IN THE SUPREME COURT OF FLORIDA

MOSES JONES,	)	
Petitioner,	)	
vs.	)	CASE NO. 66,335
STATE OF FLORIDA,	)	
Respondent.	)	
	)	

RESPONDENT'S ANSWER BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

SEAN DALY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Ave., 4th Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR APPELLEE

TOPICAL INDEX

AUTHORITIES CITED

AUTHORITIES CITED (continued)

AUTHORITIES CITED (continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The respondent accepts the petitioner's Statement of the Case but supplements his Statement of the Facts as follows:

At trial the defense presented by the petitioner to the aggravated battery charge raised was simply that he was not the individual who struck Officer Gilletto. Testimony at trial revealed that the police officer had been struck in the head with a wooden stick with such force that he was rendered unconscious and a gash opened up behind his ear which covered him in blood and required hospitalization and nine (9) stiches behind his right ear (R 26-28, 42-43, 46).[1]

One William Wells testified at trial that he saw the petitioner strike the officer in the head with a stick (R 53-55). He also noted that he had received a monetary reward for his report of the incident to police (R 55). On cross-examination, defense counsel challenged Wells' credibility by, inter alia, focusing on the fact that he had received a two hundred fifty dollar ($250.) reward, that he was hesitant to testify, and that he was under pressure to do so to receive the money (R 66-69).

One Ricky Warren also testified, stating that he was talking to Officer Gilletto on July 4, 1982 (the date of the aggravated battery at issue) and that he saw Moses Jones, the petitioner, come up behind the officer and hit him on the head with a stick (R 75-79). Warren was certain that the individual

---

[1](R) refers to the record on appeal.

he saw strike the officer was Jones because the petitioner is his cousin (R 79-80). Warren also noted that while he did not come voluntarily into the courtroom to testify he had not been paid a reward to do so (R 81).

On cross-examination of witness Warren, defense counsel brought out the fact that Warren had a twin brother, Mickey, who was also in the area when Gilletto was struck (R 81-82).

At the jury instruction conference after the close of all testimony, defense counsel, with the petitioner present in the judge's chambers, responded to the court's query as to what lesser included instructions he wished to have placed before the jury, at which point petitioner's trial counsel noted that his client did not want any lesser included offenses and was in fact waiving his right to have the jury so instructed (R 90-91). The prosecutor agreed. Id. Furthermore, petitioner's counsel made it clear on the record that he had discussed the lesser included offense waiver with his client and that he understood that in foregoing his right to have the jury instructed that he was "going for everything or nothing" (R 90). Indeed, in response to a specific query by the trial court as to defense counsel's discussion with the petitioner on that issue, the petitioner's trial counsel once again took time in the court's presence to explain the nature of the lesser included offense waiver, and defense counsel then reiterated that his client understood the consequences of that waiver and nevertheless wished the case to go to the jury as a simple case of guilty or not guilty on the aggravated battery charged by the state,

an assertion accepted by the trial court:

> THE COURT: What lessers do you want?
>
> [DEFENSE COUNSEL]: Moses doesn't want any lesser included offenses. He is waiving them.
>
> [PROSECUTOR]: That's fine with me.
>
> [DEFENSE COUNSEL]: You understand we're going for everything or nothing? Do you understand that?
>
> [THE COURT]: If you want to talk with him, you may.
>
> [DEFENSE COUNSEL]: I told him that outside.
>
> THE COURT: You talked to him at length?
>
> [DEFENSE COUNSEL]: Could I have a second?
>
> THE COURT: Take your time. Take your time. Tell him in detail what a lesser included offense is.
>
> [DEFENSE COUNSEL]: Your Honor, Moses understands and he wants to waive the lesser offenses.
>
> THE COURT: All right.

(R 90-91)

The record of the charge conference reveals no disagreement nor protest from the petitioner, who was obviously present, as to his attorney's assertion that he understood the nature of the lesser included offenses involved and nevertheless wished to forgo the presentation of as many such lesser offenses to the jury in a tactical decision to go for "all or nothing" by putting the state to its proof on the aggravated battery actually charged.

