IN THE SUPREME COURT OF FLORIDA

MICHAEL McCOY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC16-1316
L.T. Case No. 1D14-5914

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This case is before the Court pursuant to its discretionary jurisdiction under Article V, section 3(b)(4) of the Florida Constitution. In the decision below the First District Court of Appeal certified conflict with *Thomas v. State*, 91 So. 3d 880 (Fla. 5th DCA 2012). *McCoy v. State*, 194 So. 3d 1058, 1059 (Fla. 1st DCA 2016).

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

The record on appeal consists of 11 volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts as generally supported by the record but submits this Statement for convenience when reading this brief.

As noted in the opinion below, Petitioner "was charged with the second-degree murder of a man with whom he believed his wife was having an affair and of the attempted second-degree murder of the wife." *McCoy*, 194 So. 3d at 1059. At trial the following relevant events took place:

Petitioner's then wife, Diane McCoy, testified that she and Petitioner were estranged and that, as soon as she received her tax refund check, she planned to file for divorce and move to Alabama. The McCoys were still living together in Bay County, however, because she did not want to have her 14-year-old daughter, Shyanne Lomanek, to have to move during the school year. (R5: 93-97)

Shortly before the night in question, David Walker, with whom Ms. McCoy had a romantic but as yet non-sexual relationship, had moved into the McCoy home. Petitioner knew that Mr. Walker and his wife were friends, but did not know they were romantically entangled. (R5: 98-101)

On the night in question Ms. McCoy came home from her nursing assistant's job shortly before midnight. Petitioner and Mr. Walker

were engaged in a friendly conversation at the kitchen table. Ms. McCoy joined them, but as Petitioner was dominating the conversation, she and Mr. Walker began texting each other, with Mr. Walker wanting to arrange a clandestine meeting after Petitioner went to bed, an idea that Ms. McCoy rejected. (R5: 101-104)

At some point Petitioner apparently became aware of the texting and went to the bedroom he and Ms. McCoy shared. She followed and found he had retrieved her pistol from under the bed; he said he planned to kill himself. They struggled for possession until he bit her on the arm, causing her to break away. (R5: 104-108)

Petitioner then turned the gun on her and held her at gunpoint. He ordered her into the living room; Mr. Walker had gone to bed. Ms. McCoy said Petitioner implicitly threatened Ms. McCoy's daughter if Ms. McCoy left, but ultimately they went outside and sat on the tailgate of a pickup truck. (R5: 108-110)

Petitioner asked what Ms. McCoy's relationship was with Mr. Walker. She said they had hugged and kissed but that nothing more physical had taken place. Petitioner grew angry and said he wanted Mr. Walker to leave that night. Ms. McCoy went to tell Mr. Walker, but found that he was dressed and coming outside to leave. (R5: 110-113)

Ms. McCoy testified that as Mr. Walker proceeded to leave the

property, he and Petitioner exchanged angry words. When Mr. Walker was approximately 25 to 30 feet away, Petitioner shot him several times, then turned and shot her twice in the stomach. (R5: 114-115)

Other State witnesses – Ms. McCoy's daughter, father and son – all testified that Petitioner had told them that because of his disabilities (he has had multiple surgeries on his back and neck and at the time of the incident regularly used a single crutch to help him get around) he could shoot someone on his property and not face criminal charges. (R5: 169-170, 176-177, 184)

The State played a recording of the 9-1-1 call that Ms. McCoy made, a recording of the 9-1-1 call that Petitioner made, and recordings of two conversations he had made to a friend from the Bay County Jail. In Petitioner's 9-1-1 call he told the operator that Ms. McCoy had tried to get between him and Mr. Walker and that he shot her by accident but that he meant to shoot Mr. Walker, In the calls from the jail, he said she was coming toward him from his left after he had shot Mr. Walker. (R6: 219-220, 235-238)

