047

68,093

IN THE SUPREME COURT OF FLORIDA

OPHELIA REDDEN,

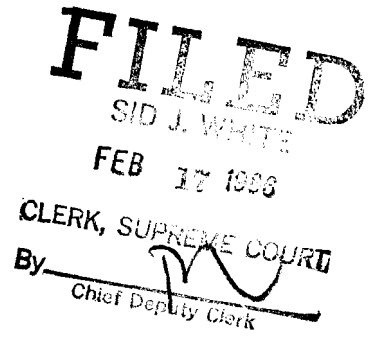
Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 68,093



RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	PAGE
LIST OF CITATIONS	i-iv
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3-4
POINT ON APPEAL	5
SUMMARY OF ARGUMENT	6
ARGUMENT	
TRIAL COURT APPROPRIATELY REGARDED DEFENSE COUNSEL'S WAIVER OF INSTRUCTIONS ON NECESSARILY INCLUDED OFFENSES, WHEN COUPLED WITH APPELLANT'S SUBSEQUENT COURSE OF CONDUCT, AS VALID WAIVER OF SUCH INSTRUCTIONS; CERTIFIED QUESTION SHOULD BE ANSWERED BY THIS COURT IN THE NEGATIVE	7-20
CONCLUSION	21
CERTIFICATE OF SERVICE	21

LIST OF CITATIONS

CASE	PAGE
Anderson v. State, 467 So.2d 781 (Fla. 3rd DCA 1985)	18
Austin v. State, 406 So.2d 1128, 1131-1132 (Fla. 4th DCA 1981)(on rehearing)	15, 16
Baker v. State, 425 So.2d 36, 50 (Fla. 5th DCA 1982)(Cowart, J, dissenting opinion), disapproved	19
Beck v. Alabama, 447 U.S. 625, 100 S.Ct 2382, 65 L.Ed.2d 392 (1980)	8, 9
Brooks v. Kemp, 762 F.2d 1383, 1400 (11th Cir. 1985)(en banc)	9
Brown v. State, 206 So.2d 377 (Fla. 1968)	9
Bufford v. State, 473 So.2d 795, 796 (Fla. 5th DCA 1985)	10, 11
Cannon v. State, 456 So.2d 513 (Fla. 5th DCA 1984)	10
Casillas v. Scully, 769 F.2d 60, 63 (2nd Cir. 1985)	9
Castor v. State, 365 So.2d 701 (Fla. 1978)	15, 16
Clark v. State, 363 So.2d 331 (Fla. 1978)	15, 16
Cutter v. State, 460 So.2d 538, 539 (Fla. 2nd DCA 1984)	16
Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct 1708, 64 L.Ed.2d 335, 345-346 (1980)	16
Daughtery v. State, 269 So.2d 426 (Fla. 1st DCA 1972)	13
Dumas v. State, 439 So.2d 246, 251 (Fla. 3rd DCA 1983)	14, 15

CASE	PAGE
Ferguson v. State, 417 So.2d 639, 641-642 (Fla. 1982)	15
Gardner v. Florida, 430 U.S. 349, 357-358, 97 S.Ct 1197, 51 L.Ed.2d 393 (19) (Stevens, J, concurring)	8, 9
German v. State, 379 So.2d 1013 (Fla. 4th DCA 1980)	12
Harris v. State, 438 So.2d 787 (Fla. 1983)	6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18
Johnson v. State, 249 So.2d 452 (Fla. 4th DCA 1971)	13
Jones v. State, 440 So.2d 570 (Fla. 1983)	12
Jones v. State, 459 So.2d 475 (Fla. 5th DCA 1984), cert. granted, Case No. 66,335 (Fla., January, 1985)	7, 8
Lighthouse v. State, 438 So.2d 380 (Fla. 1983)	12
Lockett v. Ohio, 438 U.S. 586, 98 S.Ct 2954, 57 L.Ed.2d 973 (1978)	8
McCullers v. State, 206 So.2d 30 (Fla. 4th DCA 1968)	19
Michaels v. Swanson, 403 So.2d 1023 (Fla. 2nd DCA 1981)	19, 20
Miller v. Stagner, 757 F.2d 988 (9th Cir. 1985), amended, 768 F.2d 1090, 1091 (9th Cir. 1985)	9
Mosley v. State, 11 FLW 316 (Fla. 1st DCA, January 31, 1986)	7, 8, 10, 11, 12
Nelson v. State, 450 So.2d 1223 (Fla. 4th DCA 1984)	15

