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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45243**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR-FE-2016-2213**
v.	)	
	)	
JOSHUA JAMES ALBERTS,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE MELISSA MOODY
District Judge

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STATEMENT OF THE CASE

Nature of the Case

A jury found Joshua Alberts guilty of second degree murder for killing Joshua Warren after the court erroneously instructed that Mr. Alberts could not claim self-defense if he intentionally put himself where he knew or believed he would have to act in self-defense. This instruction misstated Idaho law and thereby reduced the State's burden of proof. Because this instructional error violated Mr. Alberts' unwaived constitutional right to due process and is clear from the record, and there is a reasonable probability the error contributed to the jury's verdict, it constituted fundamental error. This Court should vacate Mr. Albert's conviction and remand his case to the district court for a new trial.

Statement of Facts and Course of Proceedings

Mr. Alberts met Briana Bliss on the job at Saint Alphonsus in April 2015, and began a romantic relationship shortly after. (Tr., p.897, L.24 – p.898, L.1, p.899, Ls.11–19.) During the course of their nearly year-long relationship, Ms. Bliss and Mr. Alberts talked extensively about her relationship with her ex-husband, Mr. Warren. (Tr., p.900, Ls.2–21, p.901, L.22 – p.902, L.4.) Ms. Bliss and Mr. Warren had been together off and on for thirteen years, had two sons together, and divorced shortly after Mr. Alberts met Ms. Bliss. (Tr., p.901, Ls.1–19.)

Ms. Bliss told Mr. Alberts that Mr. Warren was physically and emotionally abusive throughout their relationship. (Tr., p.904, Ls.21–24, 905, Ls.11–19.) For example, Ms. Bliss described times when Mr. Warren had shoved and hit her, barricaded her in her room, held a knife to her throat, and kicked her in the stomach repeatedly to try to force her to miscarry. (Tr., p.905, Ls.2–10, p.906, L.14.) Mr. Warren would threaten her, call her names like "bitch" and "sow," and when she refused to give him money, and tell their kids that his financial troubles

were her fault. (Tr., p.906, Ls.12–18, p.910, Ls.1–6.) Ms. Bliss even had to change her phone number a couple of times because Mr. Warren would call or text her incessantly. (Tr., p.909, Ls.7–9.)

Mr. Warren's aggression wasn't limited to his relationship with Ms. Bliss. Ms. Bliss told Mr. Alberts that Mr. Warren loved to fight and would start a fight anywhere with anyone. (Tr., p.907, Ls.1–6, 14-15.) For example, Mr. Warren once crawled through a girl's window and pistol-whipped her in an effort to retrieve money he thought she had taken from him. (Tr., p.907, Ls.7-11.) Another time, "he took a pipe to seven guys." (Tr., p.907, Ls.7–15.) According to Ms. Bliss, Mr. Warren "had just unbelievable strength." (Tr., p.907, Ls.13-14.)

Mr. Alberts witnessed Mr. Warren's aggression and abuse first-hand a couple of times. The first time he ever spoke directly with Mr. Warren was around 5:00 a.m. one morning. (Tr., p.911, Ls.14–16.) The day before, Mr. Warren had called Ms. Bliss twenty-something times and filled her voicemail up with comments like "[y]ou've ruined me. You're a bitch. I hate you. I hope you die. Fuck off and die." (Tr., p.912, Ls.1–14.) The next morning, Mr. Warren called over and over again until Mr. Alberts finally answered the phone to ask him to give it a rest. (Tr., p.911, L.14–p.912, L.24.) In response, Mr. Warren told Mr. Alberts that he took his wife, and so he was going to "wreck" him and "smash" him when he got the chance. (Tr., p.913, Ls.1–6.) After that, Mr. Alberts worried about whether Mr. Warren would come back to Idaho from California, where he had been living since the summer of 2015, and make good on his threats. (Tr., p.913, Ls.7–16, p.922, Ls.4–10.)

Some months later, in November 2015, Mr. Warren kept asking Ms. Bliss for Mr. Alberts' phone number. (Tr., p.913, Ls.17–22, p.915, Ls.9–12.) Rather than give Mr. Warren his number, Mr. Alberts called Mr. Warren with his number blocked, in hopes that

Mr. Warren had settled down and actually wanted to have a conversation. (Tr., p.913, L.23–p.914, L.13.) Right off the bat, Mr. Warren was mad that Mr. Alberts called from a blocked number. (Tr., p.914, Ls.16–18.) Mr. Warren again accused Mr. Alberts of taking his wife and family, and said he would "wreck" him when he gets his hands on him, until Mr. Alberts hung up. (Tr., p.914, L.16–p.915, L.1.)

Mr. Alberts saw Mr. Warren face-to-face for the first time in early February 2016. (Tr., p.920, Ls.20–22.) He was with Ms. Bliss when she got a phone call from someone saying Mr. Warren was back in town and was going to stop by to pick up the kids. (Tr., p.916, Ls.16–18.) Ms. Bliss tried calling Mr. Warren to figure out how long they had before he showed up, but Mr. Warren just hung up on her. (Tr., p.916, Ls.18–24.) Mr. Alberts was worried about Mr. Warren coming up the stairs to Ms. Bliss's apartment, but Ms. Bliss assured him that she would have the boys downstairs waiting for Mr. Warren, and that they could just run upstairs to get their bags when he got there. (Tr., p.317, Ls.4–12.) That isn't what happened. As Mr. Alberts feared, Mr. Warren went up the stairs to Ms. Bliss's apartment, banged on the door, and yelled that he wanted to talk to Mr. Alberts. (Tr., p.917, Ls.13–17.) Ms. Bliss opened the door to try to throw Mr. Warren the boys' bag without letting him into the apartment, but Mr. Warren blocked her from closing the door and yelled at Mr. Alberts to come outside. (Tr., p.918, Ls.1–16.) Mr. Alberts refused, telling Mr. Warren that if he did not let Ms. Bliss shut the door, he would call the police. (Tr., p.918, Ls.17–21.) Mr. Alberts then called the police, at which point Mr. Warren finally ran down the stairs and left. (Tr., p.918, L.22–p.919, L.13.) Ms. Bliss filed a police report, and Mr. Warren was instructed that if he went up the stairs to her apartment again, he would be charged with trespassing. (Tr., p.919, Ls.18–p.920, L.7.)

Because of Mr. Warren's violent history and his direct threats toward Mr. Alberts, Mr. Alberts was afraid of Mr. Warren and thought he was a bad person. (Tr., p.786, L.14 – p.787, L.24, p.908, Ls.1–18, p.915, Ls.2–7, p.1015, Ls.5–20.) It did not help that Mr. Warren was around sixty pounds heavier than Mr. Alberts. (Tr., p.786, Ls18–22.) So, in February when Mr. Alberts learned that Mr. Warren was back in Boise, he decided to keep his handgun in his car in case he needed to protect himself or Ms. Bliss. (Tr., p.920, L.23 – p.924, L.3, p.1010, L.23 – p.1011, L.9.)

