IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

JEFFREY WIMBERLY,

Respondent.

CASE NO. 67,847

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

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BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the defendant in the trial court, and the appellant in the District Court. The parties will be referred to as they appear before this Court. Attached hereto as an appendix is the opinion in Wimberly v. State, 476 So.2d 272 (Fla. 1st DCA 1985).

II STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts.

III SUMMARY OF ARGUMENT

Respondent will argue in this brief that the First District was entirely correct in holding that simple battery is a necessarily-lesser included offense of battery on a law enforcement officer. This will be conclusively demonstrated by an analysis of the recent developments in the law regarding lesser included offenses. This Court must answer the certified question in the affirmative. The only relief petitioner would be entitled to, if at all, is a clarification of a rule of criminal procedure.

IV ARGUMENT

ISSUE PRESENTED

IF THE EVIDENCE AT TRIAL IS SUFFICIENT TO CONVICT OF A NECESSARILY LESSER INCLUDED OFFENSE, AND THE SAME EVIDENCE ALSO INCONTROVERTIBLY SHOWS THAT THE NECESSARILY LESSER INCLUDED OFFENSE COULD NOT HAVE BEEN COMMITTED WITHOUT ALSO COMMITTING THE GREATER CHARGED OFFENSE, RULE 3.510(b), FLORIDA RULES OF CRIMINAL PROCEDURE, REQUIRES THE TRIAL JUDGE TO INSTRUCT THE JURY OF THE NECESSARILY INCLUDED OFFENSE.

Petitioner seeks to rewrite Fla.R.Crim.P. 3.490 and 3.510 to conform them to the state's view of what lesser included offenses should be, even though this Court has already done so by its 1981 revisions and the promulgation of the schedule of lesser included offenses.

Prior to 1981, the rules at issue read as follows:

Rule 3.490. Determination of Degree of Offense

If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense.

Rule 3.510. Conviction of Attempt; Lesser Included Offense

Upon an indictment or information upon which the defendant is to be tried for any offense the jurors may convict the defendant of an attempt to commit such offense if such attempt is an offense, or may convict him of any offense which is necessarily included in the

> offense charged. The court shall charge the jury in this regard.

Prior to 1981, there were four types of lesser offenses, as defined by Brown v. State, 206 So.2d 377 (Fla. 1968): (1) degrees; (2) attempts; (3) necessarily included lesser offenses; and (4) offenses which may or may not be lesser offenses, depending upon the allegation in the information and the proof at trial.

The Committee on Standard Jury Instructions in Criminal Cases filed its final report in Case No. 58,799 on March 7, 1980, in which it was stated:

> The committee recommends that lesser degrees of an offense be treated as category 3 and 4 offenses. Thus, if the offense of lesser degree is necessarily proved by proof of the greater, it will be considered a category 3 offense. If the lesser degree offense is not necessarily included in the greater but is covered by the charging document and the proof, it will be a category 4 offense. There would be no instruction required for an offense of lesser degree not falling into one of the categories. The adoption of this change would require an amendment to Rule 3.490.

This Court adopted the committee's recommendation:

> The committee recommended treating lesser degrees as category 3 or 4 offenses, depending on the offense, and treating attempts as a category 4 offense, thereby eliminating the first two Brown categories as separate categories and leaving:
>
> (1) Offenses necessarily included in the offense charged, which will include some lesser degrees of offenses.
>
> (2) Offenses which may or may not be included in the offense charged, depending on the accusatory pleading and the evidence, which will include all attempts and some lesser degrees of offenses.

* * *

> We agree with the recommendation of the committee to change these rules. The present rules have required instructions to the jury for offenses for which there is no support in the evidence and no argument by counsel, and as a result have caused jury confusion. It was this circumstance that lead us to request the committee to recommend a table of lesser included offenses and modifications of our rules.
>
> We do not view these changes as invasions by the trial judge into the province of the jury - our concern in Lomax v. State, 345 So.2d 719 (Fla. 1977). In Lomax, a trial judge refused to give a requested lesser offense instruction solely because there was ample evidence to support a guilty verdict on the higher offense. This is to be distinguished from the instant changes, which will eliminate the need to give a requested lesser offense, not necessarily included in the charged offense, when there is a total lack of evidence of the lesser offense.