CASE	PAGE
North Carolina v. Butler, 441 U.S. 369, 99 S.Ct 1755, 60 L.Ed.2d 286, 292 (1979)	12, 13
Privett v. State, 417 So.2d 805 (Fla. 5th DCA 1982)	13
Redden v. State, 10 FLW 2683 (Fla. 4th DCA, December 4, 1985)	7, 8, 10
Rotenberry v. State, 468 So.2d 971, 976 (Fla. 1985)	19, 20
Sessums v. State, 404 So.2d 1290 (Fla. 3rd DCA 1981)	11, 14, 15, 16
State v. Abreau, 363 So.2d 1063 (Fla. 1978)	9, 10, 20
State v. Baker, 456 So.2d 419 (Fla. 1984)	20
State v. Bruns, 429 So.2d 307 (Fla. 1983)	9, 10, 16
State v. Bucherie, 468 So.2d 229 (Fla. 1985)	18
State v. Cumbie, 380 So.2d 1031 (Fla. 1980)	15
State v. ex rel Gutierrez v. Baker, 276 So.2d 470 (Fla. 1973)	15
State v. Stirrup, 469 So.2d 845 (Fla. 3rd DCA 1985)	17
State v. Thomas, 362 So.2d 1340 (Fla. 1978)	10
State v. Washington, 268 So.2d 901 (Fla. 1972)	9
Strickland v. Washington, ___U.S.___, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984)	17
United States v. Hasting, ___ U.S.___, 103 S.Ct 1974, 76 L.Ed.2d 96 (1983)	17
Williams v. State, 440 So.2d 1290 (Fla. 4th DCA 1983)	11, 14

CASE	PAGE
Yohn v. State, 476 So.2d 123 (Fla. 1985)	19, 20

OTHER AUTHORITIES

In re Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 597 (Fla. 1981)	19
§775.021(4), Fla. Stat. (1983)	20
Rule 3.191, Fla.R.Crim.P. (1984)	15
Rule 3.260, Fla.R.Crim.P.	13
Rule 3.390(d), Fla.R.Crim.P.	15
Rule 3.850, Fla.R.Crim.P.	17

PRELIMINARY STATEMENT

The Petitioner, OPHELIA REDDEN, was the Appellant and Respondent, STATE OF FLORIDA, was the Appellee, before the Fourth District Court of Appeal.

In this Brief, Ophelia Redden will be referred to as "Petitioner", and State of Florida as "Repondent".

"R" will refer to the Record-on-appeal of the trial proceedings, before the Circuit Court in and for Palm Beach County, Florida.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement, to its limited extent, and makes the following additions, clarifications and corrections:

There was overwhelming evidence of Petitioner's guilt of the manslaughter charge, in the State's case-in-chief, including, inter alia, eyewitness observations of Petitioner holding the gun, and firing it, hitting and killing Eugene Steele (R, 83, 84, 111, 113, 125, 132, 134, 137); evidence that Cynthia Wright had walked away from Lovey Love and Eugene Steele, when Petitioner fired the shots, so that Love would have had to go around Eugene Steele to get to Wright (R, 110, 112, 119, 125-127); testimony that Petitioner was warned, before the shooting, not to play with the gun she found in Lawrence Cooper's truck, since if she did, it might fire, hurting somebody (R, 72, 86, 103); and evidence that the gun had to be cocked, in order to be fired, was cocked when taken from Petitioner's hands after the shooting, and was not originally left by Cooper in a cocked position, before Petitioner picked it up in the truck. (R, 73, 74, 77, 90, 91).

