D/a 6-9-86

IN THE SUPREME COURT OF FLORIDA

DANIEL R. BUTLER,

Petitioner,

vs.

CASE NO: 68,021

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Daniel Butler is the petitioner in this Court. He will be referred to as Butler in this brief.

References to the record on appeal will be designated by the symbol "R"; references to the transcript of proceedings will be designated "TR"; references to the appendix will be designated "A".

The decision of the district court being reviewed is Butler v. State, 476 So.2d 1334 (Fla. 1st DCA 1985).

The appendix, bound separately from the brief, includes the opinion of the district court, Butler's motion for rehearing, and the order denying rehearing.

STATEMENT OF THE CASE

Butler was charged by information in the Circuit Court of Duval County with three crimes: (1) burglary of a dwelling while armed with a dangerous weapon, and in possession of a firearm, with the intent to commit a battery, (2) attempted first degree murder of William Jones and, (3) attempted first degree murder of Wendy Jones (R-6,7).

The jury was instructed on Butler's theory of defense, which was justifiable use of force. The trial judge, however, included the standard jury instruction on defense of the home which he modified by inserting "person" in place of "defendant". This modification resulted in the jury being told that a person attacked in his home has no duty to retreat but instead may stand his ground even to the extent of using deadly force if necessary. Butler objected to the instruction on defense of home, pointing out that the incident took place not in his home, but in the home of the alleged victim, William Jones (TR-314). Butler also claimed the instruction was a comment on the evidence because it told the jury it was lawful for William Jones to have aimed a shotgun at Butler. That instruction, it was argued, was irrelevant: Jones denied having a shotgun during the encounter and said he was unarmed when Butler shot him (TR-85-87).

The jury found Butler guilty of burglary and attempted first degree murder of William Jones (R-19,20). He was

acquitted of the attempted murder of Wendy Jones (R-21). The trial judge imposed concurrent five year sentences on each count with three year minimum mandatory terms for possession of a firearm applicable to each (R-28-30).

On appeal the First District Court affirmed the convictions by a vote of 2-1. The majority found that the trial judge erred by failing to delete the portion of the standard jury instruction pertaining to the use of force when a defendant is attacked in his home and by modifying it to refer to the alleged victim. The Court said:

> 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 offense charged.
> 476 So.2d at 1335

Without analysis or explanation, however, the majority held that:

> A thorough review of the record and of the totality of instructions given satisfies us that, although the instruction was not proper, <u>it was harmless error in this case.</u> (Emphasis added).
> 476 So.2d at 1335-36

Judge Ervin agreed with the majority that the modified instruction was irrelevant and erroneous. He disagreed strongly with the finding of harmless error and wrote a dissenting opinion saying:

> 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).
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> * * * *
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> 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).
> 476 So.2d at 1336-37

Butler 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.

This Court granted discretionary review, sought on the basis of conflict with decisions of other appellate courts that harmless error does not apply when contradictory and confusing instructions are given on a material issue.

STATEMENT OF THE FACTS

Petitioner, Daniel Butler, was the father of a baby girl named Danielle. The mother, Christie Johnson, had been Butler's girlfriend for several years.

On December 9, 1983 Christie Johnson and Danielle were staying at the home of Christie's sister, Wendy Jones and brother-in-law, William (Gene) Jones (TR-29-32). Wendy Jones went to bed at approximately 12:30 a.m. on December 10th. She was awakened about 3:30 a.m. by the sound of her dog barking and saw Butler in the living room standing over her son Bruce, who was asleep on the couch (TR-30-31). She had not given Butler permission to be there (TR-32).

When asked by Wendy what he was doing there Butler said he had come after his woman and his child (TR-33).

Wendy showed Butler the room where Christie and Danielle were staying, turned on the lights, and woke them (TR-33-34). She also asked Butler to wait outside for Christie (TR-34). Instead, Butler sat on the bed saying he was "not going no damn place" (TR-35).

