IN THE SUPREME COURT OF FLORIDA

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ALTHA B. GILLESPIE,

Petitioner,

v. CASE NO. 64,682

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF

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ALTHA B. GILLESPIE, :

Petitioner, :

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______________________________:

PETITIONER'S REPLY BRIEF

I PRELIMINARY STATEMENT

Respondent's brief will be referred to as "AB". Other references to the record will be as set forth initially.

Attached hereto as an appendix are portions of petitioner's initial and reply briefs filed in the First District Court of Appeal, and a portion of the brief filed by the State of Florida which will be referred to as "App.".

With respect to Issue II, petitioner relies upon his initial arguments.

II ARGUMENT

ISSUE I

THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO INSTRUCT THE JURY, AS REQUESTED, ON THE LESSER INCLUDED OFFENSE OF SEXUAL BATTERY BY THREATENING TO USE FORCE OR VIOLENCE LIKELY TO CAUSE SERIOUS PERSONAL INJURY, SECTION 794.011(4)(b), FLORIDA STATUTES (1981).

Apparently recognizing the futility of its position on the merits, the state has presented a plethora of procedural default and harmless error arguments. Unfortunately, those contentions are equally as otiose.

The state first asserts that the instruction issue was not preserved at the trial level. The record clearly refutes this contention. At trial, by written and oral request, petitioner sought an instruction on Section 794.011(4)(b) as a lesser included offense of the crime charged (R 106, T 1185-1188). Petitioner asserted that from the facts adduced at trial [specifically, that portion of petitioner's confession where he related that he displayed a knife to the victim and told her not to scream or he would cut off her head (T 1190, 775, 448)], the jury could find that the victim was coerced to submit by threats of force or violence likely to cause serious personal injury (T 1185). While the trial judge apparently agreed that the evidence could support that interpretation (See T 1186-1188, 1190-1191), he refused to so instruct the jury since in his view [a clearly erroneous one in light of McClanahan v. State, 377 So.2d 240 (Fla. 2d

DCA 1979). Smith v. State, 340 So.2d 1216 (Fla. 4th DCA 1976); 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)] this lesser offense was not comprehended within the information filed [the allegata requirement of Brown v. State, 206 So.2d 377 (Fla. 1968)]. Petitioner specifically objected to the trial judge's failure to give the requested instruction (T 1213, 1215, 1332). The record thus firmly establishes that trial counsel did even more than she was required to do to preserve this issue for appeal. See, Spurlock v. State, 420 So.2d 875 (Fla. 1982); Jackson v. State, 451 So.2d 458 (Fla. 1984); Hubbard v. State, 411 So.2d 1312 (Fla. 1st DCA 1982) (On rehearing en banc). It should also be noted that the preservation of this issue was never challenged until respondent filed its brief in this Court, which fact in itself should support rejection of this argument. (See state's brief in District Court - App. 15-18). Cf., State v. Hegstrom, 401 So.2d 1343 (Fla. 1981).[1]

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[1] The fact that lack of preservation was never argued below explains why the District Court's opinion fails to discuss it. Further, even if respondent's argument had any merit, which it does not, to allow the District Court's opinion to stand would only perpetuate the irrefragable conflict which this Court recognized in accepting jurisdiction in this cause.

Respondent's claim that petitioner is barred from asserting his present claim because he "did not argue on appeal that a deadly weapon was not used in the offense" (AB 8) is patently false. Petitioner most certainly did present this point in his initial brief to the district court. (Appellant's initial brief - App. 6: "Here, the jury could have determined that the pocket knife displayed by appellant did not constitute a deadly weapon. See Goswick v. State, 143 So.2d 817 (Fla. 1962); State v. Nixon, 295 So.2d 121 (Fla. 3d DCA 1974)"). Thus, respondent's preservation argument is totally without merit.

Respondent's contention that any error in failing to instruct on Section 794.011(4)(b), a first degree felony, is harmless error because the jury was instructed on Section 794.011(5), a second degree felony, (AB 6, 8-9, 11, 13-14) is amply refuted by this Court's decision in State v. Abreau, 363 So.2d 1063 (Fla. 1978). There, in reaffirming the per se reversible error rule applicable to the failure to instruct on a "one step removed" lesser offense, this Court noted:

> [W]e note that Lomax involved a trial court's failure to give a requested instruction on a lesser-included offense that was only one step removed from the offense charged, while in DeLaine, as in the present case, the trial judge gave instructions on the next immediate lesser-included offense but refused to instruct the jury on an offense two steps removed.
>
> The significance of that distinction is more than merely a matter of number or degree, since in the latter situation, unlike the former, the jury is given a fair opportunity

> to exercise its inherent "pardon" power by returning a verdict of guilty as to the next lower crime. For example, if a defendant is charged with offense "A" of which "B" is the next immediate lesser-included offense (one step removed) and "C" is the next below "B" (two steps removed), then when the jury is instructed on "B: yet still convicts the accused of "A" it is logical to assume that the panel would not have found him guilty only of "C" (that is, would have passed over "B"), so that the failure to instruct on "C" is harmless. If, however, the jury only receives instructions on "A" and "C" and returns a conviction on "A", the error cannot be harmless because it is impossible to determine whether the jury, if given the opportunity, would have "pardoned" the defendant to the extent of convicting him on "B" (although it may have been unwilling to make the two-step leap downward to "C").

Id. at 1064. Here, the trial judge refused to instruct the jury on the one-step removed lesser offense. The offense proscribed by Section 794.011(5), on which the jury instructed, as two-steps removed from the crime charged. As Abreau notes, the jury instruction error cannot be deemed harmless since it is impossible to determine whether the jury, if given the opportunity, would have "pardoned" the defendant to the extent of convicting him on "B" [here Section 794.011(4)(b)], although it was unwilling to make the two-step leap downward to "C" [Section 794.01(5)]. See also, State v. Bruns, 429 So.2d 307 (Fla. 1983); State v. Terry, 336 So.2d 65 (Fla. 1976); Lomax v. State, 345 So.2d 719 (Fla. 1977); Jackson v. State, 449 So.2d 411 (Fla. 2d DCA 1984); Owens v. State, 437 So.2d 796 (Fla. 2d DCA 1983); Foster v. State, 448 So.2d 1239 (Fla. 5th DCA 1984).

As to the merits, petitioner maintains that under the

facts and circumstances of this case, the offense proscribed by Section 794.011(4)(b) was a proper permissive lesser included offense on which the jury should have been instructed. Respondent contends that neither the allegata[2] nor probata requirements of Brown were met herein. Petitioner most strenuously disagrees. The cases cited initially, which respondent has failed to in any meaningful way distinguish, indicate that an information alleging sexual battery effected by threats with a deadly weapon includes as a lesser offense sexual battery by threatening to use force likely to cause serious personal injury. McClanahan v. State, supra; Lake v. State, supra. Thus, the allegata requirement of Brown has been met. Likewise, petitioner maintains that the probata requirement of Brown has also been met herein. The state's evidence at trial reflected that petitioner coerced the victim to submit by threatened use of a pocketknife [he displayed a knife and "told her not to scream or do anything, he would cut her head off" (T 775)]. As the trial judge recognized, these facts provide an evidentiary basis for an instruction that the sexual battery was effected by threatened use of force or violence likely to cause serious personal injury [Section 794.011(4)(b)]. As noted initially, even if the jury believed that a pocketknife was used, a jury question

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[2] Respondent erroneously states that the District Court held that the allegata requirement was not met (AB 11). A cursory reading of Gillespie v. State, reflects no such holding.

was presented as to whether such knife was a deadly weapon or not. The jury could conclude the knife was merely a weapon, which would support a conviction under Section 794.011 (4)(b). Lake v. State, supra. Further, the jury could have found that petitioner threatened force or violence likely to cause serious personal injury. Wagner v. State, supra. Since both the allegata and probata requirements have been satisfied herein, Section 794.011(4)(b) was a proper permissive lesser offense here. Petitioner asseverates that the refusal to instruct on this one-step removed lesser offense constitutes per se reversible error entitling him to a new trial.

III CONCLUSION

For the reasons set forth in Issue II, petitioner seeks an order of discharge. Alternatively, under Issue I, he seeks a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Lawrence Kaden, The Capitol, Tallahassee, Florida; and by mail to Mr. Altha B. Gillespie, #082421, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, this 23rd day of January, 1985.

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