On the morning of February 20, 2016, Ms. Bliss was again upset about something Mr. Warren had said or done. (Tr., p.1007, L.23 – p.1009, L.11.) Wanting to put an end to Mr. Warren's harassment, Mr. Alberts decided to confront Mr. Warren about his treatment of Ms. Bliss that day. (Tr., p.1007, L.23 – p.1010, L.22.) Mr. Alberts did not know how the conversation was going to go, but he planned on putting his foot down and asking Mr. Warren to take responsibility for his own life, focus on his kids, and leave Ms. Bliss alone. (Tr., p.1011, Ls.10–23, p.1012, Ls.3–7.) Mr. Alberts decided to keep his handgun on him during the confrontation because he was concerned for his safety and wanted to communicate to Mr. Warren that he was taking the issue very seriously. (Tr., p.1012, Ls.8–22, p.1016, Ls.4–7.) He did not expect to have to draw it, let alone use it. (Tr., p.1012, Ls.23–24, p.1016, Ls.10–16, 1017, Ls.9–20.) But in the worst case scenario, Mr. Alberts thought maybe Mr. Warren would come at him, such that he would have to shoot him one time in the gut to maim him; he did not expect to have to kill him. (Tr., p.1013, L.3–p.1014, L.8, p.1016, Ls.16–18, p.1017, Ls.20–22.)

Mr. Alberts initially planned to confront Mr. Warren at the home of Mr. Warren's parents, where Mr. Warren was staying, so that the kids would not be around to hear their argument if things got heated. (Tr., p.1019, Ls.1–13.) Because Mr. Alberts knew Ms. Bliss

would not want him to confront Mr. Warren, he told Ms. Bliss he was going to run out to RC Willey, but instead drove to Mr. Warren's parents' home. (Tr., p.1020, L.14 – p.1021, L.23.) But Mr. Warren's car was not there, so after waiting for a few minutes, Mr. Alberts went back to Ms. Bliss's apartment complex, the Whispering Pines Apartments. (Tr., p.1019, Ls.13–14, p.1022, Ls.19–24.)

When he got back to the apartment complex, Mr. Alberts parked by the leasing office to wait for Mr. Warren to get there. (Tr., p.1024, Ls.18–23.) He put his holster on his hip since he would have to get out of his car to get Mr. Warren's attention as he drove in. (Tr., p.1026, L.15 – p.1027, L.5.) After seeing one of Ms. Bliss's sons walking the dog, and decided to move closer to the entrance to the complex so that the son could not hear the interaction if it got heated. (Tr., p.1027, L.15–p.1028, L.9.) The entrance to the complex is a fairly high-traffick area which is overlooked by apartments. (Tr., p.593, L.8–p.594, L.9, p.676, Ls.11–14, p.774, Ls.22–24; State's Ex. 55 (Mr. Alberts' drawing of the complex, including where he parked and Mr. Warren stopped).)

When Mr. Warren drove into the complex about ten minutes later, Mr. Alberts got out of his car and flagged him down. (Tr., p.1029, L.4–15.) Mr. Warren stopped and rolled his window down as Mr. Alberts walked from his car toward Mr. Warren's car. (Tr., p.1029, L.18 – p.1030, L.14.) As Mr. Alberts was walking, Mr. Warren said something like "[w]hat's up, motherfucker," or "fuck you, motherfucker." (Tr., p.1030, Ls.15–17.) Mr. Alberts took a couple more steps, which put him right next to the driver side of Mr. Warren's car—at the same time, Mr. Warren motioned as though he was going to unbuckle his seatbelt. (Tr., p.1030, Ls.18–21.) Mr. Alberts reached for his gun, which Mr. Warren must have seen out of the corner of his eye

because he "flattened himself against the seat." (Tr., p.1064, Ls.1–13.) Mr. Alberts then fired fourteen times, emptying his magazine. (Tr., p.1034, Ls.11–14, p.1064, L.14.)

According to Mr. Alberts,

> at that point, I just—I don't know what happened. I just—I don't know if it was just fear of him getting out of the car, panic. But it was just—it was all so quick. There was just no time to really think.
>
> And, as soon as I pulled and took a stance back, I pulled the trigger. And it just—I don't know what happened. I couldn't stop pulling the trigger. It was just—it was over in a flash.

(Tr., p.1030, L.21 – p.1031, L.6.) Mr. Alberts acknowledged that Mr. Warren's statement had made him angry and that he did not "really think he was going for a weapon or anything like that. It was pretty apparent that he was moving towards the seatbelt." (Tr., p.1031, Ls.12–22, p.1035, Ls.11–13.) But he also said that "I instantly knew that he was going for the seatbelt to get out. And I wouldn't have had enough time to make it back to my car with the 10 feet in between. If he could have gotten ahold of me and then struggle for my gun, then it wouldn't have worked out well." (Tr., p.1033, Ls.20–24.) Mr. Alberts did not know why he didn't stick to his plan: "I don't know if it was just—if it was just him saying that, him going for the seatbelt. It just—everything just hit me at once. And it was just—and, after that, I just don't know. I really don't know." (Tr., p.1032, L.21 – p.1033, L.1.) He acknowledged that he was operating on emotion at that point. (Tr., p.1034, Ls.5–8.)

After Mr. Alberts emptied his magazine, he stood there for a moment in shock while Mr. Warren's car rolled away. (Tr., p.1036, Ls.17–25.) He then went back to his car with the intention of waiting for the police to show up. (Tr., p.1037, Ls.1–10.) But, concerned that Ms. Bliss's son might walk by and see Mr. Warren, Mr. Alberts drove to the back of the complex to Ms. Bliss's apartment. (Tr., p.1037, Ls.1–21.) Before going upstairs, he reloaded his gun because he considered "committing suicide by cop." (Tr., p.1042, Ls.1–12; State's Ex. 54,

Audio 1, at 27:00–28:30.) Mr. Alberts went up to Ms. Bliss's apartment and told her that Mr. Warren was not coming for the kids, that she did not have to worry about Mr. Warren anymore, and that she and the kids needed to stay inside because the police were on the way. (Tr., p.1039, Ls.1–21.) Ms. Bliss didn't listen—she quickly walked toward the front of the complex with Mr. Alberts following behind her. (Tr., p.1040, Ls.11–25.) When Ms. Bliss saw Mr. Warren, she became hysterical. (Tr., p.1042, Ls.17–21.)

