IN THE SUPREME COURT OF FLORIDA

DANIEL R. BUTLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 68,021

# PETITIONER'S BRIEF ON JURISDICTION

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PETITIONER'S BRIEF ON JURISDICTION

## I PRELIMINARY STATEMENT

Petitioner will designate references to the appendix accompanying this brief by the symbol "A".

## II STATEMENT OF THE CASE AND FACTS

Petitioner, who was the defendant in a criminal prosecution in the circuit court, was tried and convicted of burglary of a firearm and attempted murder in the first degree. An appeal was taken to the first district court, which affirmed both convictions by a 2-1 vote. The majority opinion explained the facts, the issue, and the ruling as follows:

> The evidence before the jury was conflicting as to whether the defendant, at the time of the offense, had a status of either invitee or trespasser. Wendy Jones, the sister of the defendant's long-time girlfriend, Christie Johnson, testified that a approximately 3:30 a.m., she discovered defendant in her living room, without anyone's permission for him to be there. Following a scuffle between the defendant and Wendy, the victim came into the room, unarmed. It was at that point, according to her, that the defendant shot Gene Jones. The victim's testimony corroborates Wendy's.

The defendant's version of the incident, as may be expected, sharply conflicts with that of the State's witnesses. Defendant had earlier that evening agreed to pick up Christie and their fourteen-month-old daughter, Danielle. When he arrived at the house, Wendy opened the front door and invited him inside. Following an argument between the defendant and Wendy, Gene Jones, the victim, came into the room with a shotgun pointed at the defendant. The latter fired two shots at Jones, ostensibly, according to the defendant, to scare Jones so that he would put the shotgun down.

The above facts disclose issues as to whether the defendant or the victim was the aggressor, and whether the defendant was justified in the use of the force involved. The court, in its instructions to the jury, gave Florida Standard Jury Instruction (Criminal) 3.04(d), pertaining to the justifiable use of force. However, instead of deleting from the Standard Jury Instruction that portion relating to the defendant's right to defend himself in his own home, the court departed from the instructions, and gave the following charge to the jury:

> If a person is attacked in his own home or on his own premises, he has no duty to retreat and has a lawful right to stand his ground and meet force with force, even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent death or great bodily harm to himself or another.

(emphasis supplied)

The above instruction was irrelevant to any fact in issue. The Standard Jury Instruction, which the lower court modified, was applicable only to a defendant's theory of self-defense. The jury, if it had accepted the victim's testimony, could have found that the victim was not armed with any weapon at the time of the encounter, and, if it did so find, the above instruction would be irrelevant. If, on the other hand, it had accepted defendant's testimony that the victim was armed and was advancing on him in a threatening manner, the instruction again was irrelevant to any fact in issue. The victim did not assert the defense of self-defense, and it was not he, but the defendant, who was on trial for the offenses charged.

A thorough review of the record and of the totality of instructions given satisfies us that,

> although the instruction was not proper, it was harmless error in this case.

(A-1-3).

Judge Ervin agreed with the majority that the modified instruction was irrelevant and erroneous. He disagreed strongly, however, with the conclusion that the error was harmless because:

> The lower court's instruction in the present case was in effect an improper comment on the evidence, by advising the jury that because the defendant was the aggressor, the victim had the right not to retreat but rather had the right to meet the defendant's use of deadly force with equal force. The impression such an instruction conveys is to negate the only defense that defendant had available to him--that of self-defense. The charge implicitly told the jury that the defendant had no right to be where he was or to use the force employed, contrary to the established principle that trial courts should ordinarily refrain from commenting on the weight, character or credibility of the evidence adduced. Raulerson v. State, 102 So.2d 281 (Fla. 1958); Abrams v. State, 326 So.2d 211 (Fla. 4th DCA 1976).
>
> The devastating effect the court's instruction had upon the defendant's defense of self-defense was compounded by the arguments made by the prosecutor before the jury, stating that defendant had no right of self-defense:
>
> > He doesn't have the right to claim self-defense. . . . [S]o in summary the defendant cannot believe that the victim is that violent a person, armed himself, going to that victim's home and go in that when that victim exercises his real right to defend his home. That's the law, and you are under an obligation to follow that.
> >
> > So even if you believe the defendant's story as I said earlier, if you believe his story, he is still guilty because if you carefully follow the law of self-defense it doesn't apply in this case, but I am not suggesting, ladies and gentlemen, that you should believe this story because I think you will find it's inconsistent once you examine it carefully.
>
> * * * *

> I told you earlier that even if Gene had the shotgun this man was not justified in shooting him because it was Gene's own home, and he had a right to defend his home. . . .
>
> Because the instruction as given was confusing and contradictory, I consider that it must be held prejudicial, requiring reversal of the conviction and a remand of the case for a new trial. See Finch v. State, 116 Fla. 437, 156 So. 489 (1934); Swindle v. State, 254 So.2d 811 (Fla. 2d DCA 1971).