When Petitioner testified at trial he said Mr. Walker had left his property but had come back when Petitioner threatened to call law enforcement and report Mr. Walker as a probation violator. He said Ms. McCoy tried to stop Mr. Walker, but he continually shoved her to get around her to get to Petitioner. At that point, Petitioner testified, he fired several shots and struck Ms. McCoy

accidentally. After Mr. Walker fell, Petitioner testified, Ms. McCoy attacked him and he shot her once in the stomach. (R7: 347-350)

During the preliminary charging conference, the parties discussed whether a heat of passion defense would apply to all lesser included offenses, and counsel for both sides stated that they would work together on the instructions. (R7: 295-298) At the final charging conference, the parties had conferred and agreed to the instructions. (R7: 440-443) Defense counsel stated that she was "in agreement with the changes this morning and also the ordering, the order in which things are now located in the instructions. At this point, I do not have any issues with them." (R7: 440)

The parties apparently coordinated the verdict form, as well; the trial judge made reference to a verdict form that he had been provided and both the State and defense told him that a revised version would be prepared. (R7: 440)

Petitioner was found guilty of manslaughter for killing Mr. Walker and of aggravated battery for wounding Ms. McCoy. (R1: 91-92; R8: 530-531)

SUMMARY OF ARGUMENT

Despite the First District Court of Appeal's certification, there is no express and direct conflict between the decision below and *Thomas v. State*, 91 So. 3d 880 (Fla. 5th DCA 2012). There, the issue was whether it was harmless error to have the lesser included offenses listed out of order. In the decision below, however, the issue was whether the error was fundamental. The two doctrines are not equivalent and are analyzed differently. Thus, *Thomas* and this case can co-exist. The Court should dismiss this case, as jurisdiction was improvidently granted.

As to the merits, the First DCA's decision that no fundamental error occurred in the order that the lesser included offenses for attempted second-degree murder is consistent with case law from this court.

First, the error cannot be fundamental because the defendant affirmatively agreed to the jury instructions and, by extension, the verdict form. The invited error doctrine should apply here, which means Petitioner cannot prevail.

Second, the facts of the case are such that Petitioner cannot meet the standard for showing fundamental error, i.e., that listing aggravated battery after attempted manslaughter was not so serious an error that the guilty verdict could not have been achieved without it.

It appears to be settled law that a mistake in the order in which lesser included crimes are presented to the jury is not fundamental error. Petitioner stakes his reliance on inapposite case law that deal with jury instructions that eliminate elements or are legally incorrect.

Finally, the Court must reject Petitioner's invitation that the Court find that trial counsel's performance was deficient. There is insufficient evidence on the face of the record to support such a radical step.

ARGUMENT

WHETHER THE OPINION BELOW IS IN EXPRESS AND DIRECT CONFLICT WITH *THOMAS V. STATE*; IF SO, WHETHER GIVING THE JURY INSTRUCTIONS FOR LESSER INCLUDED OFFENSES OR HAVING THE LESSER OFFENSES "OUT OF ORDER" ON THE VERDICT IS FUNDAMENTAL ERROR. (Restated)

A. STANDARD OF REVIEW

Whether error is fundamental is a question of law to be reviewed *de novo. Croom v. State*, 36 So. 3d 707, 709 (Fla. 1st DCA 2010); *Terrien v. State*, 94 So. 3d 648, 649 (Fla. 4th DCA 2012); *Woods v. State*, 95 So. 3d 925, 927 (Fla. 5th DCA 2012).

B. BURDEN OF PERSUASION

Petitioner bears the burden of demonstrating prejudicial error. Section 924.051(7), Florida Statutes, provides:

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

Moreover, "In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979). Additionally, because the trial court's decision is presumed correct, "the appellee can present any argument supported by the record even if not expressly asserted in the lower court." *Dade County School Bd.*

v. Radio Station WQBA, 731 So. 2d 638, 645 (Fla. 1999); *Robertson v. State*, 829 So. 2d 901, 906-907 (Fla. 2002).