Mr. Alberts described feeling hopeless despair as he was processing what had just happened. (Tr., p.1041, Ls.13–25.) When the first officer, Sergeant LeBar, got there, Mr. Alberts considered taking his own life or committing "suicide by cop," but decided against the latter option because he did not think it would be fair to everyone else involved—it would not be fair to Ms. Bliss to make her see something like that; it would not be fair to the officer to make the officer kill him; and it would not be fair to Mr. Alberts' family to put them through that additional loss. (Tr., p.1044, L.11 – p.1045, L.24) So when Sergeant LeBar told Mr. Alberts to drop his gun, he obeyed. (Tr., p.1046, Ls.1–2.) Mr. Alberts was cooperative with the police throughout the rest of the encounter—he followed all of their directions and told him that he had shot Mr. Warren. (Tr., p.546, Ls.2–9, p.556, L.15 – p.557, L.5, p.595, Ls.4–17, p.617, Ls.5–16.)

After his arrest, Mr. Alberts spent a couple of hours discussing what had happened back at the police station. (Tr., p.747, Ls.19–25, p.755, Ls.1–18; State's Ex. 54.) Mr. Alberts was extremely forthcoming about what had happened—he said he was not "trying to hide" from what he had done (State's Ex. 54, Video 2, at 10:45–11:45), he volunteered a lot of information, and he answered all of Detective Ransom's questions (*see generally* State's Ex. 54). During the interrogation, officers from the scene passed along information that prompted Detective Ransom to ask Mr. Alberts about a trip to Hawaii and Mr. Alberts' offer to pay Mr. Warren $100 to pick

up the boys. (State's Ex. 54, Video 2, at 12:30–13:00.) Mr. Alberts said that Mr. Warren was supposed to pick the boys up at noon but tried to back out and have Ms. Bliss drop them off, so Mr. Alberts offered to pay him $100 to stick with the original plan. (State's Ex. 54, Video 2, at 12:30–13:00; State's Ex. 54, Audio 2, at 1:00–4:00.) He and Ms. Bliss had planned on leaving for Hawaii the next day, but Mr. Alberts never booked the trip because they recently had a series of arguments. (State's Ex. 54, Video 3, at 0:00–1:28.)

The State charged Mr. Alberts with first degree murder, and the case proceeded to trial. (R., pp.12–13, 40–41.) The central facts of the case were largely undisputed—Mr. Alberts acknowledged that he killed Mr. Warren—but the parties disagreed about Mr. Albert's mental state at the time and whether Mr. Alberts acted in self-defense. The State's theory of the case was that Mr. Alberts had committed first degree murder by concocting an elaborate plan involving a fake trip to Hawaii in order to get Mr. Warren to Ms. Bliss's apartment on the day in question so that he could murder him in broad daylight in a high-traffic area. (*See generally* Tr., p.429, L.25 – p.439, L.16 (opening statement), p.1135, L.10 – p.1174, L.7 (closing statement), p.1189, L.14 – p.1216, L.20 (rebuttal).) The defense, on the other hand, argued that Mr. Alberts acted in self-defense, acted in a heat of passion in response to a provocation and thus committed voluntary manslaughter, or at most was guilty of second-degree murder. (*See generally* Tr., p.439, L.22 – p.446, L.6 (opening statement), p.1175, L.1 – p.1189, L.11 (closing statement).)

The State called fifteen witnesses, including an acquaintance of Mr. Warren's who was with him the morning of February 20, 2016 (Tr., p.446, L.14 – p.462, L.5); a woman at the Whispering Pines complex who heard loud bangs and looked out the window to see a man with a gun, but assumed he was shooting blanks (Tr., p.462, L.16 – p.478, L.25); a couple who lived at

the Whispering Pines complex and heard gunshots and looked outside to see the shooting (Tr., p.479, L.8 – p.532, L1); various officers who responded to the scene and investigated the case (Tr., p.532, L.11 – p.568, L.1, p.573, L.4 – p.595, L.19, p.596, L.4 – p.629, L.2, p.635, L.3 – p.683, L.4, p.690, L.12 – p.777, L.14, p.782, L14 – p.788, L.25, p.822, L.19 – p.831, L.11); and employees of the Ada County Coroner's Office who collected and examined Mr. Warren's body (Tr., p.789, L.8 – p.811, L.20, p.831, L19 – p.886, L.1). The State also introduced various exhibits, including the audio recorded by the officers who first made contact with, and arrested, Mr. Alberts (State's Exs. 11, 20), and audio and video recordings of the interrogation (State's Ex. 54).

After the State rested, Mr. Alberts testified in his own defense. With a couple of minor exceptions, his testimony mirrored what he told the police during the interrogation[1]—that he did not intend to kill Mr. Warren when he first confronted him that day and he did not know why he pulled the trigger, but it may have been because he worried Mr. Warren was going to get out of the car and come at him. (Tr., p.1030, L.21 – p.1036, L.6, p.1046, Ls.22–24; *see generally* State's Ex. 54.) Mr. Alberts also elaborated on the trip to Hawaii and the $100 he offered to pay Mr. Warren.

As for the trip to Hawaii, Mr. Alberts explained that he and Ms. Bliss originally intended to go in October, but the trip got pushed back to February. (Tr., p.998, Ls.5–11.) He planned to look for last-minute deals about four weeks before they wanted to fly out, but hesitated because the pair kept getting into arguments. (Tr., p.999, L.3 – p.1000, L.6.) At the end of each

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[1] During closing argument, the State highlighted what it perceived as important differences between what Mr. Alberts said during the interrogation and while on the stand. (Tr., p.1162, Ls.10-24, p.1203, L.12-p.1204, L.23, p.1206, L.20-p.1207, L.12.) Those alleged differences went to the State's theory of premeditation, which the jury rejected, and therefore do not matter to this appeal.

argument, Ms. Bliss would ask whether the trip was still on. (Tr., p.1000, Ls.7–9.) After an argument that took place the week that he had planned on booking the trip, Ms. Bliss again asked about the trip to Hawaii, and Mr. Alberts started to wonder if Ms. Bliss was only eager to make up so that they could go on vacation. (Tr., p.1000, L.12–p.1001, L.2.) Mr. Alberts decided not to book the trip and to wait and tell Ms. Bliss that it was off after Mr. Warren picked up the boys on February 20th. (Tr., p.1001, L.3 – p.1003, L.10.) Although he acknowledged it was a bad idea in hindsight, he wanted to use it as a sort of litmus test—would Ms. Bliss forgive him or would she end the relationship after learning the trip was off? (Tr., p.1001, L.3 – p.1003, L.10.) Mr. Alberts confirmed the Hawaii trip had nothing to do with him shooting Mr. Warren, and explained that he never mentioned it to Detective Ransom during the interrogation because it was irrelevant to the whole situation. (Tr., p.1004, Ls.1–6.)

