beat up by both Howard and Marks. (R,VI,454,495,509) Petitioner ran from the scene and was arrested a few days later. Petitioner told the police she shot Howard in self-defense. (R,VI,460)

Petitioner admitted she failed to appear in court but explained she did not know when her court date was. Petitioner testified she attempted to call her attorney without success. However, Petitioner testified that she did not fail to appear wilfully. (R,VI,461,462,498,500,501) Petitioner denied attempting to sell cannabis to Marks. Instead, Ms. Roberts testified Mackey was the person who was selling the cannabis to Marks. Petitioner did not give the cannabis to Mackey.

Mackey took the cannabis from Petitioner. (R,VI, 462)

Petitioner testified she obtained the gun as a result of an altercation she had with some people while riding on a bus. She took a picture of the firearm and texted it to Howard's phone because Mackey used her phone and at the time, they were together. Petitioner wanted Mackey to see the gun prior to her buying it. The picture was not intended for Howard although it could be viewed as threatening. (R,VI,439,442,467,474) Petitioner testified she obtained the gun for her protection. (R,VI,506)

Petitioner testified she did not spend much time around Howard. However, Petitioner admitted she had a conversation with Howard concerning Mackey. Petitioner asked Howard if it was true she and Mackey were sleeping together. Petitioner explained, however, that she was not mad at either Mackey or Howard because at the time she had that conversation, she and Mackey were no longer together. Petitioner simply thought it was funny, and wanted to confront Howard because she did not know she was gay. (R,VI,466,467) However, Petitioner admitted she did not like the way Howard threatened her during that phone conversation. (R,VI,507)

The state called **Officer Duane Darnell**, Jacksonville Sheriff's Office, on rebuttal. (R,VI,539) Darnell interviewed Petitioner. (R,VI,541) During the

interview, Petitioner told him that she and Mackey were together when she received a call from Howard. Howard wanted to buy some cannabis. Petitioner and Mackey were at the Publix parking lot. The cannabis was given to Marks who refused to pay. Petitioner told Darnell that she produced a handgun and told Marks "give me my drugs back or the money," at which time "Howard smacked [Petitioner] and [Petitioner] shot her." (R,VI,543,545)

SUMMARY OF ARGUMENT

ISSUE I: The failure of the trial court to instruct Petitioner's jury on attempted manslaughter as the necessarily lesser included offense of attempted second-degree murder constituted fundamental error in this case, the same as it constituted fundamental error in **Walton v. State**, ___3d ____2016 WL 7013855 (Fla. Dec.1, 2016). Therefore, Petitioner respectfully requests this Court to reverse and quash the opinion of the First District Court on this issue, and remand with instructions that Petitioner be afforded a new trial where her jury is correctly instructed on attempted manslaughter as the necessarily lesser offense of attempted second-degree murder.

ISSUE II: Fundamental error occurred when the trial court instructed Petitioner's jury that she had the duty to retreat if whe was engaged in unlawful activity at the time of the offense. Petitioner was entitled to a jury instruction pursuant to Section 776.012(1), Florida Statutes (2011), which at the time of the offense, provided that Petitioner had the right to stand her ground and use deadly force to prevent the imminent commission of violence against her, and had no duty to retreat, even if she was engaged in unlawful activity. The effect of the incorrect jury instructions was to completely negate Petitioner's sole defense at trial. Moreover, even if no fundamental error occurred, this Court should find that

ineffective assistance of trial counsel occurred on the face of the record. As a result, Petitioner respectfully requests this Court to reverse and quash the decision of the First District Court of Appeal, and remand with instructions that she be granted a new trial on attempted second-degree murder where the jury is instructed correctly pursuant to Section 776.012(1), Florida Statutes (2011).

ISSUE III: The trial court erred in denying Petitioner's motion for judgment for acquittal as to attempted second-degree murder because the state failed to prove that Petitioner acted with a depraved mind at the time of the offense. Therefore, Petitioner respectfully requests that this Court reverse and quash the opinion of the First District Court of Appeal affirming Ms. Robert's judgment of conviction and sentence for attempted second-degree murder, and remand with directions that she be discharged of attempted second-degree murder.