C. THE DECISIONS BELOW

Trial: In the jury instruction as to Count II, attempted second-degree murder, the instruction for the lesser included offense of attempted manslaughter was read before the instruction on aggravated battery. The verdict likewise placed attempted manslaughter ahead of aggravated battery. There was no objection to the instruction either at the charging conference or after the instructions had been read, nor was there an objection to the verdict form.

Appeal: The First District Court of Appeal ruled that reading the instruction for the lesser included offense of attempted manslaughter before the instruction on aggravated battery was not fundamental error. Likewise, the incorrect order on the verdict form was not fundamental error. 194 So. 3d at 1059. The First DCA did, however, certify conflict with *Thomas v. State*.

D. JURISDICTION

While this Court has exercised its discretionary jurisdiction here, the State asserts that jurisdiction was improvidently granted. The decision below does not expressly or directly conflict either with the case cited by the court below or with a decision from this court or another district court of appeal.

The holding below in this case is that it is not fundamental error when the descending order of lesser included offenses is incorrect in jury instructions and on the verdict form.[1] *McCoy*, 194 So. 3d at 1059. The issue confronting the Fifth DCA in *Thomas* was whether a similar error was harmless, as opposed to fundamental. The *Thomas* opinion noted that the State had argued

> that the issuance of the faulty instruction was **harmless** because aggravated battery is actually a lesser included offense of attempted voluntary manslaughter. We disagree. The **error was not harmless** because, based on the order in which the charges were set forth in the instructions and verdict form, the jury could reasonably have concluded that the offenses were presented in descending order of seriousness and that attempted voluntary manslaughter was less serious than aggravated battery. As such, "it is impossible to determine whether the jury, if given the opportunity, would have 'pardoned' the defendant," *State v. Abreau*, 363 So. 2d 1063, 1064 (Fla. 1978), by convicting him of attempted voluntary manslaughter under a proper instruction.

91 So. 3d at 881-882 (emphasis supplied).

In certifying conflict, the First District apparently was confused by the Fifth District's obiter dictum in the first paragraph of the *Thomas* opinion, which reads "the trial court fundamentally erred . . . ." 91 So. 3d at 881. There is no

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[1] Aggravated battery is punished more severely that attempted manslaughter: the former is a second-degree felony in punishment level 7; the latter is a third-degree felony in punishment level 6. §§ 777.04(4)(a), (d)1., 3.; 782.07(1), 784.045(2); 921.0022(2)(f), (g); 921.0023(1), Fla. Stat. In jury instructions and on verdicts the lesser-included offenses are to be ordered by severity of punishment. *Sanders v. State*, 944 So. 2d 203, 207 (Fla. 2006).

discussion in *Thomas* about fundamental error, only harmless error.

There is a vital distinction between harmless error and fundamental error. A harmless error analysis applies when an issue is preserved. When, as here, the error is not preserved, the defendant must prove the error is fundamental. As this Court made clear in *Reed v. State*, 837 So. 2d 366 (Fla. 2002), fundamental and harmless error are not equivalent:

> [W]e take this occasion to clarify that fundamental error is not subject to harmless error review. By its very nature, fundamental error has to be considered harmful. If the error was not harmful, it would not meet our requirement for being fundamental. Again, we refer to what we said in [*State v.*] *Delva*, 575 So. 2d [643 (Fla. 1991)] at 644-45:
>
> > Instructions . . . are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred. *Castor v. State*, 365 So. 2d 701 (Fla. 1978); *Brown v. State*, 124 So. 2d 481 (Fla. 1960). To justify not imposing the contemporaneous objection rule, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Brown*, 124 So. 2d at 484. In other words, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." *Stewart v. State*, 420 So. 2d 862, 863 (Fla. 1982), *cert. denied*, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983).
>
> Thus, for error to meet this standard, it must follow that the error prejudiced the defendant. Therefore, all fundamental error is harmful error. However, **we likewise caution that not all harmful error is fundamental.** Error which does not meet the exacting standard so as to be "fundamental" is subject to review in accord with *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986)

(discussing the harmless error test).

837 So. 2d at 369-70 (emphasis provided).

When an issue is preserved, the burden is on the State to show that the error did not affect the verdict – i.e., it was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). When an issue is unpreserved, the burden is on the Appellant to show that the error vitiated the trial, i.e., it must to "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error," *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960).

The First DCA's opinion here either mistakenly conflated error that is not harmless with error that is fundamental or, more likely, mistakenly relied on the reference to fundamental error in the first paragraph of the *Thomas* opinion. The decision below and the decision in *Thomas* can coexist harmoniously. The rule in this case would apply when the error is unpreserved; *Thomas* would apply when it was preserved.

Accordingly, when a defendant objects to the order of offenses on the verdict form and/or in the jury instructions, and explains to the judge why the order is wrong, the error may not be harmless. When, however, the defendant remains silent or agrees to the order, the error is not fundamental. Thus, the Court rule that jurisdiction was improvidently granted and dismiss this case.

E. MERITS

Petitioner argues that it was fundamental error for the verdict form and the jury instructions to have the crime of attempted manslaughter precede, rather than follow, the crime of aggravated battery. The State respectfully disagrees. The mistake in the order of lesser offenses was invited by the defense and is not fundamental error under any circumstances. Moreover, defense counsel's express acceptance of the instructions and implicit acceptance of the verdict form are not ineffective assistance of counsel on the face of this record.

Invited Error

First, there is substantial authority from this Court to support an argument that even the doctrine of fundamental error is unavailable to Petitioner, who did more than fail to object. The defense affirmatively accepted the order of the jury instructions and, by extension, accepted the verdict form.

The record shows prosecution and defense apparently cooperated or collaborated in crafting the instructions. (R7: 295-298) Later, defense counsel stated that she was "in agreement with the changes this morning **and also the ordering, the order in which things are now located in the instructions**. At this point, I do not have any issues with them." (R7: 440; emphasis supplied) There was no objection of the verdict form. (R7: 440)

Thus, in addition to any claim of error being unpreserved, any error arising from the order of the instructions and the verdict form was invited by the defense. "Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal." *Gonzalez v. State*, 136 So. 3d 1125, 1147 (Fla. 2014). That doctrine applies to faulty jury instructions, as this Court made clear in *Armstrong v. State*, 579 So. 2d 734, 735 (Fla. 1994), where trial counsel's affirmative request for a limited instruction to tailor it to a particular defense was a waiver of what would have been fundamental error. This Court noted: "Any other holding would allow a defendant to intentionally inject error into the trial and then await the outcome with the expectation that if he is found guilty the conviction will be automatically reversed."

Fundamental Error

Even if this Court were not to invoke the doctrine of invited error, Petitioner cannot prevail. As noted above, appellants who must rely on fundamental error have a difficult burden. As set out in *Brown*, 124 So. 2d at 484, they must show that the error was so severe that the State could not have obtained the guilty verdict without the error. Petitioner cannot meet this burden.

Petitioner was charged in Count 2 with the attempted second-degree murder of his estranged wife. The jury was instructed that

attempted manslaughter and aggravated battery were lesser included offenses, and both qualify. The order of those lesser crimes, in the instructions and on the verdict form, was incorrect, however. As a second-degree felony, aggravated battery is a more severe crime than attempted manslaughter, a third-degree felony, and therefore should have been listed first.

That is the only error, however; the instructions on the two lesser offenses to attempted second-degree murder were not incorrect. The instructions tracked the standard language set out in the approved instructions for criminal cases,[2] and Petitioner has not argued any error in the substance of the instructions.

Also, the instruction for aggravated battery more closely dovetails with the facts presented at trial than did the instruction on attempted manslaughter.