The true tactical nature of the petitioner's waiver of lesser included offense instructions is evident from the closing argument of defense counsel wherein he asserted the petitioner's

complete innocence and claimed that Jones had been framed or set up as a "target" to take the fall by the witnesses - Wells and Warren - who testified (R 97-103, 110-113). Specifically, petitioner's counsel argued that Wells had merely come forward and fingered Jones to collect the reward money offered for information (R 97-98) and that Warren was lying about Jones' involvement in order to protect his twin brother, Mickey, whom counsel speculated had actually struck the officer with some manner of weapon (R 98-103).

That the defense strategy in no way involved an assertion that the petitioner somehow committed a mere battery is further obvious from the assertion by petitioner's trial counsel that:

> When you go back to the jury room, there is no fifty-fifty, no half way nonsense in this kind of case.

(R 113)

Finally, the state notes that defense counsel in his closing argument to the jury clearly admitted that Officer Gilletto had suffered a severe injury from ". . . a weapon that would do some damage," because Officer Gilletto was "beat on like a dog" and his head "really mangled" in the process (R 100-101).

The trial court instructed the jury after closing arguments and specifically inquired of defense counsel as to whether he wished to place anyting on the record before the jury retired after hearing those instructions (R 122). Defense counsel raised no objection to the instructions as given or to the lack of instructions on any lesser included offense. Id.

SUMMARY OF ARGUMENT

The District Court of Appeal did not err in affirming petitioner's conviction for aggravated battery. The fact that the jury was not instructed upon the necessarily lesser included offense of battery does not constitute a violation of a fundamental right of the petitioner given the fact that his trial counsel specifically and clearly waived the right to an instruction on that lesser included offense with Jones' clear and knowing acquiescence in that decision demonstrated of record. Furthermore, given the context of this case which involves a non-capital offense, no constitutional due process right has been abridged, and no fundamental error occurred when the attorney vested with the authority and duty to act at trial on behalf of his client implemented a tactical decision with the obvious informed acquiescence of his client, to waive Jones' right to an instruction on necessarily lesser included offenses in keeping with the defense's clear trial strategy to seek an all or nothing verdict based upon their assertion that Jones had no involvement in the battery at issue. There is no due process or similar constitutional requirement nor is there any state statute or rule of criminal procedure providing that the implementation of this type of tactical trial decision be made only by the defendant after a trial court inquiry into whether the waiver was knowingly, intelligently and voluntarily made. Indeed, a defendant's counsel is clearly vested with the authority to waive other equally important "rights" of his client without a mini in-trial court hearing as to the voluntariness of that waiver as to the defendant, and there is no

legal or rational basis for elevating this particular "waiver" above those others in the context of a non-capital case.

Finally, notwithstanding the certified question as to the necessary components of an adequate waiver of the right to necessarily lesser included offense instructions in a non-capital case, there is no basis for reversal sub judice given the petitioner's clear failure to object to the failure to give the lesser included offense instruction at issue such that this question has clearly not been preserved for appellate review. Similarly, the petitioner's actions in seeking to waive the lesser offense instruction clearly invited the error which is raised for the first time on appeal such that Jones is estopped from presenting this question in an appellate tribunal as the basis for reversal of his conviction below.

ARGUMENT

THE TRIAL COURT COMMITTED NO ERROR, FUNDAMENTAL OR OTHERWISE, IN OMITTING UPON REQUEST OF TRIAL COUNSEL WITH THE CLEAR ACQUIESCENCE AND AGREEMENT OF THE PETITIONER AN INSTRUCTION UPON NECESSARILY LESSER INCLUDED OFFENSES; PETITIONER HAS CLEARLY FAILED TO PRESENT THIS ISSUE IN ANY MANNER BEFORE THE APPELLATE COURT AND IS THEREFORE PRECLUDED FROM ASSERTING IT INITIALLY ON APPEAL.

The question to be addressed is whether the trial court in a non-capital case committed reversible error where it did not instruct on any necessarily lesser included offenses because defense counsel at trial in his client's presense requested that no such instructions be given and did so with the knowing and understanding acquiescence of his client. the district court below properly determined that no such error was demonstrated, and the state submits a number of alternative bases for rejecting the petitioner's assertion to the contrary.

In rejecting Jones' appellate claim, the district court certified the following question:

> Harris v. State, 438 So.2d 787 (Fla. 1983), recognizes a constitutional right of an accused in a capital case to have the jury instructed as to necessarily lesser included offenses and that the violation of that right constitutes fundamental error, a waiver of which, to be effective, must be made on the record knowingly and intelligently by the accused personally rather than be counsel. Do those charged with non-capital crimes enjoy this constitutional right as well as those charged with capital crimes?

Jones v. State, 9 F.L.W. 2504 (Fla. 5th DCA Nov. 29, 1984)

Respondent contends that the question certified should be answered

in the negative and, alternatively, that even if answered in the affirmative, no basis for reversal is demonstrated in this cause.

Initially, the petitioner's reliance on Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), and Harris v. State, 438 So.2d 787 (Fla. 1983), as support for the theory that a trial court is required to instruct upon necessarily lesser included offenses in a non-capital case without an express, knowing and intelligent waiver by the defendant is clearly misplaced. Neither of those decisions dealt with the factual context of a non-capital offense; rather, they were concerned solely with situations where the defendant faced the ultimate sanction - a sentence of death. Indeed, the Beck Court in reaching its decision noted the "significant constitutional difference between the death penalty and lesser punishments . . ." 100 S.Ct. at 2389; 447 U.S. at 637. Analysis of the rationale of the Beck decision reveals the Court's overwhelming concern that the procedural safefuard provided by instructions on lesser included offense instructions (although they have never been held to be a matter of due process right) were nevertheless a proper procedural safeguard in a capital case since the risk of an unwarranted conviction ". . . cannot be tolerated in a case in which the defendant's life is at stake." Id. Accord: Spaziano v. State, 104 S.Ct. 3154 (1984). Accordingly, the Beck Court determined that the unique Alabama statute which precluded a defendant's reliance on lesser included offenses in a capital case presented an invalid procedural rule:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

100 S.Ct. at 2390; 447 U.S. at 638 (footnote omitted)

Furthermore, in reaching its conclusion, the Court specifically refused to reach the issue as to whether the due process clause would require the giving of lesser included instructions in a non-capital case. Id. at n. 14.

Similarly, Harris v. State, supra, presented factual circumstances clearly distinguishable from that in this case because the defendant had been convicted of first degree murder and sentenced to death after waiving the presentation of certain lesser included offenses to the jury. The Harris Court, after noting the decision in Beck v. Alabama, supra, stated that the Beck preclusion of a state prohibition of lesser included offense instructions in a death case did not mean that in such a context the defendant could not waive his right to have the jury so instructed, even where the death penalty is a possible result.

This case clearly does not involve a capital offense such that the waiver of lesser included offense instructions in this case did not expose the defendant to the ultimate and irrevocable sanction of death. Accordingly, the "death is different" rationale which evokes special concern and higher standards in the application of procedural rights to assure fairness

and reliability of both guilt and sentencing determinations is not present in this cause. Beck v. Alabama, supra; Witt v. State, 387 So.2d 922 (Fla. 1980). Thus, the higher standard obviously in operation in Beck and Harris is inapplicable in this case such that those decisions have no precendential value or applicability in the non-capital offense situation at bar. Accordingly, the state submits that the new and unique express waiver requirement apparently adopted by the Harris Court for the rejection by a defendant of lesser included offense instructions in a capital case should not be expanded absent a specific holding to that effect in the non-capital offense context, especially where from a reading of the context of that decision it is clear that its intent was merely to address the concerns raised by the Beck opinion with reference to the waiver in the Harris case and to put its seal of approval on certain waiver requirements to be utilized in future capital cases.