ARGUMENT

ISSUE I:

IT WAS FUNDAMENTAL ERROR TO FAIL TO INSTRUCT THE JURY ON ATTEMPTED MANSLAUGHTER AS A NECESSARILY LESSER INCLUDED OFFENSE OF ATTEMPTED SECOND-DEGREE MURDER WHEN PETITIONER'S MENS REA WAS DISPUTED.[2]

In affirming Ms. Roberts' judgment of conviction and sentence for attempted second-degree murder, the First District Court of Appeal, after analyzing several opinions of this Court as well as an opinion of the First District Court of Appeal,[3] held that the failure to instruct a jury on a necessarily lesser included offense - one-step removed - was not fundamental error on a non-capital case. Therefore, the First District Court of Appeal affirmed Ms. Roberts' attempted second-degree murder conviction and attendant 35 years in prison to be served as a minimum mandatory sentence. In affirming, the First District Court of Appeal specifically found that the conviction for the non-capital offense of attempted second-degree murder precluded the finding of fundamental error even

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[2]The issue is a question of law and is therefore subject to de novo review. **Griffin v. State**, 160 So.3d 63,67 (Fla. 2015)(citing **Puglisi v. State**, 112 So.3d 1196 (Fla.2013)).

[3]**See e.g., Jones v. State**, 484 So.2d 577 (Fla.1986); **State v. Montgomery** , 39 So.3d 252, 259 (Fla. 2010); **Haygood v. State,** 109 So.3d 735,741 (Fla. 2013); **State v. Lucas**, 645 So.2d 425 (Fla.1994); **Morris v. State**, 658 So.2d 155 (Fla. 1st DCA 1995).

the trial court failed to instruct the jury on the necessarily lesser included offense of attempted manslaughter as the necessarily lesser of attempted second degree-murder. Rather, the First District Court of Appeal stated that for Ms. Roberts' issue to cognizable on direct appeal, Ms. Roberts' trial counsel was required to preserve the issue with a contemporaneous objection to the jury instructions below.

Petitioner disagrees with the First District Court of Appeal, both with the analysis and the result, and respectfully argues that this Court's decision in **Walton v. State**, ___3d ____2016 WL 7013855 (Fla. Dec.1, 2016), controls the resolution of the issue under review in the instant case. Petitioner therefore requests this Court to quash the decision of the First District, reverse her conviction and sentence, and remand to the appellate court with instructions that she be granted a new trial on the charge of attempted second-degree murder.

In **Walton**, **a non-capital case**, the defendant was convicted of two counts of attempted second-degree murder of a law enforcement with possession and discharge of a firearm during the commission of the attempted murders, and two counts of attempted armed robbery with possession of a firearm during the commission of the armed robbery. On appeal to the First District, and to this Court, **Walton argued, among other things, that he was entitled to a new trial**

on the offenses of attempted second-degree murder of a law enforcement because the trial court had committed fundamental error when it failed to instruct the jury on attempted manslaughter as the necessarily lesser offense of attempted second-degree murder. This Court agreed with Walton, and therefore quashed the decision of the First District and reversed for a new trial. This Court held:

> "Necessarily lesser included offenses are those offenses in which the statutory elements of the lesser included offense are always subsumed within those of the charged offense." *Sanders v. State, 944 So.2d 203,206 (Fla. 2006)*. "The law requires that an instruction be given for any lesser offense all the elements of which are alleged in the accusatory pleadings and supported by the evidence adduced at trial." *State v. Weller, 590 So.2d 923,926 (Fla. 1991). "The trial judge has no discretion in whether to instruct the jury on a necessarily lesser included offense. Once the judge determines that the offense is a necessarily lesser included offense, an instruction must be given." Montgomery v. State, 39* So.*3d 252, 259 (Fla. 2010)(quoting State v. Wimberly*, *498 So.2d 929, 932 (1986).*

And then, this Court stated:

> **Attempted manslaughter by act is a necessarily lesser included offense of attempted second-degree murder because attempted second-degree murder contains all of the elements of the**