The instruction on attempted manslaughter asked the jurors to consider whether Petitioner intended the act that would have killed Ms. McCoy, but did not. (R8: 505) The jurors also were told that if Petitioner's act was the result of mere negligence or if he abandoned his attempt, his act was not manslaughter. (R8: 505) Finally, they were instructed that the State did not have to prove the Petitioner intended to kill Ms. McCoy, only that he intended

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[2] Fla. Std. Jur. Instr. 7.7, 8.4.

the act and that the act was not excusable or justifiable. (R8: 505-506)

The instruction for aggravated battery was substantially more straightforward: The jury was to find Petitioner guilty if he intentionally caused Ms. McCoy's injuries and that he used a deadly weapon. (R8: 506)

The facts of the case more easily support the finding of aggravated battery than they do attempted manslaughter. The evidence was contradictory about how Ms. McCoy was shot; even Petitioner's accounts on the 9-1-1 recording and his version of events at trial were inconsistent. In the 9-1-1 call, he said he shot his wife accidentally. (R6: 222) At trial, he testified that his first shot accidentally hit his wife, and that the next several shots hit Mr. Walker, after which Ms. McCoy, though wounded, came to the truck where he was sitting and tried to take the gun from him; when she started hitting him he said he "pushed her off of me real hard and she came back around and I shot her once, real low in the stomach, one shot, not two shots, one shot in the stomach so she wouldn't hurt me." (R7: 350) He then went to get a telephone to call 9-1-1 and returned to where she was lying. (R7: 351)

Petitioner testified that the first shot was an accident, but the second was not; he shot to protect himself. (R7: 352) He summed up:

> I shot her on accident. And then she was coming around to get me because I shot her on accident. It was accidental and I had to defend myself against her. It was an accident.

(R7: 359)

There was also substantial evidence that Petitioner was deliberately not trying to kill his wife, only to wound her. He immediately called 9-1-1 to summon aid for her, according to his testimony. On the recorded 9-1-1 call his concern for Ms. McCoy is apparent. He repeatedly told the 9-1-1 operator to tell paramedics to hurry (R7: 216, 217, 222) and can be heard speaking to Ms. McCoy, telling her to "hold on" and to not rub dirt into her wounds and telling her "I'm sorry, Diane." (R6: 218, 222)

In contrast he expressed no concern for Mr. Walker's injuries or remorse about causing them, as the 9-1-1 recording demonstrated: Asked whether Mr. Walker was breathing, Petitioner replied: "I am not even going to check on him, I don't give a shit about him." (R6: 219)

Thus, no matter the order in which the lesser crimes were arranged, it is reasonable to conclude that the jury matched the facts – a jealous husband angered by his wife's perceived infidelity shoots at her putative lover and also shoots her, without intending to kill her, only to stop her from advancing. While that argument would be improper for a claim of harmless

error, it is consistent with fundamental error analysis.

Moreover, there was no serious discussion in closing about the lesser offenses. Petitioner's argument was that he was justified in shooting Mr. Walker and Ms. McCoy because each threatened to attack him. That was the thrust of his testimony and the sole point he argued in closing. The references made by either party to the lesser included offenses were, at best, perfunctory. The case boiled down to a he-said, she-said claim of self-defense. There was no nuanced argument by either the prosecution or the defense about the differences between attempted manslaughter and aggravated battery.

Under these circumstances Petitioner simply cannot show that the guilty verdict for aggravated batter could not have been reached without the error.

The doctrine of fundamental error is to be applied sparingly. As this Court noted in *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970): "The Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly." This Court has scrupulously followed that policy.

For example, in *Ray v. State*, 403 So. 2d 956, 959 (Fla. 1981) the defendant was charged with sexual battery but was convicted of lewd assault; he argued that as he had not been charged with lewd assault, it was fundamental error to convict him of that crime.

This Court held that lewd assault was not a permissive lesser included offense of sexual battery but upheld the conviction because the defendant had not objected to the faulty jury instruction and the error was not fundamental, noting: "the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. *Id.* at 960.