Wendy decided to wake her husband and see if he could "talk some sense into Danny and get him outside the house" (TR-35). She was headed for the bedroom when she heard Christie say "Danny, don't" (TR-35). Wendy turned and saw Butler in the den with Danielle in his arms. Christie was still in the bedroom. Wendy tried to stop Butler from taking the child out because she believed he had been drinking earlier and was not in fit condition (TR-36).

Wendy said that in trying to take the baby away from Butler she was shoved by him and they both began falling. She saw a gun in his hand and as they hit the floor the gun fired (TR-37). Butler then stood up and took two big steps and assumed a stance as if taking target practice. He pointed the gun toward the back bedroom where noises were coming from as William Jones was getting out of bed (TR-37,38). William Jones came out of the bedroom putting on his pants and Butler shot him (TR-39). According to Wendy her husband did not have anything in his hands at the time he was shot.

William Jones said he was asleep at about 3:30 when his oldest son came into the room and said "Danny is starting some trouble in there." (TR-85). Jones got up and started to put his pants on. He was zipping them up as he walked out of the bedroom and said "Danny". After saying that name Jones was shot (TR-85-87). He said he neither had anything in his hands nor had he threatened Butler at that time (TR-86,87). Jones also denied having later told Christie Johnson and Butler's mother that he might have had a stick or a gun when he left his bedroom (TR-103,300).

Butler's version of the shooting incident was altogether different. He said that when he went to the house Wendy let him in. After he picked up Danielle and started out the door Wendy jumped on his back and he fell (TR-248). His gun came out of his pocket; as he reached for it Wendy stomped his back causing the

gun to discharge accidentally (TR-248). William Jones then came into the room with a gun cocked and pointed at him. To scare Jones, Butler fired two shots at him (TR-249). Jones was struck by the second shot (TR-274).

Christie Johnson said when Butler arrived Wendy Jones took him to the bedroom and they began arguing. After Wendy walked out of the room Butler took the baby and he and Wendy got into a scuffle. Butler's gun discharged (TR-209-211). Christie said that William Jones came into the room with a gun. She took Danielle and went to the bathroom and stayed in the tub until after the shooting.

Butler was arrested at a convenience store shortly after the shooting. He told the police officer who approached him that he was the person the officer was looking for and admitted he had shot a man in Baldwin, where the Jones family lived. After being advised of his rights Butler told the officer that the man he shot was "going for a gun" (TR-124).

A .25 caliber automatic pistol was found in Butler's vehicle. A loaded clip and four or five rounds of ammunition were in his pocket (TR-157). Four spent .25 caliber shells were found in the Jones' house. There was no evidence of forced entry (TR-184-194).

SUMMARY OF ARGUMENT

The trial judge gave an instruction on justifiable use of force applicable when a person is attacked in his home. That instruction was not based on evidence offered by either party. Butler was the defendant claiming the right to use deadly force in self defense but he was not in his home at the time of the alleged offense. The home owner, whom Butler was accused of shooting, denied that he had armed himself or had otherwise used force to defend himself against Butler. The instruction on use of force by a person attacked at home was, therefore, not founded in the evidence and was confusing and contradictory.

The district court correctly found that the modified instruction was erroneous but the majority ruled, without explanation, that the error was harmless. Other appellate courts have refused to apply harmless error to contradictory and confusing instructions in similar circumstances. As noted by the dissenting judge, the instruction was in effect an adverse comment on the evidence, nullifying completely the theory of defense. The error caused by the instruction was aggravated by the prosecutor's reliance on it during closing argument.

In affirming the conviction the district court inexplicably minimized the prejudice suffered by Butler as a result of the erroneous modification of the standard jury instruction. This Court should quash that portion of the decision applying harmless error and should remand for a new trial.

ARGUMENT

ISSUE

WHETHER THE INSTRUCTION ON JUSTIFIABLE USE OF FORCE FOUND TO BE ERRONEOUS BY THE DISTRICT COURT WAS PREJUDICIAL ERROR REQUIRING REVERSAL OF PETITIONER'S CONVICTIONS.