> **crime of attempted manslaughter by act.** [Citations omitted]. . . . **Accordingly, the trial court was required to give an instruction for attempted manslaughter by act when it gave the instruction for attempted second-degree murder.**

As to whether the failure to instruct the jury on attempted manslaughter, as the necessarily lesser included offense of attempted second-degree murder, constituted fundamental error, this Court explicitly held:

> **Not only did the trial court err by failing to give the instruction for attempted manslaughter by act, but its failure constituted fundamental error.** Fundamental error occurs "only when the omission is pertinent or material to what the jury must consider in order to convict. *Griffin v. State, 160 So.3d 63,66 (Fla. 2015); see also [State v.] Montgomery*, 39 So.3d at 258 *(same). We have repeatedly held that the failure to correctly instruct the jury on a necessarily lesser included offense constitutes fundamental error. [Citations omitted] . . .* ***If giving an incorrect instruction on a necessarily lesser included offense constitutes fundamental error, then*** a *fortiori* **giving no instruction at all likewise constitutes fundamental error.** Accordingly, Walton is entitled to a new trial with correct instructions for the necessarily lesser included offense of attempted manslaughter by act.

(e.s.) **See also Haygood v. State**, 109 So.3d 735, 741-742 (Fla. 2013); **State v. Montgomery**, 39 So.3d 252 (Fla.2010); **State v. Lucas**, 645 So.2d 425 (Fla. 1994).

As in **Walton**, in the present case, the complete omission of an instruction on attempted manslaughter by act constituted fundamental error, *a fortiori*, because the jury was deprived of the opportunity to find a lesser degree of mental culpability than the depraved mind inherent in the offense of attempted second-degree murder. The same error as it occurred in this case was deemed fundamental error by this Court in **Walton**, and should be deemed fundamental error in this case as well. Petitioner's attempted second-degree murder conviction and sentence must be reversed, and a new trial granted on the attempted second-degree murder with the correct instruction for the necessarily lesser included offense of attempted manslaughter by act.

ISSUE II

THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT MS. ROBERTS HAD A DUTY TO RETREAT BECAUSE SHE WAS ENGAGED IN UNLAWFUL ACTIVITY WAS NOT ONLY ERRONEOUS BUT THE ERROR WAS FUNDAMENTAL IN NATURE BECAUSE IT DEPRIVED PETITIONER OF HER RIGHT TO HAVE THE JURY DECIDE WHETHER HER USE OF DEADLY FORCE WAS JUSTIFIABLE.[4]

The issue herein is a question of law and is therefore subject to de novo review. **Griffin v. State**, 160 So.3d 63,67 (Fla. 2015)(citing **Puglisi v. State**, 112 So.3d 1196 (Fla. 2013)).

At the time of the alleged commission of the attempted second-degree murder, Section 776.012(1)and (2), Florida Statutes (2011), titled "Use of Force in defense of person," provided that:

> 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 force and does not have a duty to retreat if:**

[4]The amended information filed on September 17, 2012, charged that Ms. Roberts committed Attempted Second -Degree Murder, Sale or Possession with Intent to Sell Cannabis while Armed, Carrying a Concealed Firearm, Failure of a Defendant on Bail to Appear, and Possession of Less than 20 grams of Cannabis on or about May 4, 2010. (R,I,86)

> (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.

Section 776.013, Florida Statutes (2011), titled "Home Protection; use of deadly force; presumptions of fear of death or great bodily harm," dealt with the use of deadly force in such places such as a dwelling, residence, vehicle or any other place where he or she has the right to be. Subsection (3), provided:

> (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.

And see also Sections 776.032, and 776.041, Florida Statutes (2011). Thus pursuant to the statutory provisions in effect at the time of Ms. Roberts' offenses, she had the right to use deadly force and did not have the duty to retreat, if she reasonably believed the deadly force was necessary to prevent imminent death or

great bodily harm to herself, or to prevent the imminent commission of a forcible felony against herself.