Similarly, in *Nesbitt v. State*, 889 So. 2d 801 (Fla. 2004) the defendant was charged with attempted second-degree murder and aggravated battery with a deadly weapon (he had repeatedly stunned his wife with a stun gun) but was convicted of battery and aggravated assault with a deadly weapon. He appealed on the ground that he was convicted of aggravated assault with a deadly weapon, but was charged in the information only with the use of a "weapon," but the Fifth District Court of Appeal declined to find fundamental error. *Id.; Nesbitt v. State*, 819 So. 2d 993, 994 (Fla. 5th DCA 2002).

This Court approved the Fifth DCA's decision and disapproved a line of cases from the Fourth DCA, represented by *Levesque v. State*, 778 So. 2d 1049 (Fla. 4th DCA 2001) that considered the erroneous jury instruction on aggravated assault with a deadly weapon to be fundamental error. 819 So. 2d at 994.

This Court's decision in *Cannon v. State*, 180 So. 2d 1023, 1035-36 (Fla. 2015) is instructive on another point. There, the trial judge *sua sponte* altered the standard jury instruction on attempted voluntary manslaughter to avoid violating *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010) and also failed to include in that altered instruction reference to justifiable or excusable homicide. 180 So. 3d at 1035. The defendant argued that counsel's failure to object should be excused because there was no opportunity to do so. *Id.* at 1036. This Court rejected that argument, noting that there was an opportunity, and further pointing out how the defense argument would lead to bad policy.

> Under Cannon's interpretation, a defendant could intentionally fail to object to a court's instruction of the jury and avoid the procedural bar on appeal by arguing that the trial court did not provide an opportunity to object. Such gamesmanship defeats the purpose of Rule 3.390(d),[3] which is to put the trial court on notice of potential errors in charging the jury.

180 So. 3d at 1036.

Petitioner's argument attempts to make this case something that it is not: a harmless error case. As argued above as to

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[3] Florida Rule of Criminal Procedure 3.390(d) states:

> No party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the presence of the jury.

jurisdiction, *Thomas* does not apply here because there was no claim of fundamental error, as even a cursory reading of that brief opinion reveals. The State relies on the discussion under Part D., above for the proposition that *Thomas* did not involve a claim of fundamental error, despite a passing reference to "the trial court [having] fundamentally erred . . . ." 91 So. 3d at 881.

Likewise, *Butler v. State*, 493 So. 2d 451, 452 (Fla. 1986) is analyzed under a harmless error approach, rather than fundamental error (and was decided well before this Court clarified the difference between the two doctrines in *Reed*, 837 So. 2d at 369-370. The same is true of *Mogavero v. State*, 744 So. 2d 1048, 1050 (Fla. 4th DCA 1999).

Moreover, those cases involved instructions that were internally misleading, not instructions that would have been unobjectionable had they been given in descending order of seriousness. That fact distinguishes this case from *Montgomery*, where this Court declared a jury instruction to be fundamental error because the jury might be misled into believing that the less serious crime of manslaughter was an improper verdict if the defendant did not intend to kill the victim. 39 So. 3d at 256-258. No such error or claim of error applies here.

Hills v. State, 994 So. 2d 412, 413 (Fla. 3d DCA 2008) is factually inapposite. There, the trial court *sua sponte* amended the

verdict form and by doing so eliminated "not guilty" as a possible verdict for burglary of an unoccupied structure. This was "a critical deficiency in the verdict process," the Third DCA held, and therefore fundamental error. No such error is found in this case.

Petitioner wants to engraft into fundamental error analysis the notion that any jury verdict must be reversed if the jury might have applied its "inherent 'pardon' power," as set out in *State v. Abreau*, 363 So. 2d 1063, 1064 (Fla. 1978). The problem with that argument is that the defendant in *Abreau* did object to the instructions, having unsuccessfully requested a jury instruction on a permissive lesser included offense and was analyzed as a harmless error case. 363 So. 2d at 1064.

Such an error is not harmless, but it may also be not fundamental, as *Ray*, *Nesbitt* and *Cannon* demonstrate. In each case, error was made that would have supported reversal but the convictions were affirmed because the error was not fundamental.

In *Ray*, the defendant was convicted of a crime with which he was not charged, but this outcome was approved because he did not object when the jury was instructed that lewd assault was a lesser included offense of sexual battery. 403 So. 2d 956, 959 (Fla. 1981)

In *Nesbitt*, the defendant was convicted of charged with using a weapon but convicted of a lesser crime committed with a "deadly

weapon; this was error, but not fundamental error, this Court noted. 889 So. 2d at 994.

In *Cannon* this Court affirmed a conviction that was achieved without the jury hearing an instruction on justifiable or excusable homicide because no fundamental error occurred. 180 So. 3d at 1035.

The disadvantage the defendants experienced in *Ray*, *Nesbitt* and *Cannon* was far greater than any prejudice Petitioner may have suffered when the jury found him guilty of the lesser crime of aggravated battery. To find fundamental error here this Court would have to disapprove those decisions along with numerous others. Moreover, such a ruling would lead to the gamesmanship this Court warned of in *Cannon*. The defendant could win reversal and a new trial simply by not alerting the trial court of a potential error that could easily be corrected.

Other than to establish that lesser included offenses should be presented to the jury in descending order, *Sanders v. State*, 944 So. 2d 203, 207 (Fla. 2006) has no relevance here. There, the defendant was charged with attempted first-degree murder but was convicted of second-degree murder. His sentence, however, was life imprisonment, and he appealed on the grounds that to be a lesser included crime, the sentence must be lower, too. 944 So. 2d at 204-205. The Second DCA disagreed and this Court approved that opinion, holding that second-degree murder is a lesser included offense to

first-degree murder, so the fact that the punishment (due to 10-20-Life enhancements) was the same did not constitute fundamental error. *Id.* at 207. *Sanders* does not hold that reading the lesser included offenses out of order is fundamental error.

Ineffective Assistance of Counsel

Petitioner's final argument is a plea to this Court to hold trial counsel's failure to object to the verdict form and jury instructions to be ineffective assistance of counsel on the face of the record. The Court should reject this argument, as well.

Once again, Petitioner has chosen an argument that presents him with a difficult burden. As this Court has held:

> Generally, ineffective assistance of trial counsel will not be cognizable on direct appeal when the issue has not been raised before the trial court. *State v. Barber*, 301 So. 2d 7 (Fla. 1974). There are rare exceptions where appellate counsel may successfully raise the issue on direct appeal because the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue.

Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987).

This case does not present one of those "rare exceptions." This Court cannot discern from the face of the record whether trial counsel's specific acceptance of the order of offenses in jury instruction, and implicit acceptance of the order in the verdict form were part of a "sound trial strategy." *Deparvine v. State*, 146 So. 3d 1071, 1082-83 (Fla. 2014).

The record here is insufficient to overcome the presumption that counsel was not ineffective. There is no showing as to whether "alternative courses [were] considered and rejected" in which case "counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). An evidentiary hearing would be necessary to determine trial counsel's thought process.

Here, there was legally sufficient evidence to support a verdict of attempted second-degree murder. There also, however, was some potential for the jury to find Petitioner – physically disabled and, arguably, cuckolded by a man he let stay in his house – a somewhat sympathetic character. Thus, it would not be unreasonable for defense counsel to anticipate the possibility of a compromise verdict, or partial jury pardon. It also would not be unreasonable for defense counsel to anticipate that the jury probably would be inclined to go to the lesser offense that immediately follows second-degree murder, a result that would be advantageous to the defendant.

Defense counsel's specific comment that she agreed with the order of the lesser offenses suggests that she was considering such an approach – but, of course, there is no way to tell without an evidentiary hearing. There are numerous cases where arguable claims of ineffective assistance of counsel were not considered on appeal

because the factual record was not crystal clear.

For example, in *Rodgers v. State*, 3 So. 3d 1127, 1132 n.3 (Fla. 2009) a defendant facing the death penalty claimed on direct appeal that trial counsel was ineffective for failing to request a competency hearing (the defendant had waived his rights to a jury during the penalty phase and his right to present mitigation). This Court noted that "Rodgers' ineffective assistance of counsel claim requires information that is not apparent on the face of the record, for example, the attorney's personal observations and conversations with Rodgers."

Likewise, in *Martinez v. State*, 761 So. 2d 1074, 1078 n. 2 (Fla. 2000), where several alibi witnesses testified at trial but defense counsel did not ask for a jury instruction on alibi, ineffectiveness was not apparent on the face of the record, though there was some reason to question counsel's action or lack thereof. Similarly, in *Ellerbee v. State*, 87 So. 3d 730, 739 (Fla. 2012), defense counsel argued that the fatal shooting was accidental, which was not a defense under felony murder, but that fact did not make the case one where ineffective assistance was conclusively established without more evidence.

Moreover, if this Court were to accept Petitioner's invitation to remand for a new trial based on perceived ineffective assistance of counsel, such a ruling would in effect make all jury instruction

errors fundamental. The doctrine would be so greatly expanded that it would consume the fundamental error doctrine.

> Such an outcome would be especially inappropriate in cases like this one, where the alleged fundamental error could be invited error or, at least, the result of sound defense strategy. Florida courts have steadfastly protected the fundamental error doctrine.

For example, in *Gonzalez*, 136 So. 3d at 1146-47, the defendant argued that he was entitled to a new trial because of a defective response to a capital jury's request to have "'transcripts of what the witnesses said.'" This Court rejected the argument, in part because the defense agreed with the trial judge's response, thus inviting the error, but also because the error was not fundamental, in context. *Id.*

The Court relied on *Hendricks v. State*, 34 So. 3d 819, 830-32 (Fla. 1st DCA 2010), which found no fundamental error in a trial court's refusal to read testimony back upon a jury's request, noting that the First DCA had invoked "the principle that finding fundamental error under [these] circumstances would encourage gamesmanship, as defense counsel may strategically choose not to object, await the outcome of the trial, and if unfavorable, secure reversal on appeal because of the 'fundamental' error the judge committed." *Gonzalez*, 136 So. 3d at 1148.

Similarly, in *State v. Smith*, 537 So. 2d 306, 309 (Fla. 1990) one issue was whether giving a "short-form" jury instruction on

excusable homicide (as opposed to the "long form" instruction) was fundamental error. The Second DCA held that it was not fundamental error, *Smith v. State*, 539 So. 2d 514 (Fla. 2d DCA 1989), and this Court approved the decision and the reasoning:

> [W]e agree with the district court when it said that to hold fundamental error occurred because of the failure to give the long-form instruction on excusable homicide when it was not requested "would place an unrealistically severe burden upon trial judges concerning a matter which should properly be within the province and responsibility of defense counsel as a matter of trial tactics and strategy." *Smith*, 539 So. 2d at 517.

State v. Smith, 573 So. 2d at 310.

As this Court noted in *Robards v. State*, 112 So. 3d 1256, 1266-67 (2013): "The reason that ineffective assistance of counsel claims are largely inappropriate on direct appeal is because '[a]n appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made.' *Barber*, 301 So. 2d at 9." That should be the result here, as well.

CONCLUSION

Based on the foregoing, the State respectfully submits that this Court should either dismiss this matter because jurisdiction was improvidently granted or to approve the decision below and disapprove of *Thomas* to the extent that it conflicts with the decision reviewed here.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by electronic mail to Assistant Public Defender Danielle Jorden, Esq., danielle.jorden@flpd2.com on November 7, 2016.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was printed in Courier New 12 point and thereby satisfies the font requirements of Florida Rule of Appellate Procedure 9.210.

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