The evidence in this case was conflicting. On the one hand the state's witnesses testified that Butler entered the Jones' home without permission and, after struggling with Wendy Jones, deliberately fired his pistol at William Jones as he entered the room fastening his pants. None of the witnesses for the state said that William Jones was armed. Jones himself said that he had nothing in his hands.

On the other hand, both Butler and Christie Johnson said that William Jones came out of his room carrying a shotgun. Butler said he fired at Jones to scare him after he heard the hammer click on the shotgun.

At issue, therefore, was the question of credibility. If the jury believed the state's witnesses, the use of force by Butler would not have been justified. But if the jury believed Butler, that Jones had a gun pointed at him, the self defense instruction would have been vital to evaluate whether Butler's actions were justifiable.

In this framework the justifiable use of force instruction was critical. It stated Butler's theory

of defense.[1] Undoubtedly Butler was entitled to the justifiable force instruction.

The instruction correctly given by the trial judge is quoted in full in the appendix at 8,9. It is the charge found in Florida Standard Jury Instructions in Criminal Cases, 3.04(d), (1981).

Instead of deleting the portion about a defendant attacked in his home as irrelevant to the theory of defense, the trial judge proposed to give it in modified form by changing "defendant" to "person." As changed, the instruction said:

> If a person is attacked in his own home or on his own premises, he has no duty to retreat and had 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 added) (TR-453, 454)

This was a departure from the standard instructions by referring to the non-necessity of retreat when a person is attacked in the home. The justifiable use of force instruction was meant for the protection of a defendant on trial. Since Butler was not defending himself in

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[1] A defendant in a criminal case has an absolute right to a jury instruction on the law applicable to his theory of defense when supported by some evidence, e.g., Hooper v. State, 476 So.2d 1253 (Fla. 1985).

his home the instruction did not apply to him and should have been omitted. The trial judge, instead, modified the standard instruction to support the right of the alleged victim to defend himself. This unauthorized modification of the standard charge was objected to by Butler's counsel who said:

> [N]umber one, it is irrelevant and, number two, it would amount to a comment on the evidence. The reason that it would be irrelevant in that it is not an issue in this trial as to whether or not the victim or in fact the defendant was attacked in his own home and whether since obviously the facts do not go to the defendant being in his own home and we are not requesting it that way, therefore the only reasonable reason it would be in the instruction or the only inference the jury would get would be that the victim was justified in all of his actions in getting a gun.
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> * * * * * * *
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> The fact that the Court intended to instruct in essence that, ... the victim who was in his own home acted certainly totally reasonably is a comment in my opinion on the evidence and is a comment to the jury that, ladies and gentlemen, this man was acting fine, and they could gain the inference from that that the fault is from the defendant's -- from this jury instruction but I strongly feel it is not an issue in this case. . . . (TR-314-316).

In Florida a trial judge is not permitted to comment, directly or indirectly, on the evidence. Section 90.106, Fla. Stat. (1983); Hamilton v. State, 109 So.2d 442 (Fla. 3rd DCA 1959). Butler's counsel was correct in describing the objectionable instruction as a disguised comment on the evidence. It told the jury that even if Butler's

testimony were true William Jones was justified in having a gun and, by implication, Butler was not justified in trying to defend himself. The prosecutor took up this theme in closing argument, portions of which illustrate vividly the erroneousness of the instruction.[1]

The prosecutor said:

> [E]ven if you find that he [Butler] didn't have the opportunity to retreat, I think there is another portion of the law that even shows he is guilty in light of something like that because the judge will tell you that a homeowner has certain rights that you as homeowners, Mr. Jones as a homeowner has a right to stand his ground inside his home and use what force necessary to protect his home, and the judge will tell you if the person is attacked in his own home or on his own premises he has no duty to retreat and has the lawful right to stand his ground and to meet force with force even to the extent of using force likely to cause death or great bodily harm if its necessary to prevent death or great bodily harm to himself.
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> [S]o 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 that he was in that man's home, and he was in that man's home at three in the morning.
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> He doesn't have the right to claim self defense. I think it's having that is very

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[2] Butler did not object to the prosecutor's argument. This is understandable because the argument was merely an elaboration of the jury charge. The fault lay in the decision originally made by the trial judge to give the instruction, an error properly preserved for appeal. It would have been futile to object to the argument springing from that improper instruction.