At trial, Appellant's only defense was that she acted in self-defense and she did not have the duty to retreat. Appellant argued that at the time she used the deadly force, she was defending herself against the imminent commission of a forcible felony against herself, i.e., aggravated battery. In instructing the jury on self-defense, the trial court instructed the jury:

> An issue in this case is whether the defendant acted in self-defense. It is a defense to the offense with which the defendant is charged if the injury to Catrina Howard resulted from the justifiable use of deadly force.
>
> Deadly force means force likely to cause death or great bodily harm.
>
> The use of deadly force is justifiable only if the defendant reasonably believes that the force is necessary to prevent
>
> 1. imminent death or great bodily harm to herself or another one, or
>
> 2. The imminent commission of Aggravated Battery against herself or another.

(R,II, 220) However, at the state's request, the trial court also instructed Appellant's jury as follows:

> If the defendant was not engaged in an unlawful activity and was attacked in a place where she had the right to be, she had no duty to retreat and she had the right to stand her ground and meet force with force, including deadly force, if she 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 forcible felony.
>
> However, if you find that the defendant was engaging in unlawful activity then you must consider if the defendant had a duty to retreat.
>
> The defendant cannot justify the use of force likely to cause death or great bodily harm unless she used every reasonable means within her power and consistent with her own safety to avoid the danger before resorting to that force. The fact that the defendant was wrongly attacked cannot justify her use of force likely to cause death or great bodily harm if, by retreating, she could have avoided the use of that force. However, if the defendant was placed in a position of imminent danger of death or great bodily harm and it would have increased her own danger to retreat then her use of force likely to cause death or great bodily hard was justifiable.
>
> Sale or narcotics and carrying a concealed firearm constitute unlawful activity.

(R,II,221,222)

In finding that the trial court committed error in instructing Ms. Roberts' jury, the First District Court of Appeal, correctly held:

> Here, instructions reflecting sections 776.012(1), 776.013(3), and 776.041(2) were read to the jury. The State argues that because appellant was

> engaged in unlawful activity - a marijuana transaction - she had a duty to retreat, and thus it was not error to instruct the jury pursuant to section 776.013. This court expressly rejected that argument in *Garrett v. State*, 148 So.3d 466, 471 (Fla. 1st DCA 2014), instead finding that if a defendant who was engaged in unlawful activity provides "some evidence to support [a] claim of justifiable use of deadly force to prevent imminent death or great bodily harm or the imminent commission of a forcible felony" the defendant is "entitled to request and receive an instruction reflecting section 776.012(1)." Therefore, it was error for the trial court to instruct the jury regarding Garrett's unlawful conduct" by instructing on section 776.013(3) and instructing that possession of a firearm by a convicted felon was unlawful. *Id*. If a defendant's claim of self-defense was based solely on the prior version of section 776.012(1), then it is "an incorrect statement of the then-existing law" to instruct that the defendant had a duty to retreat if engaged in unlawful activity pursuant to section 776.013. *McGriff v. State*, 160 So.3d 167, 40 Fla. L. Weekly D 847 (Fla. 1st DCA April 8, 2014)(finding the error in that case was preserved and harmful).

Id. at 261. **See also** **Garrett v. State**, 148 So.3d 466,471 (Fla. 1st DCA 2014), **jurisdiction discharged**, 192 So.3d 470 (Fla.2016). However, the First District Court of Appeal found that notwithstanding that Ms. Roberts' jury instruction was an incorrect statement of the then-existing law, it was not fundamental error, and to grant her a new trial required trial counsel to specifically object to the

instructions as given. The court held at 261:

> The reasoning of *Garrett* is equally applicable here. Appellant would have been entitled to request an instruction that she had no duty to retreat if the danger was imminent under section 776.012(1), and it was error to instruct that she had to retreat if engaged in unlawful activity pursuant to section 776.013(3). Regardless, that error was not fundamental because it did not negate her theory of defense. Like in *Garrett*, even under section 776.013(3) instruction, there was evidence from which the jury could have found that although appellant was engaged in an unlawful activity, appellant had no duty to retreat and had the right to stand her ground because retreating would have been futile due to the imminence of danger she faced.
>
> Appellant testified that she was retreating, "backing away slowly . . . attempting to go back to the bus stop" where she had been standing prior to the marijuana transaction, when the victim punched her in the face. She testified she shot the victim because she believed if she did not, the victim and her cousin would have beaten her and they could have potentially been armed. The fact that the jury rejected this theory of defense does not render the instruction fundamental error. As in *Garrett,* there was "ample" evidence from which the jury could have rejected this theory of defense, including the testimony of the victim and an eye-witness that the victim was not within arm's reach of appellant and was not advancing towards appellant when appellant shot her.

