IN THE SUPREME COURT OF FLORIDA

OPHELIA REDDEN,	)	
	)	
Petitioner	)	
	)	
vs.	)	
	)	CASE NO. 68,093
STATE OF FLORIDA	)	
	)	
Respondent.	)	
	)	

PETITIONER'S BRIEF ON THE MERITS

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AUTHORITIES CITED

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In the brief the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal.

STATEMENT OF THE CASE

Appellant was charged by way of an information filed in the Fifteenth Judicial Circuit with manslaughter. R 320. Appellant was convicted of manslaughter. R 332. Appellant was scored under the sentencing guidelines, pursuant to Fla.R.Crim.P. 3.701 in the three to seven year imprisonment presumptive range. R 333. Appellant was sentenced to seven (7) years in prison. R 336. Appellant filed a timely notice of appeal to the Fourth District Court of Appeal.

On December 4, 1985, the Fourth District Court of Appeal affirmed Appellant's conviction (See Appendix) However the Fourth District Court of Appeal certified the same question of greater public importance certified to this Court by the Fifth District in Jones v. State, 459 So.2d 475 (Fla. 5th DCA 1984), rev. granted, Jones v. State, Case No. 66,335 as follows:

> 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? Id. at 476.

Timely Notice to Invoke the Court's jurisdiction was filed by Appellant. Petitioner's Initial Brief on the Merits follows.

STATEMENT OF THE FACTS

Lawrence Cooper who resides in Pahokee, Florida testified that he is a friend of Appellant. R 67. Appellant rode to Belle Glade, Florida for a drink with Lawrence Cooper and Cynthia Wright on June 29, 1984. R 68. Lawrence Cooper owned a .30 caliber pistol. This pistol found at the crime scene was in his truck before the incident. R 70. When they were in the vehicle, Appellant picked up the gun. R 71. Lawrence Cooper told Appellant to put the gun down because someone may get hurt. R 72. Appellant laid the gun down. R 72.

They went to a Stop N Go in Pahokee to purchase some food. R 72. Lawrence Cooper went into the store. R 72. While he was in the store, he heard a shot. R 72. When he came out of the store Appellant was standing by his pick-up truck with the gun in her hand. R 73-74. Lawrence Cooper took the gun out of her hand and threw it in the truck. R 74. The pistol may have been cocked when he took it from Appellant's hand. R 77. He heard one shot. R 90.

The next witness called by the state was Cynthia Wright who testified that on June 30, 1984, she was in a vehicle with Appellant and Lawrence Cooper. R 97-99. While they were in a truck, she observed Appellant show a gun that was under the vehicle seat to Lawrence Cooper. R 101.

They arrived at a store in Pahokee. R 102. Lawrence Cooper went into the store. R 102. Appellant and Cynthia Wright remained in the truck. R 103. Cynthia Wright told Appellant to put down the gun she was holding because she might shoot someone.

R 103. Appellant did not put the gun down. R 103. Cynthia Wright got out of the vehicle and spoke to a man, Ricky Fields. R 103-104, 115.

At this time, Loretta Love with a broken bottle in her hand walked up to Cynthia Wright who was in the store parking lot. R 103. Appellant, with a gun in her hand, jumped out the truck. R 103. She hollered to Cynthia Wright. R 104. Eugene Steele came over to speak with Loretta Love. R 108. He told Loretta Love that she was wrong. R 108. Cynthia Wright then walked away from Loretta Love toward Appellant at the truck. R 108-110. Appellant was standing in front of the car door with a gun. The gun went off. R 108. Eugene Steele was struck with a bullet and fell down. R 113. Appellant was holding the gun with two hands. R 113.

On cross-examination, Cynthia Wright testified that Loretta Love came up to her with a broken wine bottle. R 116. Loretta Love told Cynthia Wright to stay away from her boyfriend. R 116-118.

Loretta Love testified that on June 30, 1984, at approximately 3:40 a.m., she was at the Stop N Go in Pahokee, Florida. R 131. She walked up to Cynthia Wright with a broken bottle in her hand. R 131, 144. She told Cynthia Wright to leave her boyfriend alone. R 132. She was angry at Cynthia Wright for calling her boyfriend. R 143. Then Appellant, with a gun in her hand, jumped out of the truck and called Loretta Love a "bitch." R 132. Loretta Love dropped the broken bottle. R 134. Loretta

Love said to Appellant, "Well, shoot me then, bitch." R 132. Eugene Steele walked up to Loretta Love. Appellant shot the gun. Eugene Steele was struck with a bullet in his chest. R 132.

Detective Radford testified that on June 30, 1984, he took a taped statement from Appellant concerning this incident. R 167. During this statement, Appellant was advised of her " Miranda rights." R 169-171.

Appellant told Detective Radford that Lawrence Cooper, Cynthia Wright and she went to the Stop N Go in Pahokee. R 173. Loretta Love with a bottle approached Cynthia Wright in the parking lot. R 174. Appellant had a gun in her hand that she found in the truck. R 175. Appellant told Loretta Love that she was not going to hit Cynthia Wright. R 175-176. Loretta Love threw the bottle down and then the gun went off. R 176. The bullet struck Eugene Steele who was standing between the two women. R 177.