It is well established that generally a client is bound by the acts of his attorney performed within the scope of his authority. State ex rel. Gutierrez v. Baker, 276 So.2d 470 (Fla. 1973). Indeed, as justification for a contemporaneous objection rule, this court noted that the furnishing of all defendants with counsel in criminal cases has resulted in the safeguarding of their rights and provision for their adequate defense. See, State v. Jones, 204 So.2d 515 (Fla. 1967).

Inasmuch as a defendant's counsel acts as his spokesman in trial matters and stands free to exercise tactical decisions on the part of his client which necessarily involve many of his fundamental constitutional rights, is it necessary that this specific "right" require an express waiver by the defendant?

Indeed, although this court has recognized a defendant's right to a speedy trial as "fundamental", Singletary v. State, 322 So.2d 551 (Fla. 1975); it is well established that a defense counsel has full authority to act on his client's behalf in waiving this right guaranteed a defendant under Florida's constitution and implemented by state procedural rule. Defense counsel may dispense with this "fundamental right" on behalf of his client without a defendant's "express waiver" and in fact may do so outside the defendant's presence. State ex rel. Gutierrez v. Baker, supra; Nelson v. State, 450 So.2d 1223 (Fla. 4th DCA 1984); State v. Boyd, 368 So.2d 54 (Fla. 2d DCA 1979); State v. Abrams, 350 So.2d 1104 (Fla. 4th DCA 1977); McArthur v. State, 303 So.2d 359 (Fla. 3d DCA 1974); Art I, § 16, Fla. Const.; Fla. R. Crim. P. 3.191.

Similarly, any number of strategical decisions and procedural determinations made by defense counsel at trial may profoundly affect his client's fundamental constitutional rights and may in fact result in a waiver of any of those rights without the defendant's express, knowing and intelligent agreement on the record. For example, an improper comment on a defendant's exercise of his fundamental right to remain silent made at trial may be waived by defense counsel's failure to object (for whatever reason) without any express, knowing and voluntary waiver by the defendant himself. See, Clark v. State, 363 So.2d 331, 335 (Fla. 1978). In addition, the failure to challenge the sufficiency of the evidence to support a conviction under Florida Rule of Criminal Procedure 3.380(a) at trial necessarily waives that right despite the fact that the question as to evidentiary sufficiency is a

constitutional one involving a due process right. See, Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). No express, knowing and voluntary waiver by the defendant is necessary. Similarly, there is no specific requirement of an express, knowing and voluntary waiver by the defendant of his right to testify at trial,[2] or of his right to confront and cross-examine witnesses; thus, when a defendant's counsel does not call his client to the stand to testify or does not cross-examine a specific witness at trial, such obviously strategical decisions are not questioned on the record with the concomitant requirement that the defendant then on the record indicate an express, knowing and voluntary waiver of his constitutional right to testify and cross-examine the witness.

Given defense counsel's right to waive on his client's behalf these equally "fundamental" constitutional rights without an express on-the-record waiver by his client, why should such an express waiver requirement be applied in the context of necessarily lesser included offenses? The United States Supreme Court has adopted no such "express waiver" requirement and, until this court's decision in Harris, no state law or rule of criminal procedure indicated that any such requirement was applicable.[3]

---

[2]Cutter v. State, 9 F.L.W. 2607 (Fla. 2d DCA Dec. 12, 1984)

[3]Indeed, the state submits that even if the Harris "express waiver" rule were to be applied in non-capital situations, this new rule of law should not be applied retroactively to this case given its circumstances and the test for retroactive application under Witt v. State, supra, at 926.