Petitioner respectfully disagrees with the First District Court of Appeal and argues that instructing the jury as to the incorrect statement of the law, constituted fundamental error, because the misstatement of the law, amounted to negating Petitioner's sole defense. This Court must agree with Petitioner and reverse the district court and remand with instructions that Petitioner receive a new trial where her jury is charged with the correct statement of the law as it existed when the crime was committed.

This Court has explained whether an erroneous jury instruction constitutes fundamental error:

> To justify not imposing the contemporaneous objection rule, "the error must 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." In other words, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." Failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error and there must be an objection to preserve the issue for appeal.

Delva v. State, 575 So.2d 643, 644-645 (Fla. 1991)(quoting **Brown v. State**, 124 So.2d 481, 484 (Fla. 1960); **Stewart v State**, 420 So.2d 862 (Fla. 1982)). Where

the challenged instruction involves an affirmative defense, as opposed to an element of the crime, fundamental error occurs only where a jury instruction is "so flawed as to deprive defendants claiming the defense . . . of a fair trial." **Smith v. State**, 521 So.2d 106, 108 (Fla. 1988); **Martinez v. State**, 981 So.2d 449, 455-456 (Fla. 2008) (fundamental error occurs if an erroneous instruction deprives the defendant of his sole or primary theory of defense and the evidence thereon is not "extremely weak") . **See also** **Carter v. State**, 469 So.2d 194, 196 (Fla. 2nd DCA 1985)(fundamental error occurs where the trial court gives an instruction that is the incorrect statement of the law and necessarily misleading to the jury, the effect of that instruction is to negate the defendant's only possible defense); **Richards v. State**, 39 So.3d 431 (Fla. 2nd DCA 2010)(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); **Williams v. State**, 982 So.2d 1190, 1194 (Fla. 4th DCA 2008)(where 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); **Davis v. State**, 804 So.2d 400,404 (Fla. 4th DCA 2001); **Harris v. State**, 570 So.2d 397, 399 (Fla. 3rd DCA 1990); **Crummins v. State**, 113 So.3d

945 (Fla. 5th DCA 2013).

An assessment of the strength or weakness of the evidence remained the only hurdle to fundamental error under **Martinez**, 981 So.2d 449. However, the First District Court of Appeal did not decide whether the evidence of justification "was extremely weak," as **Martinez** required, rather it assessed the evidence - the testimony of Petitioner vs. the testimony of the victim and another witness - and held that the jury had not been precluded from considering Petitioner's defense notwithstanding the fact she was engaged in unlawful activity at the time of the shooting. The First District pointed to the evidence and stated that Ms. Roberts testified that she was retreating slowly going back to the bus stop where she was prior to the drug transaction, and "ample evidence" was present in the record from which the jury could have rejected her claim of imminent danger of death, great bodily harm or the imminent commission of a forcible felony, to wit, the testimony of the victim and of an independent witness who stated that Petitioner's was not within arm's length when she shot Howard. **Roberts**, 168 So.3d at 261.

However, the decision as to whether Petitioner lawfully stood her ground based on fear of imminent violence belongs to a correctly instructed jury, and not to a court of appeal weighing the evidence. **See Rios v. State**, 143 So.3d 1167

(Fla. 4th DCA 2014); **Dorsey v. State**, 149 So.3d 144 (Fla. 4th DCA 2014)(Dorsey II) (holding that the erroneous instruction caused fundamental error by reimposing the duty to retreat discarded in 2005, "effectively eliminat[ing] Defendant's sole affirmative defense.") (citing to **Rios**, 143 So.3d at 1170). **And see Knight v. State**, 186 So.2d 1005,1012 (Fla. 2016)(Supreme Court is not at liberty to reweigh the evidence. That is the jury's role); **State v. Coney**, 845 So.2d 120 (Fla.2003)(an appellate court cannot use its review powers as a mechanism for reevaluating conflicting evidence and exerting covert control over the factual findings. A reviewing court cannot reweigh the pros and cons of conflicting evidence).