With respect to the $100, Mr. Alberts explained that Mr. Warren was supposed to pick the boys up at noon on February 20th, so that he and Ms. Bliss could leave for Hawaii the next day. (Tr., p.1006, Ls.12–17.) But on February 19th, Mr. Warren said he wanted Ms. Bliss to drop the boys off instead. (Tr., p.1004, L.9–p.1005, L.2.) Neither Ms. Bliss nor Mr. Alberts wanted Ms. Bliss to go to Mr. Warren's house, so Mr. Alberts suggested that Ms. Bliss offer to give Mr. Warren $100 to spend with the boys for the week if he picked them up. (Tr., p.1004, L.23–p.1007, L.9.) Mr. Alberts confirmed that his decision to pay Mr. Warren to pick up his children had nothing to do with the shooting. (Tr., p.1009, Ls.16–25.)

Finally, the State called Ms. Bliss in rebuttal. She acknowledged that there were times when she and Mr. Warren fought physically, and that she told Mr. Alberts about those incidents. (Tr., p.1080, L.22 – p.1081, L.23.) And although Ms. Bliss testified that the physical altercations with Mr. Warren took place years prior, she could not remember whether she had told

Mr. Alberts about when those fights took place. (Tr., p.1082, L.25 – p.1083, L.21.) She understood that Mr. Alberts thought her relationship with Mr. Warren was unhealthy and that Mr. Warren "did a lot of terrible things." (Tr., p.1083, Ls.15–19.) Ms. Bliss also acknowledged changing her phone number and communicating with Mr. Warren through his mother. (Tr., p.1083, L.20 – p.1084, L.17.)

The court instructed the jury on first and second degree murder, voluntary and involuntary manslaughter, and self-defense. The State requested a non-pattern self-defense instruction based on an instruction discussed in *State v. Jurko*, 42 Idaho 319 (1926), which provided that a defendant cannot claim self-defense after he has intentionally put himself where he knows or believes he will have to invoke its aid. (Tr., p.1100, L.25 – p.1101, L.5.) After making a couple of changes in response to defense counsels' objections, the court ultimately instructed the jury as follows:

> One cannot claim the benefits of self-defense if he intentionally put himself where he knew or believed he would have to invoke its aid. If you believe from the evidence, and beyond a reasonable doubt, that the Defendant sought a meeting with the deceased for the purpose of provoking a difficulty with the deceased, or with the intent to take the life of the deceased or to do him such serious bodily injury as might result in death, then the Defendant would not be permitted to justify on the ground of self-defense, even though he should thereafter have been compelled to act in his own defense. The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was not justifiable. If there is a reasonable doubt whether the homicide was justifiable, you must find the Defendant not guilty.

(R., p.226.) Defense counsel did not object to this instruction as an incorrect statement of the law. (Tr., p.1100, L.25 – p.1111, L.19.)

The jury found Mr. Alberts guilty of second degree murder (R., p.201), and the court sentenced Mr. Alberts to life, with thirty years fixed (R., pp.251–53). Mr. Alberts timely

appealed. (R., pp.258–60.) On appeal, he contends that the above-quoted instruction was a misstatement of the law rising to the level of fundamental error.

ISSUE

Did the district court commit fundamental error when it instructed the jury that Mr. Alberts could not have acted in self-defense if he intentionally put himself in a situation where he knew or believed he would have to act in self-defense?

ARGUMENT

The District Court Committed Fundamental Error When It Instructed The Jury That Mr. Alberts Could Not Have Acted In Self-Defense If He Intentionally Put Himself In A Situation Where He Knew Or Believed He Would Have To Act In Self-Defense

A. Introduction

The district court erred in instructing the jury that Mr. Alberts could not claim self-defense if he intentionally put himself in a situation where he knew, or believed, he would have to invoke its aid. That instruction, derived from language in an old Idaho Supreme Court case, is a misstatement of law concerning the defense of justifiable homicide. The controlling statute contains no exception for those individuals who seek out a meeting with someone, knowing or believing that that meeting could end badly.

By misstating the law as it did, the district court effectively took Mr. Alberts' self-defense theory completely off the table. After all, Mr. Alberts readily conceded—before and during trial—that he confronted Mr. Warren knowing that even a verbal confrontation could escalate given Mr. Warren's violent nature. Thus, even if the jurors accepted Mr. Alberts' testimony, the court's erroneous instruction prevented them from acquitting Mr. Alberts on a justifiable homicide theory. As such, the instruction lowered the State's burden of proof.

The district court's erroneous self-defense instruction amounted to fundamental error because: by lowering the State's burden of proof, it violated Mr. Alberts' un-waived constitutional right to due process; the error is plain on the face of the record; and there is a reasonable possibility that the error affected the outcome of the trial. This Court should vacate Mr. Alberts' judgment of conviction and remand this case for a new trial

B. Standard Of Review

A trial court must instruct the jury on all matters of law relevant to their considerations. *State v. Severson*, 147 Idaho 694, 710 (2009); I.C. § 19-2132. Appellate courts exercise free review over whether jury instructions correctly state the applicable law. *State v. Draper*, 151 Idaho 576, 587-88 (2011). This Court reviews the instructions as a whole, rather than individually, to determine whether the district court adequately instructed the jury. *Id.* at 588.

This Court reviews un-objected to jury instructions for fundamental error, which requires the defendant to show: "(1) the alleged error violated an unwaived constitutional right; (2) the alleged error plainly exists; and (3) the alleged error was not harmless." *State v. Adamcik*, 152 Idaho 445, 472-73 (2012) (citing *State v. Perry*, 150 Idaho 209, 228 (2010)).

C. The Challenged Instruction Misstated Idaho Law

Before this Court can "consider whether there was fundamental error, [it] must first determine whether the trial court erred at all." *Adamcik*, 152 Idaho at 473. Mr. Alberts contends that it did because the challenged instruction misstated the law.

To prove that Mr. Alberts committed first degree murder or any lesser-included offense (including second degree murder, which is what the jury ultimately found), the State had to prove that Mr. Alberts killed Mr. Warren "unlawfully," *i.e.*, without justification. *See* I.C. §§ 18-4001, 18-4006. One potential justification for the killing was that Mr. Alberts acted in self-defense. *See* I.C. §§ 18-4009, 18-4010.[2] According to section 18-4009,

> Homicide is justifiable when committed by any person in either of the following cases:

[2] Idaho's law of self-defense will be changing as of July 1, 2018. *See* 2018 Idaho Sess. Laws 222. However, the law that is relevant to this appeal is that which was in effect when Mr. Alberts shot Mr. Warren in 2016.