Appellant told the officer that she did not intentionally shoot Eugene Steele. R 177. She did not fire the gun to prevent anyone from hurting anyone else. R 177-178. Appellant did not know this gun was real. R 178-179. Appellant did not pull the hammer or release the trigger. R 179. The gun just went off by itself. R 182, 196-189. Appellant wanted to scare Loretta Love with the gun which Appellant believed was not a real gun. R 185. Appellant indicated to the officer that she was throwing the gun up into the air. R 182.

The next witness called by the state was Charles Myers, an expert in the field of forensic ballistics. R 207. Charles Myers examined the pistol that was handled by Appellant. R 208. It was in a safe operating condition. R 209. This gun had a normal trigger pull. R 210. There would have to be a movement with more than four pounds of pressure rearward on the trigger before discharge could occur. R 213.

Appellant took the stand on her own behalf. R 222. During the early morning of June 30, 1984, Appellant was in a truck with Lawrence Cooper and Cynthia Wright. R 223. She did not believe that this gun was real. R 223. When they arrived at the Stop N Go in Pahokee, Lawrence Cooper went to the store. R 224. Cynthia Wright and Loretta Love engaged in a conversation in the parking lot. R 224. Then Loretta Love went to the side of the store and emerged with a bottle. R 224. Appellant thought that Loretta Love was going to cut or kill Cynthia Wright. R 224-225. Appellant jumped out of the truck with a gun in her hand. R 225. Eugene Steel walked up to Loretta Love. R 225. The gun just went off. R 225.

Appellant testified that she did not pull the trigger on the gun. R 225. Appellant's intention was to prevent Loretta Love from hurting Cynthia Wright. R 225. She had absolutely no intention of killing Eugene Steele. R 225. Appellant also testified that she did not hear Lawrence Cooper tell her to put the gun down while they drove in the vehicle. R 229.

SUMMARY OF THE ARGUMENT

In Harris v. State, 438 So.2d 787 (Fla. 1983), cert. den., ___U.S.___, 104 S.Ct. 2181 (1984), this Honorable Court held that a defendant has a procedural right to have instructions on necessarily lesser included offenses. This right may be waived just as the right to jury trial may be waived. This Court held that:

> But, for an effective waiver, there must be more than just a request from 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 is was knowingly and intelligently made.

At bar, there clearly was not an effective waiver of the procedural right to instructions on all the necessarily included lesser offenses supported by the evidence to the crime charged, manslaughter. Although the trial judge did instruct the jury on the crime of aggravated battery over Appellant's objection, aggravated battery is not a valid or proper lesser included offense of manslaughter. Said instruction was nullity and thereby Appellant was deprived of her procedural right to an instruction on all proper or valid lesser included offenses supported by the evidence. There is no indication in the Harris decision that it should be limtied to capital cases. Hence this Honorable Court should answer the certified question in the affirmative and reverse petitioner's conviction.

ARGUMENT

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 SHE PERSONALLY, KNOWINGLY AND INTELLIGENTLY WAIVED HER 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 benefits 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.

This 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). In State v. Washington, 268 So.2d 901 (Fla. 1972), this Court held that the trial court correctly instructed the jury upon necessarily lesser included offenses over objection of a 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).

In State v. Bruns, 429 So.2d 307 (Fla. 1983), a non-capital case, this Court 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. However this court was concerned about the integrity of the jury deliberation

process whereby guilt or innocence was determined in a manner without other appropriate alternatives being provided to the jury. 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, this Court 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). This Court 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 States 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. (citations 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. Id. at 796-797 (e.s.)

Although Harris was a death case, this Court conspicuously did not limit its holding solely to death cases. The emphasized language, supra, 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. There is no indication in the Harris decision as suggested by the Fourth District in this cause that it should be limited to capital cases. Thus this Court should answer the certified question in the affirmative and vacate the decision of the Fourth District.

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, this Court 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.

At bar, Petitioner was charged and tried for an offense committed after the effective date of the Harris decision. During the charge conference, Petitioner's trial counsel stated the following on lesser included offenses:

> THE COURT: What about LIO's? Are there going to be any LIO's?
>
> MS. WASHINGTON [Petitioner's trial counsel]: I am not requesting any.
>
> THE COURT: It is manslaughter or not guilty?
>
> Any verdict forms, Mr. State?
>
> MR. BARLOW: The State is going to request an LIO of aggravated battery with a firearm. R 250.

Petitioner's trial counsel objected to an instruction on aggravated battery as a lesser included offense as follows:

> MS. WASHINGTON: Judge, I'm having a lot of problems with this aggravated battery as a lesser included offense. Manslaughter does not have a minimum. It sounds like a greater included offense rather than a lesser.
>
> I am objecting that it be included.
>
> THE COURT: And you are asking for it, Mr. Barlow?
>
> MS. WASHINGTON: I cannot see it being a lesser included offense for the life of me. Maybe I am missing something.
>
> MR. BARLOW: Yes, Your Honor, I am asking for it. I believe this is a case that says it is a lesser.
>
> THE COURT: Well, what I'll have to do, in reading that definition of aggravated battery with a firearm, I'll have to add -- instead of using the word deadly weapon, I'll have to read the word firearm each time it says deadly weapon.
>
> I'll give that LIO over your objection. A matter of strategy, here. R 252-253.