(A-4-5).

Petitioner moved for rehearing, arguing that the majority had misapplied the harmless error rule (A-6-7). The court denied rehearing by vote of 2-1, with Judge Ervin again dissenting (A-8).

## III SUMMARY OF ARGUMENT

The instruction on use of force by a person attacked in his home was contradictory and confusing. The district court's decision applying harmless error conflicts with decisions of other courts which hold that contradictory and confusing instructions cannot be harmless error, especially when the overall effect is to negate the theory of defense.

## IV ARGUMENT

QUESTION PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT APPLYING HARMLESS ERROR AND AFFIRMING CONVICTIONS WHEN CONFUSING AND CONTRADICTORY INSTRUCTIONS WERE GIVEN ON A MATERIAL ISSUE CONFLICTS EXPRESSLY AND DIRECTLY WITH DECISIONS OF OTHER APPELLATE COURTS.

The entire panel of the district court found that the trial judge erred by modifying the standard instruction on use of force. Petitioner's theory of defense was that he was attacked by the homeowner and shot him in self defense. Petitioner was not at home when the shooting occurred so the instruction did not apply to his own actions. The homeowner did not

claim to be armed or be acting in self defense so the instruction was inapplicable to him also.

Petitioner was entitled to have the jury instructed on justifiable use of force as his theory of defense; that instruction was given as follows:

> There has been raised as the defense that Daniel R. Butler was justified in the use of force likely to cause death or great bodily harm against William E. Jones. Daniel R. Butler was justified in the use of that force if he reasonably believed that its use was necessary to prevent imminent death or great bodily harm to himself or another at the hands of William E. Jones.
>
> In deciding whether the defendant was justified in the use of force likely to cause death or great bodily harm, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing the defendant need not have been actual; however, to justify the use of force likely to cause death or great bodily harm, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force based upon appearances the defendant must have actually believed that the danger was real.
>
> The defendant cannot justify his use of force likely to cause death or great bodily harm unless he used every reasonable means within his power and consistent with his own safety to avoid the danger before resorting to that force. The [f]act [sic] that the defendant was wrongfully attacked can [not][sic] justify his use of force likely to cause death or great bodily harm if by retreating he could have avoided the need to use that force; however, if the defendant was placed in the position of imminent death or great bodily harm and it would have increased his own danger to retreat, then his use of force likely to cause death or great bodily harm was justifiable.

(A-9-10).

In contrast with those rights accruing to petitioner, the jury was then told:

> If a person is attacked in his own home or on his own premises, he has no duty to retreat and has a

> lawful right to stand his ground and meet force with force, even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent death or great bodily harm to himself or another.

Jurors here were unable to give petitioner the benefit of the general self defense instruction even if they believed his testimony that Jones (occupant of the house) was armed. In that event the jury had been instructed that Jones had a right to be armed. By implication, the petitioner had no right to defend himself from Jones' justifiable use of force in self defense. The modification of the instruction by the trial judge in effect negated completely any defense petitioner had.

The district court majority found that the instruction pertaining to the occupant's right to use force if attacked at home was harmless error. The court did not explain how it was harmless. Conflict jurisdiction exists because the first district court applied harmless error to a situation which other courts have not. This is sufficient to support discretionary review. Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981).

Florida courts have consistently rejected the harmless error doctrine as a cure for contradictory and confusing instructions similar to those given here.

In Finch v. State, 116 Fla. 437, 156 So. 489 (1934) the court proclaimed:

> An instruction which tends to confuse rather than enlighten, and which is calculated to and may mislead the jury and cause them to arrive at a conclusion that otherwise might not be reached by them should not be given, and if given is reversible error. . . .