> 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,
> 2. When committed in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,
>
> 3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or,
>
> 4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.[3]

Nothing in the plain language of section 18-4009 prohibits a jury from finding that a defendant acted in self-defense where he had intentionally placed himself in a situation where he knew or believed he would have to defend himself. Thus, no such exception to the law of self-defense exists. *See Verska v. Saint Alphonus Reg'l Med. Ctr.*, 151 Idaho 889, 893 (2011) ("The interpretation of a statute 'must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.'") (quoting *State v. Schwartz*, 139 Idaho 360, 362 (2003)).

[3] Section 18-4010 bears upon the defense of justifiable homicide, in that it provides that homicide is only justifiable if the defendant's fears are objectively reasonable, and the sole motivation for the killing. However, because this section does not relate to the jury instruction challenged on appeal in this case, it is not discussed further herein. Thus, when Mr. Alberts speaks of the law of justifiable homicide herein, he is referring to section 18-4009.

Even though Idaho's law of justifiable homicide (section 18-4009) includes no exception for situations where the defendant intentionally placed himself in a situation where he knew or believed he would have to defend himself, the district court instructed the jury in this case that:

> One cannot claim the benefits of self-defense if he intentionally put himself where he knew or believed he would have to invoke its aid. If you believe from the evidence, and beyond a reasonable doubt, that the Defendant sought a meeting with the deceased for the purpose of provoking a difficulty with the deceased, or with the intent to take the life of the deceased or to do him such serious bodily injury as might result in death, then the Defendant would not be permitted to justify on the ground of self-defense, even though he should thereafter have been compelled to act in his own defense. . . .

(R., p.226.) This instruction was inconsistent with section 18-4009.

As noted above, the challenged instruction was derived from a 1926 Idaho Supreme Court case—*State v. Jurko*. In *Jurko*, the Supreme Court considered the following instruction:

> [I]n relation to the law of self-defense, . . . one cannot claim its benefits after he has intentionally put himself where he knows or believes he will have to invoke its aid. The circumstances justifying an assault, in the law of self-defense, must be such as to render it unavoidable. If you believe from the evidence, and beyond a reasonable doubt, that the defendant sought a meeting with the deceased for the purpose of provoking a difficulty with said deceased, or with the intent to take the life of the said deceased or to do him such serious bodily injury as might result in death, then he would not be permitted to justify on the ground of self-defense, even though he should thereafter have been compelled to act in his own defense. The law says that, if you invoke the law of self-defense, you must show that you were without fault in bringing about the necessity for the killing.

245 P. 685, 688. The Court held that the giving of that instruction was not reversible error because: (1) the instruction did not "advise the jury that the plea of self-defense could not be maintained if appellant was the first aggressor, even though he thereafter was compelled to act in self-defense," and (2) even if the instruction did indicate that the first aggressor could not avail himself of the defense of self-defense, the instructions *as a whole* correctly apprised the jury as to self-defense. *Id*. at 688-89.

The district court's reliance on *Jurko* in crafting the challenged instruction in this case was incorrect for a number of reasons. First, *Jurko* reveals that the instruction at issue apparently has its roots in Oregon's common law. Specifically, *Jurko* cites to *State v. Dunlap*, 40 Idaho 630 (1925), which examined a similar instruction. *See Jurko*, 245 P. at 688. *Dunlap*, however, makes it clear that the instruction at issue came to Idaho from an Oregon case, *State v. McCann*, 72 P. 137 (Or. 1903). Thus, the instruction is wholly untethered from any Idaho justifiable homicide statute, past or present.[4] And while Idaho's courts certainly apply common law standards to gaps in the Idaho Code, they do not apply the common law to matters covered by statutory law. *See* I.C. § 73-116. Because Idaho's justifiable homicide statute (section 18-4009) does not limit a defendant's ability to claim self-defense if he knowingly put himself in a situation in which he might need to invoke its aid, *Jurko* has no bearing on the propriety of the district court's instruction in this case.

Second, although the instruction at issue in *Jurko* was similar to the one at issue here, the defendant in that case challenged the instruction on different grounds—that it said a defendant could not claim self-defense if he was the *first aggressor*; the defendant did not challenge the instruction on the grounds that it said a defendant could not claim self-defense if he merely puts himself in a situation in which he might have to act in self-defense. *Jurko*, 245 P. at 688. Being the first aggressor, *i.e.*, the first to physically attack, is undoubtedly different than merely putting oneself in a situation in which one may need to resort to self-defense, such as by initiating a verbal confrontation. Therefore, although the *Jurko* Court concluded the instruction withstood

[4] Other than being re-numbered numerous times, Idaho's statute on justifiable homicide reads the same today as it did when Idaho's first Legislature decided what constitutes justifiable homicide. *See* Idaho Rev. St. § 6570 (1887); Idaho Rev. Code § 6570 (1908); Comp. Laws of Idaho § 6570 (1918); Idaho Comp. St. § 8219 (1919); I.C. § 17-1111 (1932); I.C. § 18-4009 (1972).

the defendant's appellate challenge, it did not directly address the propriety of the language that is relevant here—the part which spoke of self-defense being unavailable where the defendant knew or believed he would have to invoke its aid because he "sought a meeting with the deceased for the purpose of provoking a difficulty . . . ." *Id.*

Third, in a subsequent case, the Supreme Court did specifically address an instruction containing language like that which is at issue here, and it held that instruction was erroneous. In *State v. Livesay*, the jury was instructed as follows:

> The Court instructs you, in relation to the law of self-defense that one cannot claim its benefits after she has intentionally put herself where she knows or believes she will have to invoke its aid. The circumstances justifying an assault, in the law of self-defense, must be such as to render it unavoidable. If you believe from the evidence, and beyond a reasonable doubt, that the defendant sought a meeting with the deceased for the purpose of provoking a difficulty with said deceased, or with the intent to take the life of the said deceased or to do him such serious bodily injury as might result in death, even though she should thereafter have been compelled to act in her own defense. [Sentence incomplete] The law says that, if you invoke the law of self-defense, you must show that you were without fault in bringing about the necessity for the killing.'

71 Idaho 442, 446 (1951) (bracketed commentary in original). There, the defendant specifically challenged the notion that she could not invoke the aid of self-defense if she "intentionally put herself where she knew or believed she would have to invoke the aid of self defense . . . ." *Id.* at 447. That challenge was well-taken, as the Supreme Court held that, "Bare intent and purpose to provoke a difficulty does not deprive one of the right of self defense. He must do some act or something at the time of the difficulty that does provoke the same." *Id.* at 448.

Finally, in examining the *Jurko* instruction through the "first aggressor" lens, the *Jurko* Court touched upon a construction that was potentially consistent with Idaho's justifiable homicide statute. That statute provides that self-defense (or defense of another) is not available as defense to criminal liability if the defendant "was the assailant," unless he "really and in good faith . . . endeavored to decline any further struggle before the homicide was committed . . . ."

I.C. § 18-4009(3).[5] Thus, while it may have been appropriate under section 18-4009 to give the jury in this case an instruction that Mr. Alberts could not claim self-defense if he was the first aggressor and failed to seek to withdraw from the struggle, neither the statute nor *Jurko* support the instruction given in this case—that Mr. Alberts could not claim self-defense if he merely "put himself where he kn[ew] or believe[d] he [would] have to invoke its aid," *i.e.*, "sought a meeting with the deceased for the purpose of provoking a difficulty . . . ." *Compare* I.C. § 18-4009(3), *and Jurko*, 245 P. at 688, *with* R., p.226.

In light of the foregoing, it is clear the district court incorrectly instructed the jurors when it told them that self-defense was unavailable to Mr. Alberts if "he intentionally put himself where he knew or believed he would have to invoke its aid," *i.e.*, "sought a meeting with the deceased for the purpose of provoking a difficulty with the deceased . . . ." (R., p.226.) This instruction was simply not in accordance with Idaho law on justifiable homicide. *See* I.C. § 18-4009.

D. <u>By Misstating Idaho Law Regarding Self-Defense, The Challenged Instruction Lowered The State's Burden Of Proof, And Thus Violated Mr. Alberts' Unwaived Constitutional Right To Due Process</u>

The first question in this Court's fundamental error analysis is whether the district court's instructional error violated one of Mr. Alberts' unwaived constitutional rights. *Adamcik*, 152 Idaho at 473; *Perry*, 150 Idaho at 228. Because it did, that question should be answered in the affirmative.

Under the Fourteenth Amendment's Due Process clause, the government bears the burden of proving each element of a charged offense beyond a reasonable doubt. *In re Winship*,

[5] The Supreme Court has long held that that self-defense is not available to the defendant if he was the first aggressor, unless he first withdrew from the fight. *See State v. Woodward*, 58 Idaho 385, __, 74 P.2d 92, 95 (1937); *State v. Lyons*, 7 Idaho 530, __, 64 P. 236, 239 (1901).

397 U.S. 358, 364 (1970). It thus follows that jury instructions which serve to lessen the government's burden of proving each element beyond a reasonable doubt violate the defendant's due process rights. *Cool v. United States*, 409 U.S. 100, 100 (1972); *State v. Trowbridge*, 97 Idaho 93, 95 (1975).

In order to convict a defendant of murder (first or second degree) or manslaughter (voluntary or involuntary) in Idaho, the State must prove, *inter alia*, the *unlawful* killing of another human being. I.C. §§ 18-4001, 18-4006. As noted above though, a killing which is deemed to be a justifiable homicide under section 18-4009 is not an "unlawful" killing. *State v. Copenbarger*, 52 Idaho 441, __, 16 P.2d 383, 389 (1932). Thus, if a defendant in a homicide prosecution presents *prima facie* evidence of self-defense, it then becomes the State's burden to disprove, beyond a reasonable doubt, the allegation that the killing was justified and, therefore, lawful. *See* ICJI 1514 & cmt. The State's failure to meet this burden of disproving self-defense—because it goes directly to the element of unlawfulness—means a conviction cannot, consistent with due process, be allowed to stand. Likewise, any jury instruction which lowers the State's burden of disproving a defense of justifiable homicide is violative of due process.

Mr. Alberts recognizes that in *State v. Jimenez*, 159 Idaho 466, 469-71 (Ct. App. 2015), the Idaho Court of Appeals held that a misstatement of the law of self-defense can never be a due process violation; however, he contends *Jimenez* was incorrectly decided.[6] In *Jimenez*, the Court

[6] If this case is assigned to the Court of Appeals, Mr. Alberts asks that the Court of Appeals overrule *Jimenez* as manifestly wrong, and in violation of plain, obvious principles of law and causing a continued injustice. *See State v. Humpherys*, 134 Idaho 657, 660 (2000) (explaining that, while stare decisis dictates that Idaho's appellate courts follow precedent, precedent need not be followed where "it is manifestly wrong, . . . it has proven over time to be unjust, or . . . overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice"). On the other hand, if the Supreme Court retains this case, Mr. Alberts asks that the Supreme Court reject *Jimenez* as not reflective of Idaho law. *See State v. Clinton*, 155 Idaho 271, 272 n.1 (2013) (explaining that the Supreme Court does not "overrule" Court of Appeals

of Appeals cited two United States Supreme Court cases for the proposition that "the Due Process Clause of the United States Constitution does not require the State to disprove a defendant's affirmative defense." *Id.* at 470 (citing *Martin v. Ohio*, 480 U.S. 228, 236 (1987), and *Patterson v. New York*, 432 U.S. 197, 210 (1977)). And, although the United States Supreme Court cases cited by the *Jimenez* Court for that proposition do indeed hold that due process does not require the government to disprove an affirmative defense, given the particularities of Idaho law, they do not support the Court of Appeals' ultimate holding in *Jimenez*. In *Patterson*, for example, the Court held that where New York law created an affirmative defense of "extreme emotional disturbance," *and placed upon the defendant the burden of proving that defense by a preponderance of the evidence*, the state scheme withstood scrutiny. *Patterson*, 432 U.S. at 205-11. The *Patterson* Court reasoned that it is for state legislatures to define the elements of crimes (which must then be proved beyond a reasonable doubt), and the elements of the crime at issue were satisfied without regard to the question of "extreme emotional disturbance." *See id.* *Patterson* has no application in Idaho. Whereas New York law made it clear that the affirmative defense at issue had nothing whatsoever to do with the elements of the crime charged, and it placed the burden of persuasion on the defendant, Idaho law takes a very different approach. As noted above, Idaho law holds that in the case of a homicide, one of the elements to be proved is that the killing was "unlawful," and in proving the unlawfulness of the killing, the State bears the burden of disproving self-defense beyond a reasonable doubt.

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opinions with which it disagrees because those opinions are not its own; rather, it announces a rule of law which all lower courts are then expected to follow).

Likewise, in *Martin v. Ohio*, the United States Supreme Court held that the defendant could be required to prove the affirmative defense of self-defense where that defense *did not go to any of the elements of the charged crime* (aggravated murder) and state law specifically placed the burden of proving affirmative defenses on the defendant. *Martin*, 480 U.S. at 233-36. In *Martin*, the defendant's argument was similar to Mr. Alberts' argument here—that because he could only be convicted of aggravated murder for an "unlawful" killing, and because self-defense would have rendered the killing lawful, disproving self-defense was actually an element of the crime. *Martin*, 480 U.S. at 235. However, there was a flaw with this argument, in that the Ohio Supreme Court had already defined the elements of aggravated murder statute, and in doing so had not read in an unlawfulness requirement.[7] *Id.* As the *Martin* Court observed, it was not for the United States Supreme Court to second-guess Ohio's determination of the elements of its own crimes. *Id.* at 235. Because *Martin*, like *Patterson*, turned on a state law requirement—that the defendant prove the affirmative defense at issue—which does not exist in Idaho, and so it has no relevance in Idaho. Accordingly, Mr. Alberts respectfully submits that the Court of Appeals erred in *Jimenez* by citing *Patterson* and *Martin* for the sweeping proposition that the Due Process Clause never requires the State to disprove self-defense. *Jimenez*, 159 Idaho at 470-71.

The *Jimenez* Court also relied upon the Idaho Supreme Court's opinion in *State v. Mubita*, 145 Idaho 925 (2008). In *Mubita*, the Supreme Court held that a certain jury instruction had not lowered the State's burden of proof with regard to a defense to the crime of transferring bodily fluids which may contain HIV (I.C. § 39-608), and then stated in *dicta* that, even had the instruction lowered the State's burden, its doing so would not have been a due process violation.

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[7] It does not appear that Ohio's aggravated murder statute, Ohio Revised Code § 2903.01, expressly included any unlawfulness requirement. *See* 1996 Ohio Laws 158 (showing the 1996 changes to the statute—apparently the first changes to section 2903.01 since 1981).

Mubita, 145 Idaho at 942. In reaching this conclusion, the *Mubita* Court cited *Martin v. Ohio* for the proposition that requiring a defendant to prove an affirmative defense does not violate due process. *Id.* However, critical to the *Mubita* Court's analysis was its observation that "*the instruction here did not pertain to an element of the offense*." *Id.* (emphasis added). That is because the statute at issue in *Mubita*—unlike the homicide statutes at issue here—did not require the State to prove any "unlawful" action. *Compare* I.C. § 39-608 (making it a crime to transfer bodily fluids known to be infected with the HIV virus, without limiting criminal liability to "unlawful" transfers) *with* I.C. § 18-4001 (defining murder as an "unlawful killing") *and* I.C. § 18-4006 (defining manslaughter as an "unlawful killing"). Thus, just as *Patterson* and *Martin* do not support the *Jimenez* holding, neither does *Mubita*.

It is beyond dispute that the State bore the burden of proving, beyond a reasonable doubt, every single element of the charged homicide offenses—including that Mr. Alberts' killing of Mr. Warren was "unlawful"—and its failure to meet that burden would be a clear violation of the Fourteenth Amendment's Due Process Clause. And because a justifiable homicide under I.C. § 18-4009 is not "unlawful," the State could not meet its burden of proof and satisfy the requirements of the Due Process Clause without disproving, beyond a reasonable doubt, that Mr. Alberts killed Mr. Warren in self-defense. Thus, when the district court erroneously instructed Mr. Alberts' jury as to the law of self-defense, incorrectly stating that Mr. Alberts could not have acted in self-defense if he initiated the confrontation with Mr. Warren, it essentially instructed them that self-defense was not available to Mr. Alberts in this case, and it thereby effectively eliminated one of the elements the State was required to prove. This was a violation of Mr. Alberts' right to due process.

E. <u>The Instructional Error Plainly Exists In The Record</u>

The second question in this Court's fundamental error analysis is whether the district court's instructional error "plainly exists." *Adamcik*, 152 Idaho at 473; *Perry*, 150 Idaho at 228. An error is "plain" if it is apparent from the appellate record without the need for outside information, and if it appears that the failure of the defendant to preserve a challenge to the error (through motion or objection) was not a tactical decision. *See Perry*, 150 Idaho at 228. Applying this standard, this Court should find that the district court's instructional error is, in fact, plain.

First, there can be little doubt that the court's instructional error is apparent from the record, without resort to outside information. The challenged jury instruction appears in the packet of instructions provided to the jury (*see* R., p.226), and it was read to the jury (Tr., p.1130, L.17 – p.1131, L.9). That is all that this Court needs to determine whether the instruction was a misstatement of the law which lowered the State's burden of proof, thus depriving Mr. Alberts of due process.

Second, the failure of defense counsel to object to the erroneous instruction surely was not a tactical decision. There would be no strategic or tactical reason for a defendant to allow a court to give an instruction misstating the law of self-defense in such a way as to completely undermine the defense's self-defense theory, *i.e.*, its only theory of innocence. Furthermore, the record reveals that defense counsel actually objected to the instruction in question, albeit on different grounds than those asserted on appeal. (*See* Tr., p.1100, L.25 – p.1105, L.8.) Clearly, defense counsel did not wish for such an instruction to be given generally. (*See* Tr., p.1101, Ls.9-19.) And although counsel eventually indicated the proposed instruction was "better" with some additional language (reiterating that it was the State's burden to disprove justifiable homicide beyond a reasonable doubt) (Tr., p.1102, Ls.14-23) and, when pressed, eventually

conceded his mistaken belief that that change rendered the instruction an accurate statement of the law (Tr., p.1102, L.24 – p.1103, L.3), none of this indicates a strategic reason to fail to object to the instruction on the basis that it misstated the law and lowered the State's burden of proof. Indeed, counsel's statement demonstrating his misunderstanding of the law establishes that his failure to object to the erroneous instruction was not a strategic or tactical decision. *Cf. Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (in the context of a Sixth Amendment-based claim of ineffective assistance of counsel, observing that an attorney's inaction cannot fairly be characterized as "strategic" where it is based on his ignorance of the law). Accordingly, this Court should hold that the instructional error plainly exists.

F. The Instructional Error Was Not Harmless

The third (and final) question in this Court's fundamental error analysis is whether the district court's instructional error was harmless. *Adamcik*, 152 Idaho at 473; *Perry*, 150 Idaho at 228. In order to show that the error was not harmless, Mr. Alberts bears "the burden of proving there is a reasonable possibility that the error affected the outcome of the trial." *Perry*, 150 Idaho at 226. There is such a reasonable probability in this case.