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)(Emphasis added). Accordingly, this Court also amended the above-cited rules, which now read as follows:

> Rule 3.490. Determination of Degree of Offense
>
> If the indictment or information charges an offense divided into degrees, the jury may find the defendant guilty of the offense charged or any lesser degrees supported by the evidence. The judge shall not instruct on any degree as to which there is no evidence.
>
> Rule 3.510. Determination of Attempts and Lesser Included Offense
>
> Upon an indictment or information upon which the defendant is to be tried for any offense the jury may convict the defendant of:
>
> (a) an attempt to commit such offense if such attempt is an offense and is supported by the evidence. The judge shall not

> instruct the jury if there is no evidence to support such attempt and the only evidence proves a completed offense.
>
> (b) any offense which as a matter of law is a necessarily included offense or a lesser included offense of the offense charged in the indictment or information and is supported by the evidence. The judge shall not instruct on any lesser included offense as to which there is no evidence.

While Rule 3.510(b) "is not as clear as it might be" Flint v. State, 463 So.2d 554, 556 (Fla. 2d DCA 1985), the committee report and this Court's opinion demonstrate that this Court did not intend to blur the distinction between category 1 (formerly category 3) and category 2 (formerly category 4) lesser offenses. This Court did not intend to make category 1 necessarily lesser included offenses (formerly category 3) dependent upon the proof at trial as are category 2 (formerly category 4) offenses:

> The words "and is supported by the evidence" could be read to modify the entire phrase "a necessarily included offense or a lesser included offense of the offense charged in the indictment or information." However, considering the historical distinction between necessarily included offenses (category 1) and lesser included offenses which are charged in the information and supported by the evidence (category 2), we are convinced that the words "and is supported by the evidence" modify only the phrase "a lesser included offense of the offense charged in the indictment or information".

Flint v. State, supra, at 556.

In the instant case, the First District found the rule to be "ambiguous". The rule could be modified to more clearly explain the distinction between these two types of lesser offenses:

> (b) Lesser included offenses which fall into two categories:
>
> (1) any offense which as a matter of law is a necessarily included offense; or

> (2) a lesser included offense of the offense charged in the indictment or information, which is supported by the evidence. The judge shall not instruct on any such offense as to which there is no evidence.

Turning to the crimes at issue here, respondent was charged with battery on a law enforcement officer, a violation of Section 784.07(2)(b), Florida Statutes, which provides:

> Whenever any person is charged with knowingly committing an assault or battery on a law enforcement officer or firefighter while the officer or firefighter is engaged in the lawful performance of his duties, the offense for which the person is charged shall be reclassified as follows: . . . (b) in the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

Respondent requested an instruction on simple battery, a violation of Section 784.03(1), Florida Statutes, which provides:

> A person commits battery if he: (a) actually and intentionally touches or strikes another person against the will of the other; or (b) intentionally causes bodily harm to an individual.

The schedule of lesser included offenses at page 260 thereof shows that battery is a category 1 necessarily included lesser offense of battery on a law enforcement officer, which must be given in all cases. Since Section 784.07(2)(b) adopts the definition of battery from Section 784.03(1) in defining battery on a law enforcement officer, the more serious crime cannot be committed without also committing the simple battery. See especially Foster v. State, 448 So.2d 1239 (Fla. 5th DCA 1984) (aggravated battery and simple battery) and Cannon v. State, 456 So.2d 513 (Fla. 5th DCA 1984)(aggravated assault and simple assault). Thus, battery is not a category 2 lesser offense, which is dependent upon the allegation in the information and the proof at trial. Rather, it is a category 1 lesser offense.

Petitioner has made the same mistake which it made in Wheat v. State, 433 So.2d 1290, 1291 (Fla. 1st DCA 1983), rev. den. 444 So.2d 418 (Fla. 1984):

> What the state and lower court have apparently overlooked, however, is that in any case in which there is sufficient proof of the greater offense to go to the jury, there is inescapably proof of a lesser offense which is necessarily included within the offense charged. (Emphasis added).

Petitioner's contention that when it proves battery on a law enforcement officer, it disproves simple battery is legally and logically absurd. If, as petitioner repeatedly insists, there is no evidence of simple battery, then there was also no evidence of one of the essential elements of battery on a law enforcement officer, and respondent should have been discharged. Petitioner cannot have it both ways.

In summary, then, the present rules requires an instruction on a necessarily included lesser offense, i.e., one that must be proven before the greater can be proven. Battery is a necessarily included lesser offense of battery on a law enforcement officer. When viewed in its historical perspective, the present rule supports the decision of the First District in the instant case. This Court should answer the certified question in the affirmative, and may wish to further clarify the rule to avoid confusion in the future.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court answer the certified question in the affirmative, and approve the decision of the First District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Respondent on the Merits has been furnished by hand delivery to Assistant Attorney General Henri Cawthon, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to respondent, JEFFREY WIMBERLY, #066821, Post Office Box 747, Starke, Florida 32091 on this 18 day of December, 1985.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER