IN THE SUPREME COURT OF FLORIDA

MOSES JONES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,335

PETITIONER'S INITIAL BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

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

PETITIONER'S INITIAL BRIEF ON THE MERITS

STATEMENT OF THE CASE

Mr. MOSES JONES, was charged by information with violation of Section 784.045(1)(b), Florida Statutes [aggravated battery] (R 149)[1/]. The Office of the Public Defender was appointed to represent Mr. Jones (R 147), and the matter proceeded to a jury trial in the Circuit Court for Osceola County, the Honorable Cecil H. Brown presiding.

The State's case consisted of the testimony of five persons, including that of the police officer who was the victim of the aggravated battery (R 19-39) and that of two witnesses who observed the aggravated battery (R 50-69,75-90). Four items were introduced into evidence without objection, to-wit: a photograph of the scene of the incident (R 23), a notebook of the victim (R 26), a photograph of a suspect that the victim

1/ (R) refers to the Record on Appeal of the instant case, Fifth District Court of Appeal Case No. 83-1096.

was interviewing at the time of the incident (R 30), and a wooden stick (R 44).

At the conclusion of the State's case, defense counsel moved for a Judgment of Acquittal upon the basis that the State had failed to prove that a deadly weapon had been used in the commission of battery (R 84-86). The motion was denied (R 87).

Mr. Jones exercised his constitutional right to remain silent (R 88), and the jury was instructed upon the law of the case without objection (R 115-122) following closing arguments that also were objection free (R 96-115). In compliance with a request made by defense counsel in the presence of Mr. Jones, the Court did not instruct upon any lesser included offenses (R 90-91). The Court did not ascertain from Mr. Jones personally whether he knowingly and intelligently waived the jury instruction upon necessarily lesser included offenses.

The alternate jurors were excused (R 122) and the jury, following deliberation, returned a verdict of guilty of aggravated battery, as charged (R 123, 148) Mr. Jones was adjudicated guilty (R 143-144) and sentenced on July 11, 1983 to a ten (10) year term of imprisonment, with credit to be received for 130 days time served (R 145-146).

Following a timely appeal, Mr. Jones' conviction was affirmed. Jones v. State, 9 FLW 2504 (Fla. 5th DCA November 29, 1984) (see Appendix "A"). In doing so, the Fifth District Court of Appeal certified the following question to be of great public importance pursuant to Fla.R.App.P. 9.030(a)(2)(v):

> 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 by counsel. Do those charged with non-capital crimes enjoy this constitutional right as well as those charged with capital crimes?

A timely Notice to Invoke this Courts' jurisdiction was filed. This brief follows.

STATEMENT OF THE FACTS

At approximately 3:30 a.m. on July 4, 1982 an officer of the Kissimmee Police Department responded to a reported shooting in the vicinity of McLaren Circle, Kissimmee, Florida (R 19-21). Officer Gilletto stopped an individual (Rickey Warren) for questioning, but while conducting the interrogation Officer Gilletto was struck in the back of the head with a wooden stick wielded by an unknown assailant and thereby rendered unconscious (R 24-26). The wound behind the officer's right ear required nine stiches and resulted in the officer's absence from work for four months (R 27-29).

Although Officer Gilletto was totally unaware of the presence or identity of his assailant (R 39), two persons testified at trial that they observed Mr. Jones approach Officer Gilletto from behind and strike him with a stick (R53-54, 79). No description of the "stick" was provided (R 54,59-60). However, a 14 inch mop handle that was found at the scene of the incident was admitted into evidence without objection (R 43-44).

SUMMARY OF ARGUMENT

Mr. Jones was convicted of aggravated battery. The jury was not instructed upon the necessarily lesser included offense of battery, and a waiver of that instruction [though purportedly given by defense counsel] was not given personally by Mr. Jones.

The right to have the jury instructed upon a necessarily lesser included offense is a fundamental right and one that affects the reasoning process of the jury. Therefore, due process requires that the defendant knowingly and intelligently waive his right to have the jury instructed on necessarily lesser included offenses, because the omission of the instruction on the lower crime deprives the jury of the opportunity to find the defendant guilty of a less serious crime.

ISSUE

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY OMITTING AN INSTRUCTION UPON NECESSARILY LESSER INCLUDED OFFENSES, AT THE REQUEST OF DEFENSE COUNSEL IN THE PRESENCE OF THE DEFENDANT, WITHOUT ASCERTAINING FROM THE DEFENDANT WHETHER HE PERSONALLY, KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO SAID INSTRUCTIONS.

A defendant's right to have a jury instructed upon necessarily lesser included offenses obtains from the Fourteenth Amendment to the United States Constitution as a matter of procedural due process.

> At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged. (Footnote omitted). This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged. (citation omitted). But it has long been recognized that it can also be beneficial to the defendant because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal.