The defendant's tactical decision, implemented by counsel, under the evidence presented seeks an all or nothing verdict based upon Jones' trial defense that he was not present at the crime scene and was therefore not involved in any way in the offense at issue should not be subject to any rule requiring an express waiver by the defendant at trial. Other fundamental rights afforded a defendant at trial are considered adequately protected by defense counsel's actions and statements without the requirement of judicial intervention to determine that counsel's conduct does indeed represent the informed and voluntary decision of his client. The instant case presents no different situation nor does it in a non-capital context justify judicial interference in the attorney/client relationship. Indeed, if in fact defense counsel were to waive a defendant's fundamental right without first determining that it was the knowing and voluntary wish of his client to do so, the defendant need only raise that challenge in an ineffectiveness claim by post-conviction, rule 3.850 motion, to obtain relief. See, Dumas v. State, 439 So.2d 246 (Fla. 3d DCA 1983).

As noted by the Court in Hopper v. Evans, 102 S.Ct. 2049 (1982), due process requires a lesser included offense instruction be given only when the evidence warrants such an instruction. In Hopper, the Court, after considering the evidence adduced as to the defendant's intent to kill (the element separating the greater from the lesser offense), determined that the instruction was unwarranted, i.e., that the jury could not rationally determine that the defendant had no intent to kill and was therefore guilty of only the lesser offense.

As in Hopper, the state submits that given the unique facts of this case no federal constitutional due process violation occurred when the trial court failed to instruct on a necessarily lesser included offense such as battery since the evidence produced at trial and the defense presented by the petitioner would not have permitted a jury to rationally find Jones guilty of the lesser offense and acquit him of the greater. See, Beck v. Alabama, supra; Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973). Clearly, from the evidence presented and the admissions made by the petitioner before the jury, there was little doubt that an aggravated battery was committed on Officer Gilletto; indeed, defense counsel did not dispute and in fact conceded that the police officer was struck by someone with an implement of some kind that caused severe bodily injury sufficient to justify a conviction for aggravated battery and not mere simple battery. The only defense raised by the petitioner was that he was not the one who perpetrated the crime and, accordingly, the defense strategy, obviously agreed to by the defendant himself as evinced by the charge conference, was to let the jury decide his guilt or innocence on an "all or nothing" basis (R 113). Given these factual circumstances, it is clear that the due process concerns raised by the Beck Court are not at issue here for the petitioner's decision to forgo any lesser included instructions did not enhance the risk of an unwarranted conviction or diminish the reliability of the guilt determination. 100 S.Ct. 2389-2390, 447 U.S. 637-638. Indeed, from the factual admissions made by the defense in closing argument, the intent of their strategy in waiving any lesser included

offense instructions is obvious, i.e., the petitioner claimed that he was totally innocent of any wrongdoing and that he was misidentified as the perpetrator of any crime involved in this case, and he therefore wished the jury to determine guilt or innocence on that basis, putting the state to its proof on the higher offense charged, thereby making his conviction of any offense more difficult and increasing his chance of a complete acquittal. No fundamental federal constitutional due process infringement has therefore occurred.

Analysis of the petitioner's assertion of a "fundamental right" to have the jury charged upon necessarily lesser included offenses despite his knowing and voluntary waiver, through counsel at trial and in Jones' presence (and with his obvious acquiescence) is without merit. For example, Jones asserts that the decisions in Williams v. State, 285 So.2d 13 (Fla. 1973); Rayner v. State, 273 So.2d 759 (Fla. 1973); State v. Washington, 268 So.2d 901 (Fla. 1972); and Brown v. State, 206 So.2d 377 (Fla. 1968), required the court instruct the jury as to necessarily lesser included offenses notwithstanding defense counsel's affirmative request that no such instruction be given. What the petitioner fails to note is that the rationale for all of those decisions was the specific language of then section 919.16, Florida Statutes, which required in language that this court deemed mandatory that "the court shall charge the jury on [necessarily included offenses]" (underscoring supplied). As the petitioner notes, section 919.16 has been repealed and replaced with Florida Rule of Criminal Procedure 3.510 which, although it provides that a jury may convict a defendant of any offense which as a matter of law is a necessarily included offense,

does not include the mandatory "shall" language previously focused upon in the Williams, Rayner, Washington and Brown decisions.