The First District Court of Appeal mixes and integrates the instructions on the use of deadly force in response to a threat of imminent deadly force when a defendant is, and is not, engaged in an unlawful activity. These instructions are different. In this case, the trial court told the jurors that deadly force was justifiable if Roberts reasonably believed she faced a threat of imminent death or great bodily harm or the commission of aggravated battery upon herself, but omitted to tell them that she did not have the duty to retreat. (R,II,20) The subsequent instruction on self-defense while engaged in an unlawful activity

added another condition to her right to use force to meet a threat of imminent violence: inability to safety retreat. The jury, given both instructions, could have found that Ms. Roberts believed she faced a threat of imminent deadly harm but concluded that, instead of responding with deadly force, she could and should retrated or she should have safely retreated. Both of the instructions, as given, negated Petitioner's right under section 776.012(1), Florida Statutes, right to stand her ground without retreating even though she was engaged in an illegal activity, as permitted by the law in effect at the time of the alleged attempted second-degree murder.

The First District Court of Appeal erred in its unconstitutional assumption of the jury's role, its incorrect fundamental error analysis, and its flawed reasoning. These errors led it to wrongly affirm Ms. Roberts' conviction for attempted second-degree murder despite the erroneous instructions that she had a duty to retreat because she was engaged in illegal activity. The decision of the First District Court of Appeal should be quashed. Like **Rios** and **Dorsey**, Ms. Roberts is entitled to a new trial before a jury that is not told that she was engaged in unlawful activity and therefore had a duty to retreat.

To the extent that this Court agrees that the error did not amount to

fundamental error and that her trial counsel ought to have objected on the grounds advanced herein, Petitioner respectfully alleges ineffective assistance of trial counsel on the face of the record. **Strickland v. Washington**, 466 U.S. 668 (1984); **Monroe v. State**, 191 So.3d 395 (Fla. 2016); **Sloss v. State**, 45 So.3d 66 (Fla. 5th DCA 2020); **Stoute v. State**, 987 So.2d 748 (Fla 4th DCA 2008); **Little v. State**, 111 So.3d 214 (Fla. 2nd DCA 2013)(defendant was not precluded from relying on Stand your Ground Law even though he was a felon in possession of a firearm at the time he killed the victim); **Hill v. State**, 143 So.3d 981 (Fla. 4th DCA 2014)(provision of stand your ground law not limited to persons not engaged in unlawful activity, and therefore, it did not preclude a defendant who was a felon in possession of a firearm from asserting the defense with no duty to retreat); **Ford v. State**, 172 So.3d 1003 (Fla. 1st DCA 2015)(court committed reversible error when it failed to instruct the jury on defendant's theory of defense, and in referencing duty to retreat if defendant was engaged in unlawful activity; a new trial granted because issue properly preserved by trial counsel and not harmless); **McGriff v. State**, 160 So.3d 167, 168-69 (Fla. 1st DCA 2015)(remanding for a new trial because the trial court incorrectly instructed the jury that he had duty to retreat if he was engaged in unlawful activity).

ISSUE III:

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT 1 OF THE INFORMATION.

This Court reviews de novo the trial court's denial of a motion for judgment of acquittal, to determine whether the evidence is legally sufficient. **Pagan v. State**, 830 So.2d 792,803 (Fla. 2002). A trial court must grant a motion for judgment of acquittal if ". . . the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law." **Fitzpatrick v. State**, 900 So.2d 945, 507 (Fla. 2005)(quoting **Lynch v. State**, 293 So.2d 44,45 (Fla. 1194) Inadequate motions for judgment of acquittal renders counsel ineffective which can be raised for the first time on appeal if the ineffectiveness is apparent from the face of the record. The standard of review is also de novo and the petitioner's claims must be reviewed de novo to determine if the claims meet the deficiency and prejudice prongs of **Strickland v. Washington**, 466 U.S. 668 (1984); **Monroe v. State**, 191 So. 3d 395 (Fla.2016); **Hills v. State**, 78 So.3d 648, 652-53 (Fla. 4th DCA 2012).

At trial, Petitioner's defense was self-defense. The state's evidence established that Petitioner and Mackey were at a bus stop close to a Publix parking lot when

Howard and her cousin Marks arrived to give Mackey a ride home. Appellant was going to take the bus to her Godmother's house where she stayed. Mackey got in Howard's vehicle and left leaving Ms. Roberts at the bus stop. Shortly thereafter, Mackey jumped out of Howard's vehicle and returned to where Petitioner was. Howard and Marks turned around to see if Mackey still needed a ride. Mackey retrieved some cannabis from Petitioner, got back inside the car, and gave the cannabis to Marks. Marks wanted the cannabis on credit or in exchange for car rides. Mackey called Petitioner over to the car, and she did not agree to give Marks the cannabis on credit. Petitioner wanted the money or the weed back.

While at the car, Petitioner asked Mackey for her MP3, and Mackey responded that it was in her purse which was inside the car, in the backseat, close to where Mackey was. According to Petitioner, she was about to retrieve her MP3 from Mackey's purse, when Marks pushed her prompting Petitioner to pull out her gun and have it by her side. Howard saw Petitioner with the gun and exited the car to confront her. Howard wanted to know why Ms. Roberts had pulled out a gun. Howard and Petitioner argued and Howard punched Ms. Roberts on the face. According to Howard, as a reaction to the punch, Petitioner got her gun, raised it and shot Howard. Petitioner, however, testified that she shot Howard both as a reaction to the punch and because she was in fear that Howard and Marks might beat her up and be armed.

The crime of second-degree murder, and attempted second-degree murder, is defined as the "unlawful killing [or attempting killing], when perpetrated by an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual" Section 782.04, Florida Statutes. An act is imminently dangerous to another and evincing a "depraved mind" if it is an act or series of acts that: (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another; (2) is done from ill will, hatred, spite or an evil intent; and (3) is of such a nature that the act itself indicates an indifference to human life. **Wiley v. State**, 60 So. 3d 588, 591 (Fla. 4th DCA 20ll).

Florida courts have held that an impulsive overreaction to an attack or injury is itself insufficient to prove ill will, hatred, spite, or evil intent. **Light v. State**, 841 So. 2d 623, 626 (Fla 2nd DCA 2003); **McDaniel v. State**, 620 So. 2d 1308 (Fla. 4th DCA 1993). Although exceptions exist, the crime of second- degree murder, or attempted second-degree murder, is normally committed by a person who knows the victim and has had time to develop a level of enmity toward the victim. **Light**, at 626. Moreover, "[ha]tred, spite, evil intent, or ill will usually requires more than an instant to develop." **See also Dorsey v. State,** 74 So. 3d

521 (Fla. 4th DCA 2011).

While a jury may reasonably reject the theory of self- defense in a case involving a defendant's impulsive overreaction to a victim's attack, such a case warrants a conviction for manslaughter, or attempted manslaughter, not second-degree murder, or attempted second-degree murder. **Poole v. State**, 30 So. 3d 696 (Fla. 2nd DCA 2010)(where defendant stabbed the unarmed victim once after the victim had lunged at him in a confined R.V., the evidence showed an impulsive overreaction to an attack, warranting a conviction for manslaughter but not second-degree murder); **Bellamy v. State**, 977 So. 2d 682, 684 (Fla. 2nd DCA 2008)(reversing convictions for second-degree murder and attempted-second degree murder where the defendant stabbed victims after he was pushed to the ground and someone stepped on his neck at a night club); **Rayl v. State**, 765 So. 2d 917, 919-920 (Fla. 2nd DCA 2000)(prosecution failed to establish that the defendant acted with a depraved mind where the victim stormed into defendant's place of business threatening to kill the defendant, the defendant shot the victim twice, and the victim had come toward the defendant before each shot; the fact that the defendant was standing with his arms folded when officers arrived was insufficient to prove ill will); **McDaniel**, at 1308 (prosecution failed to prove

prima facie case of second-degree murder where the evidence showed that the victim initiated altercation with the defendant by hitting him in the mouth and knocking him to the ground; although defendant's use of knife to ward off further attack may be excessive, thereby negating a finding of self-defense, his acts did not evinced depraved mind; no evidence was presented that defendant acted out of ill will, hatred, spite, or evil intent).

In **Dorsey v. State**, 74 So. 3d 521 (Fla. 4th DCA 2100), the issue was whether the state introduced sufficient evidence to sustain a conviction for second-degree murder. Dorsey was by his car when he was confronted with several people including the victim. The victim had been drinking. After there was an exchange of words, the victim punched the defendant causing him to fall back against his vehicle. The court held

> Although a jury could reasonably find that the defendant's use of a gun was excessive, thereby negating a finding of self-defense, no evidence was presented that the defendant acted out of ill will, hatred, spite or evil intent. Furthermore, we reject the State's argument that the defendant's demeanor before the confrontation was sufficient to prove beyond a reasonable doubt that he acted with a depraved mind. The defendant's use of deadly force occurred only after he was attacked, and the State has pointed to no record evidence that the defendant had any previous grudge against these

victims or any ongoing disputes between them.

Id at 525.

The instant case cannot be distinguished from **Poole**, **Rayl**, **McDaniel** and **Dorsey** where murder charges were reduced to manslaughter because the evidence established an impulsive overreaction to a victim's attack rather than an act out of ill will, hatred, spite, or evil intent. Here, Petitioner and Howard argued over the phone days prior to the incident; however, the incident was not the result of the argument nor did Ms. Roberts shoot at Howard in furtherance of the prior disagreement they had. Indeed, Howard testified that Petitioner's shooting her was an overreaction to her punching her. The argument between Petitioner and Howard ensued not because of any ill will, hatred, despite or evil intent that Ms. Roberts harbored against Howard, but rather, the incident started out Howard wanting to know why Petitioner took out her gun while talking to her cousin Marks, and punching her. Moreover, even if the state introduced the picture of a gun that Petitioner texted to Howard prior to the incident, the state could not track the showing of the gun to any animosity on the part of Petitioner against Howard at the time of the shooting. Even Howard admitted that the text could have been intended for Mackey who was using her phone, and Petitioner corroborated that text with the picture of the gun was for Mackey prior to her purchasing it. Under those circumstances, while the prior disagreement between Ms. Roberts and Howard could have explained why she was scared of Howard, it did not demonstrate that the shooting was done with ill will, hatred, spite or evil intent.

Petitioner's judgment of conviction and sentence for attempted second- degree murder should be reversed and Petitioner ordered discharged.

CONCLUSION

Based on the foregoing arguments and supporting authority, Petitioner respectfully requests this court to reverse her judgment of conviction and sentence for attempted second-degree murder and order that she be discharged as to the offense. At the very minimum, Petitioner should be afforded a new trial for attempted second-degree murder.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Robert Charles Lee, Assistant Attorney General, at crimapptlh@myfloridalegal.com, and, via US Mail, to Jessie Claire Roberts, J51716, Lowell Correctional Institution - Annex, 11120 NW Gainesville Rd., Ocala, FL 34482-1479, on this date, February 22, 2017.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Rule 9.210 of the Florida Rules of Appellate Procedure, this brief was typed in Times New Roman 14 Point font.

ANDY THOMAS
Public Defender
Second Judicial Circuit

/s/ Maria Ines Suber
MARIA INES SUBER
Assistant Public Defender
Florida Bar No. 539538
Leon County Courthouse
301 S. Monroe St., Suite 401
Tallahassee, Florida 32301
(850) 606-8500
ines.suber@flpd2.com

ATTORNEY FOR PETITIONER