116 Fla. at 443 (emphasis added).

This rule was applied in Shannon v. State, 463 So.2d 589 (Fla. 4th DCA 1985) when the trial judge instructed the jury that a person is never

justified in the use of any force to resist arrest and also gave a charge, requested by the defense, that an accused could use non-deadly force to resist an arrest if the officer used excessive force. The appellate court said:

> Obviously, these statements are diametrically opposed; they confuse - rather than explain - a key principle of law in defendant's case. The trial court has an obligation to give full instructions on applicable principles of law. [citation omitted] Implicit is the requirement that instructions be coherent and comprehensible. Those given in the case at bar fail to meet this minimum standard and, thus, we must reverse.

463 So.2d at 590.

The Second District reversed a conviction when the defendant argued that the trial court's summary instruction on excusable homicide "may have misled the jury." Blitch v. State, 427 So.2d 785, 786 (Fla. 2d DCA 1983). The court agreed, saying that a plausible misconstruction of the instructions could have led the jury to the improper conclusion that "the excusable homicide defense was not available to appellant since he killed [the victim] with a shotgun." Id. at 787. The court said:

> We are aware, of course, that the jury may not have been naively misled by the instruction given. However, we refuse to sustain appellant's conviction on such a fragile assumption.

Ibid.

Affirmance of petitioner's conviction by the district court also expressly and directly conflicts with Stripling v. State, 349 So.2d 187 (Fla. 3d DCA 1977), cert.denied, 359 So.2d 1220. In giving an instruction on entrapment in Stripling, the judge included a statement, not part of the standard charge, that entrapment is not available to a defendant who denies committing the crime. The District Court reversed because the defendant was charged with a conspiracy as well as other crimes and the

defendant could have denied being involved in a conspiracy but claimed entrapment as to the overt acts. In commenting on the instructions the Court said they were:

> [C]onfusing by virtue of the fact that when an instruction on entrapment was rendered, the court found that [the defendant] had presented sufficient evidence with respect thereto to warrant such a charge. As a result of the court further instructing that the defense was unavailable to an accused who denied commission of the acts charged, the jurors, even if they believed [the defendant] was entrapped, could not then give him the benefit of the entrapment defense because he denied the charges.

349 So.2d at 190.

Swindle v. State, 254 So.2d 811 (Fla. 2d DCA 1971) conflicts with the first district court's decision. There the court said an instruction was

> erroneous and prejudicial since it was not germane to the theory of the prosecution nor was it advanced as a defense by appellant.

Id. at 812.

In Wilson v. State, 171 So.2d 903 (Fla. 2d DCA 1965) the defendant was charged with second degree murder and claimed that he shot the victim with a pistol in self defense. His version of the offense, if believed, would have entitled him to an acquittal. In addition to charging the jury on defendant's right of self defense the trial judge also gave an instruction that it was a crime to carry a pistol without a license. No evidence had been presented about whether the defendant had a license. The second district rejected the state's contention that the error was harmless. The court said that the jury could have inferred that if the defendant wrongly possessed a firearm he was not entitled to claim self defense. That is exactly the situation created by the instruction at petitioner's trial.

Finally, the instructions in the case were conclusively rendered harmful by the prosecutor's argument, quoted in part in Judge Ervin's

dissent, that;

> even if you believe the defendant's story that this rifle was present, I submit to you that the victim in this case had every right to have that rifle present, and this man had no opportunity, had no right to fire, that he did not have the right to exercise this self defense due to the fact he was in this man's home.

Affirming petitioner's conviction in the face of the combined errors in instruction and argument conflicts with Harvey v. State, 448 So.2d 578, 581 (Fla. 5th DCA 1981) in which the court said:

> The trial judge in this case should have corrected the misleading instruction. The instruction, the prosecutor's repeated misstatements of the law and the obvious jury confusion deprived Harvey of a fair trial so as to constitute fundamental error which requires reversal even in the absence of timely objections.

## V CONCLUSION

This Court has jurisdiction to grant discretionary review of the decision of the first district because that decision is in express and direct conflict with numerous rulings of other appellate courts rejecting harmless error when confusing and contradictory instructions are given on a material issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on Jurisdiction has been furnished by hand delivery to Ms. Andrea Hillyer, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Daniel R. Butler, #094028, Post Office Box 628, Lake Butler, Florida, 32054, this 16th day of December, 1985.

MICHAEL J. MINERVA