Mr. Alberts' claim of justifiable homicide played a huge part in his defense. In his opening statement at trial, defense counsel began by admitting that Mr. Alberts confronted and ultimately killed Mr. Warren, but he explained that Mr. Alberts never intended to kill him during that confrontation. (Tr., p.439, L.22 – p.440, L.10.) He went on to explain that Mr. Alberts knew of Mr. Warren's history of violence, and was scared of him. (Tr., p.441, Ls.8-18, p.442, Ls.7, 24-25.) The trial evidence ultimately bore this out.

At trial, Mr. Alberts testified on his own behalf. He testified extensively as to his understanding of Mr. Warren's affinity for, and tendency toward, violence. (*See* Tr., p.904, L.21

– p.905, L.19, p.906, L.9 – p.907, L.15.) Much of this information came to him secondhand through Ms. Bliss; however, he also personally experienced Mr. Warren's aggression—both over the phone, when Mr. Warren threatened him (*see* Tr., p.912, L.15 – p.913, L.6, p.913, L.17 – p.914, L.23), and during their only prior meeting when Mr. Warren banged on Ms. Bliss' door, yelled through the door, and eventually tried to force his way into her apartment[8] (*see* Tr., p.916, L.7 – p.920, L.20). Mr. Alberts also testified that Mr. Warren was much stronger than he (Tr., p.907, Ls.13-14), and that based on all of these factors, he was afraid of Mr. Warren (Tr., p.908, Ls.4-7, 14-18, p.915, Ls.1-7). He explained that because of his safety concerns regarding Mr. Warren, he started keeping a gun in his car for protection. (Tr., p.922, Ls.11-16, p.922, L.25 – p.923, L.12.)

Mr. Warren testified that he wanted to confront Mr. Warren to try to persuade him to stop harassing him and Ms. Bliss. (Tr., p.1009, Ls.2-15, p.1011, L.13 – p.1012, L.7, p.1025, Ls.12-19, p.1035, Ls.23-25.) He decided to have that confrontation when Mr. Warren came by to pick up his children from Ms. Bliss on February 20, 2016. (Tr., p.1010, Ls.15-22.) However, given what he knew about Mr. Warren, Mr. Alberts was concerned for his safety. (Tr., p.1012, Ls.8-12.) He decided to carry his gun to feel safer, although he never expected to use it. (Tr., p.1012, L.16 – p.1013, L.2, p.1015, Ls.10-17, p.1016, Ls.10-14, p.1017, Ls.11-17, p.1026, L.24 – p.1027, L.5.) He testified that even if Mr. Warren "c[a]me at" him, such that he did have to use his gun, he still would not have wanted to kill him. (Tr., p.1013, Ls.15-25, p.1014, Ls.3-8, p.1016, Ls.10-18, p.1017, Ls.18-22, p.1018, Ls.3-9.)

Ultimately, Mr. Alberts flagged Mr. Warren down as Mr. Warren pulled into Ms. Bliss'

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[8] Mr. Warren fled as soon as he realized Mr. Alberts had called 9-1-1. (Tr., p.919, L.3 – p.920, L.14.)

apartment complex. (Tr., p.1029, Ls.9-25.) He testified that he was immediately met with hostility. Mr. Warren rolled down his window and said, "'What's up, motherfucker,' 'fuck you, motherfucker,' something like that." (Tr., p.1030, Ls.15-17.) Mr. Warren then reached over to unbuckle his seatbelt. (Tr., p.1030, Ls.18-21.) Mr. Alberts testified,

> And, at that point, I just—I don't know what happened. I just—I don't know if it was just fear of him getting out of the car, panic. But it was just—it was all so quick. There was just no time to really think.
>
> And, as soon as I pulled and took a stance back, I pulled the trigger. And it just—I don't know what happened. I couldn't stop pulling the trigger. It was just—it was over in a flash.

(Tr., p.1030, L.21 – p.1031, L.6.) Although Mr. Alberts conceded that he did not think Mr. Warren had been reaching for a weapon, just his seatbelt (Tr., p.1031, Ls.19-22), he explained that this action alone triggered his fear response:

> I can't imagine any other reason why he would go for the seatbelt [other than to get out of the car]. I instantly knew that he was going for the seatbelt to get out. And I wouldn't have had enough time to make it back to my car with the 10 feet in between. If he could have gotten ahold of me and then struggle for my gun, then it wouldn't have worked out well.

(Tr., p.1033, Ls.17–24.)

In addition, the jury heard a recording of Mr. Alberts' interrogation by the police (Exhibit 54). During the interrogation, Mr. Alberts told the detective that when Mr. Warren went to unbuckle his seatbelt, he did not want him getting out of the car, and that was it. (State's Ex. 54, Audio 1, at 6:00-6:45.)

Finally, in closing, defense counsel framed the case thusly: "Now, the real issue here is kind of how and why. Was it premeditated? Was it provoked? I mean, those are the real issues we are dealing with. Whether or not Joshua Alberts killed Josh Warren is not the issue." (Tr., p.1175, L.23 – p.1176, L.2.) He then went on to argue, in part, that Mr. Alberts was afraid

of Mr. Warren and shot him in self-defense.[9] (Tr., p.1176, Ls.3-4, p.1176, L.15 – p.1177, L.11, p.1183, Ls.11-16, p.1186, Ls.2-8, p.1189, Ls.7-10.)

As the foregoing should make clear, a justifiable homicide theory was critical to Mr. Alberts' defense. However, the challenged jury instruction effectively nullified that theory of defense altogether, as it told the jurors that self-defense was not available to Mr. Alberts if he initiated the verbal confrontation with Mr. Warren.[10] (*See* R., p.226.) In other words, the instruction effectively withdrew an entire defense theory from the jury's consideration. Had that not happened, one can only speculate as to what the jury would have decided; surely though, there is at least a reasonable possibility of a different outcome.

CONCLUSION

For the reasons detailed above, Mr. Alberts respectfully asks that this Court vacate his judgment of conviction and remand his case to the district court for a new trial.

DATED this 20th day of April, 2018.

________/s/__________________
ERIK R. LEHTINEN
Chief, Appellate Unit

________/s/__________________
MAYA P. WALDRON
Deputy State Appellate Public Defender

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[9] Alternatively, defense counsel argued that the killing was a heat of passion killing, such that it only rose to the level of voluntary manslaughter. (*See, e.g.*, Tr., p.1186, Ls.2-8.)

[10] The prosecution cited the challenged instruction in its closing argument, specifically arguing that Mr. Alberts could not avail himself of self-defense because he "set up this whole circumstance" by flagging Mr. Warren down and approaching his car. (Tr., p.1143, L.13 – p.1144, L.10.)

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of April, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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MELISSA MOODY
DISTRICT COURT JUDGE
E-MAILED BRIEF

ERIC R ROLFSEN
ADA COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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_________/s/________________
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Administrative Assistant

MPW/eas