A defendant has a procedural right to have instructions on necessarily included lesser offenses. Harris. This Court in approving the new standard jury instructions and schedule of lesser included offenses renumbered and reduced the Brown v. State, 206 So.2d 377 (Fla. 1968) categories to two:

> 1. Offenses necessarily included in the offense charged, which will include some lesser degrees of offenses; and
>
> 2. Offenses which may or may not be included in the offense charge, depending on the accustory pleading and evidence, which includes all attempts and some lesser degrees of offenses.

See In Re Use By Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981).

In the schedule of lesser included offense, which is presumptively correct and complete, Ray v. State, 403 So.2d 956, 961 n. 7 (Fla. 1981), Culpable Negligence, §784.05(1), 784.05(2) is a category one lesser included offense of manslaughter and attempted manslaughter, aggravated assault, battery, assault are category two lesser included offenses. Fla. Standard Jury Instructions in Criminal Cases (2d ED. 1981) (p. 259). The right to these instructions may be waived. However, under Harris, "there must be more than just a request from 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, at797. At bar, there clearly was not an effective waiver of the procedural right to instructions on the necessarily included lesser offenses to the crime of manslaughter which was supported by the evidence. There was evidence to support the crimes of culpable negligence, aggravated assault and simple battery. There was not an express waiver by the defendant of the lesser included offenses. There was nothing in the record to indicate that it was knowingly and intelligently made. Harris. Therefore on the authority of Harris, Petitioner's conviction should be reversed and this cause remanded for a new trial.

Petitioner acknowledges that the trial judge did instruct the jury on the crime of aggravated battery with a firearm over Petitioner's trial counsel's timely objection. R 252. The prosecutor requested said instruction and the trial judge overruled Appellant's objection to the instruction. R 253.

The trial judge erred in overruling Appellant's objection to an instruction on the crime of aggravated battery as a lesser included offense of manslaughter. Aggravated battery is not a category one or category two lesser included offense of manslaughter under the schedule of lesser included offenses approved by the Florida Supreme Court, supra. Also aggravated battery would not be a lesser included offense under the Blockburger Rule as delineated in State v. Gibson, 452 So.2d 553 (Fla. 1984); See also, Hall v. State, 10 FLW 1444 (Fla. 4th DCA June 12, 1985). In addition, aggravated battery and manslaughter are second degree felonies with the same potential penalties. The penalty aspect of offenses has been frequently considered in the substantive analysis of the identity of the offenses in double jeopardy cases. State v. Gibson; State v. Carpenter, 417 So.2d 989 (Fla. 1982). In Michaels v. Swanson, 403 So.2d 1023 (Fla. 2d DCA 1981), the Court held aggravated battery was a lesser included offense of manslaughter. However this case was wrongly decided or impliedly overruled by the adoption of the schedule of lesser included offenses by this Court.

Also it must be noted that the issue at bar is not what offenses are necessarily lesser included offenses of manslaughter under the double jeopardy clause. Rather, the issue is what

offenses are necessarily lesser included offense for purposes of jury instructions. This Court in State v. Baker, 456 So.2d 419 (Fla. 1984), noted: "We disagree and hold that the statutory language refers only to necessarily lesser included offenses and that the Brown category four lesser included offense analysis, while still possibly viable for jury alternatives, has nothing to do with double jeopardy." Id., at 420 (e.s). The Baker court further stated at Footnote 2 at 420: "We do not address this issue in this case."

In Benjamin v. State, 462 So.2d 110 (Fla. 5th DCA 1985), the Fifth District found that a defendant charged with resisting an officer with violence was entitled to a jury instruction on the category two lesser included offense of resisting arrest without violence. Hence, it follows from Baker and Benjamin that Appellant had a procedural right to an instruction on all category one and category two lesser included offenses for the crime charged, manslaughter, that is supported by the evidence. See Harris; Fla.R.Crim.P. 3.510. The trial court's instruction on aggravated battery as a "lesser included offense" was a nullity. It is not a proper lesser included offense and said instruction was objected to by Appellant on that basis.

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, supra. 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, this Court has cast an

affirmative duty upon the trial judge to inquire of the defendant personally as to 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.

Therefore the trial court reversibly erred in failing to obtain an express waiver, knowingly and intelligently made by Petitioner, herself, on the record of Petitioner's right to proper or valid jury instructions on all necessarily lesser included offenses (Category 1 and/or Category 2) supported by the evidence trial. This is fundamental reversible error. The Fourth District erred in affirming Petitioner's conviction. Hence the decision of the Fourth District must be reversed and this cause remanded to the trial court for a new trial.

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 Fourth District Court of Appeal, and to remand the matter with directions that Petitioner's 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 copy of the foregoing has been furnished to RICHARD BARTMON, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 24th day of January, 1986.

Of Counsel