Even if the "express waiver" requirement of Harris which arose from the Beck decision were applicable in this non-capital case, the state submits that just such an express waiver did occur sub judice, and the fact that that waiver came from the mouth of defense counsel is of no consequence since the defendant clearly acquiesced in his attorney's statement after being informed of the consequences of his technical decision. This form of "express waiver" by defense counsel presents no constitutional problem under Beck v. Alabama as at least one federal court has already noted. Look v. Amaral, 725 F.2d 4, 8-9 (1st Cir. 1984).

Alternatively, the state notes that in an unbroken and continuing line of precedent appellate courts of this state, and most specifically this court, have held that in order to preserve an issue as to the giving or failure to give a jury instruction - including instructions on necessarily lesser included offenses - a defendant must request and/or object to the giving or failure to give that particular instruction in a contemporaneous manner at the trial court level. State v. Bruns, 429 So.2d 307 (Fla. 1983); Griffin v. State, 414 So.2d 1025 (Fla. 1982); Growden v. State, 372 So.2d 930 (Fla. 1979); Williams v. State, supra; Rayner v. State, supra; Brown v. State, supra; Flagler v. State, 198 So.2d 313 (Fla. 1967); Brown v. State, 124 So.2d 481 (Fla. 1960); Chester v. State, 441 So.2d 1165 (Fla. 2d DCA 1983); Hood v. State, 287 So.2d 110 (Fla. 1974); Alford v. State, 280 So.2d 479 (Fla. 3d DCA 1973); Cowart v. State, 277 So.2d 821 (Fla.

1st DCA 1973), cert. denied, 283 So.2d 561 (Fla. 1973); Henry v. State, 277 So.2d 78 (Fla. 2d DCA 1973).

The federal courts have likewise held that a defendant is entitled to an instruction on a lesser included offense if the evidence supports it and if a proper request is made. United States v. Neiss, 684 F.2d 570 (8th Cir. 1982). However, if defense counsel does not request such a charge, the omission is not error. United States v. Seijo, 537 F.2d 694 (2d Cir. 1976), cert. denied, 429 U.S. 1043, 97 S.Ct. 745 (1977); United States v. Meyers, 443 F.2d 913 (9th Cir. 1971).

In Harris v. State, supra, relied upon by the petitioner, this court again noted that it had consistently held that upon a proper request a trial judge must give jury instructions on necessarily lesser included offenses and that the failure to do so upon request constitutes fundamental error when properly preserved for appeal by timely objection under Florida Rule of Criminal Procedure 3.390(d). 438 So.2d at 796. Indeed, in each of the cases discussed by the Harris Court (relied upon by the petitioner) in support of its decision that a defendant could waive lesser included offense instructions, it has been specifically noted that the failure to give such an instruction is ". . . of no avail on appeal unless it is requested and then properly refused at the trial level." Brown v. State, 206 So.2d at 384. Accord, Williams v. State, supra; State v. Washington, supra; see also, Rayner v. State, supra; after remand, 286 So.2d 604 (Fla. 2d DCA 1973).

The state submits that the contemporaneous objection requirement in order to preserve a jury instruction issue for state appellate review has not been obviated by the Harris decision

which necessarily concerns itself only with the propriety of the defendant's waiver of lesser included offense instructions in a capital case and not with the adequacy of the preservation of that issue for appellate review.

Indeed, the state submits that the petitioner's effort to create "fundamental error" - i.e., error reviewable on appeal even absent timely and proper objection below - is misguided and totally unsupported by case law. In fact, this court as reannounced in Harris and as noted in Bruns has consistently required a proper request and/or objection in compliance with Florida Rule of Criminal Procedure 3.390(d) in order to consider the issue of the giving or failure to give lesser included offense instructions on appeal.