> important in this case, so in summary the defendant cannot believe that the victim is that violent a person, armed himself, going 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.
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> 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,
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> * * * * * * *
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> I told you earlier that even if Gene [William Jones] had the shotgun this man was not justified in shooting him because it was Gene's own home, and he has a right to defend his home. (TR-407-410,421)

Inherently and as exploited by the prosecutor, the challenged instruction gave the state the benefit of a situation which was disavowed even by its own witnesses. William Jones denied being armed. His wife, Wendy, supported that denial. The jury was allowed to find, however, that even if Jones lied under oath he had an abstract right to be armed and use force against Butler. This virtually negated the self defense argument and transformed the instruction designed to benefit Butler into a prosecution theory of guilt.

By giving the instruction the trial judge made the use of force by the occupant an abstraction. That is, even without evidence that William Jones believed it was necessary to use force to defend himself, the trial judge allowed the jury to make that conclusion

on behalf of Jones. That kind of speculation contradicts the ruling of this Court in Falco v. state, 407 So.2d 203 (Fla. 1981). The defendant Falco was charged with manslaughter for using a trap gun against a burglar. He had rigged a device which would fire a shotgun automatically if an inside door to the home were opened. No one was at home at the time a burglar entered the dwelling, attempted to open the door, and was killed by the rigged gun. The Court upheld the conviction under the general manslaughter statute even without a specific law against trap guns. It labelled as faulty the premise of Falco's argument that a property owner had a statutory "right" to use deadly force to protect himself or another from imminent death or great bodily harm or the imminent commission of a forcible felony. Rather, use of force is a privilege, limited to situations in which there existed a justifiable belief that reasonable force was necessary. The "castle doctrine" was defined as:

> [T]he proposition that a person's dwelling house is a castle of defense for himself and his family, and an assault on it with intent to injure him or any lawful inmate of it may justify the use of force as protection and even deadly force if there exist reasonable and factual grounds to believe that unless so used, a felony would be committed. (Emphasis added) 407 So.2d at 208.

Because the trap gun was incapable of exercising discretion or reason it could not invariably be justified as necessary. There was always the possibility that

were the owner present he would realize that use of deadly force in the circumstances was not necessary.

There is a strong analogy between Falco and this case. In Falco the Court said it could not be assumed that a person defending his home would find it necessary to use deadly force. In this case the occupant did not testify it was necessary to use any force and denied attempting to use force. Thus there was no evidence of the occupant's reasonable and factual belief that force was necessary. Despite Jones' denial, the jury was told that Jones would have been justified in using force.

The trial judge thus allowed the jury to ponder a theory of the case which was not based on the evidence. Manifestly, that theory was likely to have confused and misled the jury and prejudiced Butler's right to a fair trial.

Fla.R.Cr.P. 3.390(a) requires the trial judge to charge the jury "only upon the law of the case". This rule rests upon the fundamental principle expressed in Driver v. State, 46 So.2d 718 (Fla. 1950) that:

> [I]nstructions should be confined to the law applicable to the controversy. Abstract instructions on questions of law not applicable should not be given by a trial court.

A jury should only be given instructions which apply to the evidence and should not be given instructions

which are confusing, contradictory, or likely to be misleading. Finch v. State, 116 Fla. 473, 156 So. 489 (1934); Neumann v. State, 116 Fla. 98, 156 So. 237 (1934); Swindle v. State, 254 So.2d 811 (Fla. 2nd DCA 1971).

Jurors were apt to be puzzled by the justifiable force instructions as a whole. Even if jurors believed Butler's testimony that William Jones was armed, the modified instruction said that by arming himself Jones had acted lawfully. That instruction necessarily diluted the potency of Butler's theory of defense and unnecessarily compromised the efficacy of the justifiable force instruction intended for his benefit. Butler's right to defend himself even from a wrongful attack became doubtful to non-existant in light of the occupant's right to be armed. The defense of home instruction made the other justifiable force instructions confusing, if not outright contradictory.

