IN THE SUPREME COURT OF FLORIDA

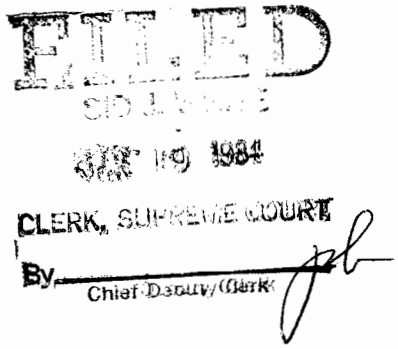
ALTHA B. GILLESPIE,

Petitioner,

v. CASE NO. 64,682

STATE OF FLORIDA,

Respondent.




PETITIONER'S BRIEF ON JURISDICTION

GLENNA JOYCE REEVES
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

## TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| ALTHA B. GILLESPIE, | : | |
| Petitioner, | : | |
| v. | : | CASE NO. 64,682 |
| STATE OF FLORIDA, | : | |
| Respondent. | : | |
| | : | |

PETITIONER'S BRIEF ON JURISDICTION

## I PRELIMINARY STATEMENT

Petitioner, ALTHA B. GILLESPIE, was the defendant in the trial court and the appellant in the First District Court of Appeal. He will be referred to in this brief as petitioner. Respondent, the State of Florida, was the prosecution in the trial court, the appellee on appeal, and will be referred to in this brief as respondent. All references shall be to the appendix designated by the symbol "A" followed by the appropriate page number, in parenthesis.

## II STATEMENT OF THE CASE AND FACTS

The pertinent facts are taken from the majority opinion of Gillespie v. State, __ So.2d __ (Fla. 1st DCA 1983). (A-1-9).

Petitioner was charged with and convicted of the offense proscribed by Section 794.011(3), Florida Statutes (1981), sexual battery by using or threatening to use a deadly weapon, to wit: a knife. (A-1-2). Evidence at trial showed that a sexual battery was committed by the threatened

use of a knife (A-2). The trial court refused to instruct the jury that Section 794.011(4)(b), Florida Statutes (1981), sexual battery by threatening to use force or violence likely to cause serious personal injury, was a lesser included offense of the crime charged. (A-1-2).

On appeal, petitioner contended, inter alia, that the trial court committed per se reversible error in failing to instruct the jury on the lesser included offense of sexual battery by threatening to use force or violence likely to cause serious personal injury. (A-1). The First District Court, in its majority opinion, rejected petitioner's contention apparently holding that there was no evidence as to the lesser offense. (A-1-3). Judge Ervin dissented from the majority's "bizarre interpretation of...the amendment to Florida Rule of Criminal Procedure 3.510(b)...." (A-4-9).

Petitioner filed a timely motion for rehearing or for rehearing en banc requesting rehearing, rehearing en banc or that the Court certify that its decision conflicted with Lake v. State, 380 So.2d 1120 (Fla. 2d DCA 1980), cert. denied, 388 So.2d 1115 (Fla. 1980) and Wagner v. State, 356 So.2d 867 (Fla. 4th DCA 1978). (A-10-21).

Petitioner's motion for rehearing was denied November 30, 1983. (A-22).

Timely notice was given by petitioner on December 28, 1983 that the First District Court of Appeal's decision in this case expressly and directly conflicts with decisions of another district court of appeal or this Court on the same question of law. (A-23). This jurisdictional brief follows.

## III ARGUMENT

### ISSUE I

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH LAKE V. STATE, 380 So.2d 1120 (Fla. 2d DCA 1980), cert. denied 388 So.2d 1115 (Fla. 1980) and WAGNER V. STATE, 356 So.2d 867 (Fla. 4th DCA 1978) ON THE SAME POINT OF LAW.

As noted, petitioner was charged with and convicted of sexual battery by using or threatening to use a deadly weapon, to wit: a knife, in violation of Section 794.011(3), Florida Statutes (1981). Petitioner requested that the jury be instructed on Section 794.011(4)(b), sexual battery by threatening to use force or violence likely to cause serious personal injury, as the next immediate lesser included offense (one-step removed) of the offense charged. The majority of the First District Court of Appeal upheld the trial court's refusal to so instruct the jury apparently on the basis that there was a total lack of evidence as to the lesser offense. The evidence showed that petitioner committed a sexual battery by using or threatening to use a knife. In concluding that this evidence constituted a total lack of evidence of the lesser offense proscribed by Section 794.011(4)(b), the First District expressly and directly conflicts with the decisions of the Second District in Lake v. State, 380 So.2d 1120 (Fla. 2d DCA 1980), cert. denied 388 So.2d 1115 (Fla. 1980) and the Fourth District in Wagner v. State, 356 So.2d 867 (Fla. 4th DCA 1978).