Furthermore, the petitioner's effort to characterize the failure to instruct on lesser included offenses in this case as "fundamental error" evinces a lack of understanding of the Harris opinion. In Harris, the Court's effort was obviously focused merely on the procedural requirement that a trial judge instruct upon necessarily included offenses; however, this "requirement" is nothing new, and the Court's explanation as to the method by which that "requirement" could be waived has no effect on the well established state contemporaneous objection rule which addresses a distinct issue, i.e., those procedural requirements that a defendant must meet in order to preserve a jury instruction issue for appellate review. No change in that unswerving line of decisional, statutory, and rule-based legal authority was affected by the Harris opinion, nor does that decision equate the failure to make a "proper"

waiver with "fundamental error."

In Ray v. State, 403 So.2d 956 (Fla. 1981), this court held that it was fundamental error to convict a defendant under an erroneous lesser included offense instruction if the defendant failed to object to that instruction and, inter alia, defense counsel requested the improper jury charge or relied on that charge as evidenced by his argument to the jury or other affirmative action. In reaching that conclusion, Justices Alderman and Boyd concurred entirely on the basis that in order to preserve for appeal the issue of the giving or failure to give an instruction a defendant must make a timely objection under Florida Rule of Criminal Procedure 3.390(d). In Torrence v. State, 440 So.2d 392 (Fla. 5th DCA 1983) (en banc), and W. J. W. v. State, 446 So.2d 248 (Fla. 5th DCA 1984), the district court in applying the Ray decision held that a defendant's conviction of an erroneous lesser included offense did not constitute fundamental error.

The state respectfully submits that under the rationale announced in Ray, Torrence, and W. J. W. no fundamental error can be deemed to have occurred in this cause where the failure to give the lesser included offense instruction was the sole result of the defense counsel's request and where it is obvious from the record that the petitioner raised no objection to the failure to give that charge and in fact relied on that omission in his argument to the jury as a tactical decision to present an "all or nothing" case and thereby enhance his chance of acquittal and to avoid a factually unsupported "jury pardon" where the only evidence presented clearly supported his conclusion

that if the petitioner was guilty of any crime it was aggravated battery and nothing less. Clearly, the same waiver/contemporaneous objection provision applied in Ray, Torrence, and W. J. W. should be applied in this case for if it is not fundamental error to convict a defendant on a crime not charged because of the actions of his attorney it cannot be said that a deprivation of fundamental fairness occurred in this case.

The doctrine of fundamental error should be applied in only the rare cases where a jurisdictional error appears or the interests of justice present a compelling demand for its application. Ray v. State, 403 So.2d 960. Here, the accused was required, like the state, to comply with the established rules of procedure to assure both fairness and reliability in the ascertainment of guilt or innocence, and his failure to object (indeed, his specific request that no lesser included offense instructions be given) is a "strong indication" that at the time and under the circumstances the defendant did not regard the alleged fundamental error as harmful or prejudicial. Id. Accordingly, the state respectfully submits that under the facts of this case no fundamental error/due process violation occurred, sub judice. See, Ray v. State, supra; Higgins v. Wainwright, 424 F.2d 177 (5th Cir. 1970), cert. denied, 400 U.S. 905, 91 S.Ct. 145 (1970); Flagler v. Wainwright, 423 F.2d 1359 (Fla. 5th Cir. 1970), cert. denied, 398 U.S. 943, 90 S.Ct. 1862 (1970).

Further, the state notes that the petitioner is precluded from challenging the failure to instruct on lesser included offenses since the alleged error committed was clearly "invited" by the petitioner who was then estopped to complain on appeal.

See, Pope v. State, 441 So.2d 1073 (Fla. 1983); Jackson v. State, 359 So.2d 1190 (Fla. 1978); McKee v. State, 9 F.L.W. 1056 (Fla. 3d DCA May 8, 1983). In addition, the state respectfully submits that on the face of this record no error of any kind is in fact shown, i.e., there is no indication that the defendant himself did not intend to waive all lesser included offense instructions as a matter of trial tactics in order to obtain an "all or nothing" decision or that that waiver was not knowingly or voluntarily made. Indeed, a review of the record clearly reveals defense counsel's assertion that it was his client's wish to waive those instructions and that he understood the ramifications of that waiver and yet voluntarily wished to undertake it in order to put the state to their proof on the great offense actually charged (R 90-91).