For unexplained reasons the majority of district court judges considering this case failed to grasp the prejudice caused by the admittedly irrelevant instruction.[3]

Other 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:

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[3] State v. Murray, 443 So.2d 955 (Fla. 1985), implies that an appellate court should explicate on the record its analysis of harmlessness when serious error has been found.

> 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. . . .(Emphasis added)
> 116 Fla. at 443

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 the minimum standard and, thus, we must reverse.
> 463 So.2d at 559

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 Butler's conviction by the district court is contrary to 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.

In Swindle v. State, 254 So.2d 811 (Fla. 2d DCA 1971), 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.

Florida appellate courts have thus created a strong rule against use of harmless error when, as here, the instructions on a material issue are capable of causing confusion. This is a sound rule, because it can never be stated with confidence that the jury's verdict was not unduly guided, or at least influenced, by the erroneous charge.

As this Court said in Fla. Power & Light Co. v. McCollum, 140 So.2d 569 (Fla. 1962):

> A full consideration of the authorities reflects no intent to adopt an entirely subjective test as to whether a particular jury was actually misled, but instead the inquiry is whether the jury might reasonably have been misled. The requirement, in statutory language, is that an error must have "resulted in a miscarriage of justice." Such a miscarriage results when instructions are not only erroneous but also, as found in the instant case, reasonably calculated to confuse or mislead. (Footnotes omitted)

The test is whether the instruction "may have misled the jury and caused them to arrive at a

conclusion that otherwise they may not have reached." Veliz v. American Hospital, Inc., 414 So.2d 226, 228 (Fla. 3rd DCA 1982), petition for review denied 424 So.2d 760. By affirming Butler's conviction when the instructions were undeniably misleading and were likely to have confused the jury, the district court misapplied harmless error. No precedents support affirmance in these circumstances.

In light of the combined errors in instruction and argument Butler's convictions should have been reversed. The First District should have followed Harvey v. State, 488 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.

The modified and abstract defense of home instruction in this case had the wrongful effect of telling the jury that William Jones was right in defending himself by pointing a gun at Butler, without any evidence from Jones that he did so, or believed it necessary to do so. The jury was also given the impression through the instruction and the prosecutor's argument that the defense of home doctrine justified force for offensive purposes, with the necesary implication being that regardless of the circumstances Butler had no legitimate self defense claim.

This error in the instruction tainted both the attempted murder and burglary convictions. The theory

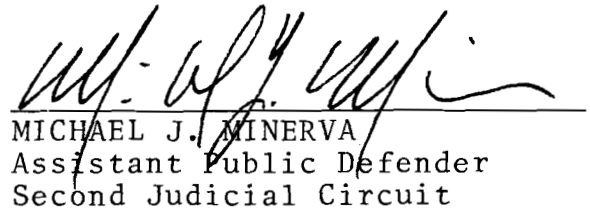
of the prosecution was based upon either premeditation or felony murder, with the underlying felony being the burglary (TR-319). By agreement and ruling of the court the unlawful intent supporting the burglary was the intent to commit battery upon William Jones (TR-332-342). If the jury had been wrongly induced to discard the self defense theory in considering attempted murder, there was a corresponding detrimental effect on the deliberations of Butler's intent to commit battery upon Jones. Without proper self defense instructions the jury was not adequately charged on the crime of burglary.

The flawed instruction was therefore both erroneous and harmful and the prejudice affected both convictions. The District Court should have reversed.

CONCLUSION

The decision of the District Court finding harmless error should be quashed and the cause remanded with directions to order a new trial.

Repectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits has been furnished to Ms. Andrea Hillyer, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. Daniel Butler, #094028, Post Office Box 628, Lake Butler, Florida, 32054, this 10th day of April, 1986.

MICHAEL J. MINERVA