In Wagner, supra, the defendant was charged with a violation of Section 794.011(3), sexual battery by using or threatening to use a deadly weapon. As did petitioner, the defendant requested an instruction, which the trial judge refused, on the first degree felony of involuntary sexual battery, Section 794.011(4)(b), sexual battery by threatening to use force or violence likely to cause serious personal injury. The evidence at trial revealed

that the defendant had repeatedly threatened the victim with a long piece of pipe. The Fourth District held that the refusal to instruct on Section 794.011(4)(b) was reversible error. The Court concluded that this offense was a "category four" lesser included offense of the crime charged since the accusatory pleading and the evidence would support this lesser offense. With respect to the evidentiary aspect of the "category four" requirement, the Court stated:

> [T]he jury could have believed that appellant only used threats of force or violence likely to cause serious personal injury....

Id. at 869.

The decision of the First District here directly conflicts with Wagner. The evidence here showed threats with a knife. A knife, like a pipe [Goswick v. State, 143 So.2d 817 (Fla. 1962); Jones v. State, 392 So.2d 18 (Fla. 1st DCA 1980)], may constitute a deadly weapon. State v. Nixon, 295 So.2d 121 (Fla. 3d DCA 1974). However, the jury was not required to so find. As in Wagner, the jury could have believed that petitioner only used threats likely to cause serious personal injury. Thus, had the First District followed the Wagner rationale, it would have found that the failure of the trial judge to instruct on Section 794.011(4)(b) was reversible error.[1]

---

[1] The amendment to Rule 3.510, F.R.Cr.P., In Re Florida Rules of Criminal Procedure, 403 So.2d 979 (Fla. 1981), does not affect the precedential value of Wagner. The amendment provides that "the judge shall not instruct on any lesser included offense as to which there is no evidence." However, at least since 1968, by definition, in order for an offense to constitute a "category four" lesser offense, the proof at trial was required to support the charge. Brown v. State, 206 So.2d 377 (Fla. 1968). Thus, with respect to a category four offense (now category two), as opposed to a lesser degree offense or an attempt, the provision of the new rule that there must be evidence of the lesser offense imposes no new substantive requirements. Since the law at the time Wagner was decided required evidence of the lesser charge, as now, the holding of Wagner that Section 794.011(4)(b) is a proper lesser included offense of Section 794.011(3) has continued viability.

The decision of the First District also conflicts with that in Lake v. State, supra. Therein, the defendant was charged with a violation of Section 794.011(3) by an information alleging that he "did commit a sexual battery...and did threaten to use deadly weapons, to wit: a knife and firearm..." Id. at 1121. The defendant was found guilty of sexual battery with a weapon. On appeal, the defendant contended he was convicted of a nonexistent crime. The Second District rejected this contention concluding that the defendant was, in fact, convicted of sexual battery by threatening to use force or violence likely to cause serious personal injury, Section 794.011(4)(b), which offense, the Court held was "a lesser included offense of the charge in the information." Id. at 1122. The Court reasoned that the use of a weapon (as opposed to a deadly weapon) to commit a sexual battery was the equivalent of the threat of using force and violence likely to cause serious personal injury. Had the First District followed the Lake rationale, it would have found that an instruction on Section 794.011(4)(b) was required since the evidence presented at petitioner's trial could support a finding that a weapon was used to commit sexual battery (rather than a deadly weapon).

Express and direct conflict has been shown to exist. Petitioner submits this Court should accept jurisdiction because it affirmatively appears that the majority of the First District has totally misinterpreted the effect of the amendment to Rule 3.510 concerning the propriety of the refusal to instruct on a lesser offense as "to which there is no evidence." The majority appears to resurrect the repeatedly rejected principle that the refusal to instruct on a lesser included offense is proper where there is ample evidence to support a guilty verdict on the higher offense. See, Hand v. State, 199 So.2d 100 (Fla. 1967); Lomax v. State, 345 So.2d 719 (Fla. 1977); In the Matter of the Use by the Trial Courts of the Standard

Jury Instructions in Criminal Cases, 431 So.2d 594, 596-597 (Fla. 1981). To avoid state-wide confusion engendered by the First District's opinion, this Court should accept jurisdiction.