Furthermore, as previously noted, it should be noted that the petitioner raised no allegation before the district court nor does he assert before this tribunal that he did not in fact make a knowing and voluntary waiver of his right to an instruction on necessarily lesser included offenses at the trial below; rather, this issue was raised only at the insistence of the district court following the submission an Anders[4] brief on the petitioner's behalf. If indeed Jones were to raise a claim that his waiver was not a knowing or voluntary one and that his counsel's assertions before the trial court were untrue, he need only present that issue to the trial court in a post-conviction motion (Fla. R. Crim. P. 3.850) for a fact finding on that claim

[4] Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

and a determination of the legal effect thereof.[5] At this point, no factual determination having been made, any reversal would necessarily be based on mere speculation as to whether any error in fact occurred. See, Sullivan v. State, 303 So.2d 632 (Fla. 1974).

Accordingly, upon the arguments presented, the certified question should be answered in the negative. Alternatively, the district court's affirmance of Jones' conviction should be upheld as no reversible/prejudicial error has been demonstrated given the overwhelming evidence of a completed offense - i.e., aggravated battery; the lack of proof as to the lesser offense of mere battery; and the petitioner's tactical decision to seek an all or nothing verdict based on that obvious evidentiary situation. Any error in the procedural manner in which Jones waived his right to the lesser offense instruction must be considered harmless in

---

[5] In the comparable situation of Dumas v. State, 439 So.2d 246 (Fla. 3d DCA 1983), the district court held that although the right to a jury trial was "fundamental" a defendant's waiver of that right is a matter governed by procedural rule adopted by this court which specifically required only a written waiver by the defendant. Fla. R. Crim. P. 3.260. Therefore, there was no procedural requirement that a knowing and voluntary waiver be demonstrated of record. While the rules of criminal procedure prescribe that a trial court must make a judicial inquiry as to the knowing and voluntary nature of a guilty plea (involving the waiver of the fundamental right to a trial), that is not required under the rules for waiver of a jury by the defendant. Thus, while a defendant may challenge the knowing or voluntary nature of his jury waiver by post-concivction motion under Florida Rule of Criminal Procedure 3.850 by alleging that the waiver was not voluntarily and intelligently made, no prophylactic rule that the absence of a record inquiry of a defendant as to a jury trial waiver requires reversal is justified.

Here, the petitioner has not alleged that the decision to waive lesser included offenses was not his, nor has he ever claimed that it was not voluntarily and intelligently made and, absent an evidentiary hearing in a post-conviction proceeding, that issue cannot be correctly and completely determined.

light of the petitioner's obvious informed acquiescence in that waiver as specifically announced by his attorney. See, § 924.33, Fla. Stat. (1983). To reverse this conviction constitutes a needless and improper exhaultation of form over substance, especially given the petitioner's failure to preserve this issue for appellate review by properly rejecting to the jury instructions (and more specifically the lack thereof) on the necessarily lesser included offense at issue.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court affirm the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

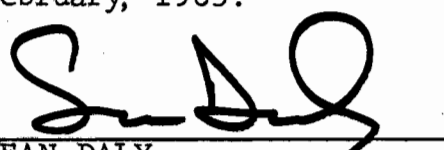
JIM SMITH
ATTORNEY GENERAL

SEAN DALY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Ave., 4th Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Answer Brief on the Merits has been furnished, by mail, to Larry B. Henderson, Assistant Public Defender for petitioner, at 1012 South Ridgewood Avenue, Daytona Beach, Florida 32014-6183, this 13th day of February, 1985.



SEAN DALY
COUNSEL FOR RESPONDENT