Beck v. Alabama, 447 U.S. 625,633, 100 S.Ct. 2382, 65 L.ED.2d 392, 400 (1980). In Beck, the United States Supreme Court held that under the due process clause of the Fourteenth Amendment the death sentence could not be imposed where the jury had not been permitted to consider a verdict of guilt as to lesser included non-capital offenses.

The ruling in Beck recognized that the giving of a charge upon necessarily lesser included offenses inures to the benefit of both the State and the defendant. The State bene-

fits when a verdict of guilty is returned upon the lesser offense for the defendant who, though clearly guilty of a serious offense, would otherwise have been acquitted by a jury not thoroughly convinced of the defendant's guilt of the alleged capital offense. Conversely, in other instances the defendant benefits from being convicted of the lesser included offense where he otherwise would have been found guilty of a capital offense by a jury thoroughly convinced of his guilt of some serious offense and not willing to acquit him because of his clear guilt. The court in Beck, supra, reasoned that the failure to charge the jury upon necessarily lesser included offenses detracted from the integrity of the guilt determination process due to the interjection of impermissible considerations by the jury.

Although the same rationale exists and has been recognized as occurring in the non-capital jury deliberation process, cf. State v. Bruns, 429 So.2d 307, 209 (Fla. 1983), State v. Abreau, 363 So.2d 1063 (Fla. 1978), the "fundamental right" to have the jury charged upon necessarily lesser included offenses has until very recently been discussed solely in capital cases. In this regard, an important evolution in the law is evident.

In State v. Washington, 268 So.2d 901 (Fla. 1972),the Supreme Court of Florida held that the trial court correctly instructed the jury upon necessarily lesser included offenses over objection of defense counsel. The Court reasoned that the instruction was required pursuant to Section 919.16, Florida Statutes [repealed, now Rule 3.510, Florida Rules of Criminal Procedure] and Brown v. State, 206 So.2d 377 (Fla. 1968).

One year later, the Supreme Court again indicated that

the trial court must instruct the jury as to necessarily lesser included offenses notwithstanding defense counsel's affirmative request that no such instruction be given. Rayner v. State, 273 So.2d 759 (Fla. 1973). The Court did not reverse that conviction, however, but remanded for determination by the district court as to whether the failure of defense counsel to object at trial precluded appellate review of the issue. Thus, preservation of constitutional error became the focus. It is interesting to note that in Rayner the Second District Court of Appeal held that it was permissible for a defendant to affirmatively waive the giving of instructions upon necessarily lesser included offenses. Rayner v. State, 264 So.2d 74 (Fla. 2d DCA 1972).

The last of this trilogy of cases was Williams v. State, 285 So.2d 13 (Fla. 1973), where the Supreme Court of Florida explained that although it was no longer required for the defense attorney to make a formal exception to a court's ruling, the attorney was nonetheless required to state an objection concerning jury instructions prior to the jury retiring for deliberations. Pursuant to the language of Williams V. State, it was apparent that defense counsel must affirmatively request the giving of a necessarily lesser included instruction or object to its ommission in order to preserve the issue for appellate review. Confer Reddick v. State, 394 So.2d 417 (Fla. 1981); Thomas v. State, 406 So.2d 538 (Fla. 4th DCA 1981).

In 1980, however, the United States Supreme Court in Beck, supra, recognized that the jury deliberation process in capital cases was fundamentally tainted by the absence of instruction on necessarily lesser included offense. Florida, too, recognized that per se error was caused by the failure of the

trial court to instruct upon an offense one step removed from the charged offense even in non-capital cases, but until Beck, supra, Florida required a contemporaneous objection to preserve the matter for appellate review. Cf. State v. Abreau, supra.

Thus, although the Supreme Court in Spaziano v. State, 393 So.2d 1119 (Fla. 1981), held that a defendant accused of murder was not entitled to a jury instruction upon necessarily lesser included offenses where the defendant could not be convicted of said offenses due to the Statute of Limitations having expired upon them, the Court quickly qualified that position by observing that "[in] Spaziano, we concluded that where the state charges a defendant with a capital offense and where it unquestionably appears that the statute of limitations has run on the necessary lesser included offenses, either the defendant must waive the statute of limitations defense, and thus subject himself to possible conviction and sentence for one of them, or the trial court will instruct only for the capital offense." Sturdivan v. State, 419 So.2d 300, 302 (Fla. 1982): See also Tucker v. State, 417 So.2d 1006 (Fla. 3d DCA 1982).

Recently, in Bruns v. State, 429 So.2d 307 (Fla. 1983), a non-capital case, the Supreme Court of Florida observed that "fundamental trial fairness requires that a defendant being tried for robbery should be permitted to have an instruction on a lesser included offense upon timely request". Id. at 310. The court was speaking in terms of preserving the jury's pardon power, but clearly the court was concerned about the integrity of the jury deliberation process whereby guilt or innocence was determined in a manner without appropriate selections being provided. This case began the transition from having an affirmative

duty on behalf of defense counsel to object on the failure to give the instruction to an affirmative duty upon the trial court to instruct upon the lesser included offense absent a knowing and intelligent waiver. Thus, the right to have the jury instructed on necessarily lesser included crimes became a personal constitutional right of a defendant.