ISSUE II

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH STATE V. NIXON, 295 So.2d 121 (Fla. 3d DCA 1974) ON THE SAME POINT OF LAW.

In State v. Nixon, the Third District expressly held that a knife may or may not be a deadly weapon depending upon its likelihood to produce death or great bodily injury. "Whether an object used as a weapon...is a deadly weapon is a factual question to be resolved by the finder of facts at trial." Id. at 122. Accord, Goswick v. State, supra; M.R.R. v. State, 411 So.2d 983 (Fla. 3d DCA 1982) and cases cited therein.

Implicit in the decision of the First District is the holding that a knife, as a matter of law, is a deadly weapon. The majority states:

> If there was any evidence whatsoever that a deadly weapon was not used then it would have been reversible error for the trial judge to have refused to instruct on the lesser included offense. However, in this case, there was no evidence that a knife was not used and it was therefore proper for the trial judge to refuse to instruct on the lesser included offense.

[Emphasis supplied]. Gillespie v. State, supra (A-2). It is readily apparent that crucial to the majority's opinion was its conclusion that a knife constitutes a deadly weapon as a matter of law. This holding directly conflicts with State v. Nixon, supra. Had the First District followed the rationale of Nixon, it would have concluded that although the evidence was undisputed that the victim was coerced by threatened use of a knife, the jury, within its province, could find that the knife did not constitute a

deadly weapon, and therefore, petitioner would be entitled to a new trial since "there was...evidence...that a deadly weapon was not used..." Id. at (A-2).

Petitioner submits this Court should accept jurisdiction because direct and express conflict has been demonstrated. The First District has held that as a matter of law a knife is a deadly weapon. As State v. Nixon notes, this determination is a factual one to be made by the jury, and not one within an appellate court's prerogative. Since the opinion of the First District reflects a total misapprehension of the role of a jury vis-a-vis the role of an appellate court, this Court should accept jurisdiction to resolve the clear conflict reflected here.

ISSUE III

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH STATE V. SIMONE, 431 So.2d 718 (Fla. 3d DCA 1983); OWENS V. STATE, 437 So.2d 796 (Fla. 2d DCA 1983); LOMAX V. STATE, 345 So.2d 719 (Fla. 1977); and STATE V. ABREAU, 363 So.2d 1063 (Fla. 1978).

In Lomax v. State, 345 So.2d 719 (Fla. 1977), as modified by State v. Abreau, 363 So.2d 1063 (Fla. 1978), this Court held that the failure to instruct on the next immediate lesser-included offense (one-step removed) constitutes error that is per se reversible. The First District has stated in its decision, sub judice, that Lomax and Abreau are no longer valid since each was prior to the 1981 amendment to the Florida Rules of Criminal Procedure. (A-2). In so concluding, the First District is in conflict with State v. Simone, 431 So.2d 718 (Fla. 3d DCA 1983) and Owens v. State, 437 So.2d 796 (Fla. 2d DCA 1983), as well as Lomax and Abreau. Simone and

Owens both recognize that the viability of Lomax and Abreau is not affected by the amendments to the standard jury instructions on lesser included offenses and Rule 3.510. Both recognize the continued validity of the principle that the failure to instruct on a lesser included offense one-step removed from that for which the defendant was convicted is per se reversible error.

Admittedly, the holding of the First District that Abreau and Lomax are no longer valid is dicta. However, dicta conflict is an appropriate basis for this Court to obtain jurisdiction. Twomey v. Clausohm, 234 So.2d 338 (Fla. 1970). Petitioner submits this Court should exercise its discretion and accept jurisdiction here in order to expeditiously remedy the inevitable morass the First District has created.

## IV CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction herein.

Respectfully submitted,

GLENNA JOYCE REEVES
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and a copy mailed to petitioner, Altha B. Gillespie, #082421, Florida State Prison, Post Office Box 747, Starke, Florida 32091 on this 9th day of January, 1984.

GLENNA JOYCE REEVES