In recognition of the ever changing requirements of procedural due process, the Supreme Court of Florida therefore unequivocally ruled that a defendant is entitled to have the jury instructed on all necessarily lesser included offenses absent a valid waiver. Harris v. State, 438 So.2d 787 (Fla. 1983).

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." (Citation omitted). Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Dept. of Social Services, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 68 L.Ed2d 648, 649 (1981).

In Harris v. State, supra, the Supreme Court of Florida specifically stated:

> Our decisions holding that a defendant is entitled to have the jury instructed on all necessarily included lesser offenses are consistent with the holdings of the federal courts. For instance, in Beck v. Alabama, 487 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the United Stated Supreme Court held that a state cannot prohibit the giving of lesser-included-offense

> instructions in a death case without violating the United States Constitution. This procedural right to have instructions on necessarily included offenses given to the jury does not mean, however, that the defendant may not waive his rights as he may expressly waive his right to a jury trial. (citation omitted). But, for an effective waiver, there must be more than just a request for counsel that these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly and intelligently made.

Harris, supra, at 796-797 (Emphasis theirs).

Although Harris was a death case, the Supreme Court conspicuously did not limit its holding solely to death cases, but instead, in emphasized language, recognized that procedural due process has evolved to the point where the jury should be provided the opportunity and capability to convict the non-capital defendant of a necessarily lesser included unless the entitlement to such an instruction is knowingly and intelligently waived by the defendant.

In Lassiter, supra, the United States Supreme Court recognized that the right to due process is the right to judicial processes which are "fundamentally fair". In Beck v. Alabama, supra, the United States Supreme Court recognized that fundamental fairness required that the jury be provided options covering necessarily lesser included offenses in order to preserve the integrity of the fact finding process. Citing Beck, the Supreme Court of Florida thereafter held in Harris that the same consideration of fundamental fairness entitled every defendant to an instruction on necessarily lesser included offenses, which entitlement may be affirmatively waived only after the court determines from the defendant personally if a knowing and intelligent waiver

exists. In Brown v. State, 206 So.2d 377 (Fla. 1968), the Supreme Court of Florida indicated that a defendant has a fundamental constitutional right to receive a jury instruction on necessarily lesser included offenses. In Harris, supra, the Supreme Court of Florida so held.

The procedural right to have the jury instructed upon necessarily lesser included offenses may be waived, but only by the defendant personally, because the fundamental right is personal to the defendant.

> ...For an effective waiver, there must be more than just a request from defense counsel that these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly and intelligently made.

Harris, supra, at 797 (Emphasis provided). In light of clarity of the above emphasized language, there could be no doubt but that the defendant personally must waive the right to a jury instruction, and that the request of defense counsel not to so instruct the jury will not suffice.

THE FAILURE TO INSTRUCT ON NECESSARILY LESSER INCLUDED OFFENSES IS FUNDAMENTAL ERROR THAT MAY BE RAISED FOR THE FIRST TIME ON APPEAL PURSUANT TO HARRIS V. STATE, 438 So.2d 796, (Fla. 1983).

In concluding that the records must demonstrate a defendant's knowing and intelligent waiver of the right to have the jury charged upon necessarily lesser included offenses, the Supreme Court of Florida has cast an affirmative duty upon the trial judge to inquire of the defendant personally as to the existence of a waiver of a fundamental right. Harris, supra, at 797. The Court alluded to previous cases consistently holding that either a request for, or an objection to, the omission of

such instructions had to have been made by counsel in order to have adequately preserved the "fundamental" error for appellate review. Harris, supra, at 796.

The Court then departed from that line of cases and cast a procedural burden upon the trial judge to instruct upon necessarily lesser included offenses unless the instruction is knowingly and intelligently waived by the defendant. The record must affirmatively demonstrate the existence of a knowing and intelligent waiver by the defendant. Fundamental error cognizable for the first time on appeal exists where the court fails to obtain a knowing and intelligent waiver of a fundamental right from a defendant, which waiver is not affirmatively demonstrated by the record. Confer. Francis v. State, 413 So.2d 1175 (Fla. 1982); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct 1602, 16 L.Ed.2d 694 (1966).

CONCLUSION

BASED UPON the argument and authorities cited herein, this Honorable Court is respectfully requested to answer the certified question in the affirmative, to vacate the opinion of the Fifth District Court of Appeal, and to remand the matter with directions that Mr. Jones' conviction be reversed due to the presence of fundamental error, and remand the matter for retrial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General at 125 North Ridgewood Avenue, Fourth floor, Daytona Beach Florida 32014, and mailed to Mr. Moses Jones, Inmate No. 090433, Sumter Correctional Institute, P.O. Box 667, Bushnell, Florida 33513, this 23rd day of January 1985.

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