At the charge conference, the trial court asked if there were any lesser included offense instructions to be given. (R, 250). It is evident that Petitioner was present, as her counsel, with whom she had not, and did not thereafter express dissatisfaction, stated that "I am not requiring any". (R, 250, 257). The State requested the lesser included offense of aggravated battery with a firearm. (R, 250). Subsequently, defense counsel indicated "problems" with this instruction, noting that manslaughter had no minimum sentence, and that aggravated battery "sounds like" a greater, rather than lesser offense of manslaughter. (R, 252, 253). After the State argued it was an appropriate lesser offense in the subject case, the trial court agreed

to give the instruction. (R, 253).

In defense counsel's final argument to the jury, she maintained that Appellant's conduct was reasonable, in order to keep her friend, Cynthia Wright, from being hurt, and that because of this the jury should have enough reasonable doubt to acquit Appellant, rather than convict her of manslaughter. (R, 257-264). There was no argument or reference by Appellant's counsel of any lesser degree of manslaughter. (R, 257-264).

Petitioner did not make or indicate any objection, challenge or disagreement, with defense counsel's statement that he was not requesting any lesser included offense instructions, or with his closing argument, which emphasized an "all or nothing" approach for the jury. (R, 250-264).

POINT ON APPEAL

WHETHER THE TRIAL COURT APPROPRIATELY REGARDED DEFENSE COUNSEL'S WAIVER OF INSTRUCTIONS ON NECESSARILY INCLUDED OFFENSES, WHEN COUPLED WITH APPELLANT'S SUBSEQUENT COURSE OF CONDUCT, AS VALID WAIVER OF SUCH INSTRUCTIONS; AND WHETHER CERTIFIED QUESTION SHOULD BE ANSWERED BY THIS COURT IN THE NEGATIVE?

SUMMARY OF ARGUMENT

The Fourth District appropriately and correctly concluded that the requirement of a personal waiver by a criminal defendant, of jury instructions on lesser included offenses, as mandated in this Court's decision in Harris v. State, 438 So.2d 787 (Fla. 1983), does not apply in a non-capital case, and is limited in application solely to capital offenses. At bar, there was an effective waiver by Petitioner (through counsel), by his actions, of instructions on any lesser included offenses.

Further, the trial court appropriately instructed the jury on aggravated battery, at the State's request, as a lesser included offense of manslaughter, since it is necessary to prove each element of aggravated battery, in proving the elements of manslaughter. Assuming arguendo that aggravated battery was not proper as a lesser included offense, the jury verdict on the greater offense renders such error, if any, harmless.

ARGUMENT

TRIAL COURT APPROPRIATELY REGARDED DEFENSE COUNSEL'S WAIVER OF INSTRUCTIONS ON NECESSARILY INCLUDED OFFENSES, WHEN COUPLED WITH APPELLANT'S SUBSEQUENT COURSE OF CONDUCT, AS VALID WAIVER OF SUCH INSTRUCTIONS; CERTIFIED QUESTION SHOULD BE ANSWERED BY THIS COURT IN THE NEGATIVE.

Petitioner has maintained that a personal and express waiver by a criminal defendant, in a non-capital case, of his right to jury instructions on lesser included offenses, is mandated by considerations of procedural due process, and of the "pardon power" of a jury. In accord with this view, Petitioner has urged this Court to reject the Fourth District's decision herein, that this Court's opinion in Harris v. State, 438 So.2d 787 (Fla. 1983), requiring a personal waiver by a criminal defendant in a capital case, was limited to such cases. Redden v. State, 10 FLW 2683 (Fla. 4th DCA, December 4, 1985). Because Petitioner's argument places undue emphasis on form over substance, misinterprets this Court's Harris decision, and would result, if logically extended, in encouraging manipulation of the criminal justice system by criminal defendants, this Court should affirm the Fourth District's opinion in this case.

It is particularly noteworthy to point out that all three district courts, which have considered the certified question posed herein, have concluded that a criminal, non-capital defendant is not required to personally waive her rights to "lesser included offense" jury instructions. Mosley v. State, 11 FLW 316 (Fla. 1st DCA, January 31, 1986); Redden, supra; Jones v. State, 459 So.2d 475 (Fla. 5th DCA 1984), cert. granted, Case No. 66,335 (Fla., January, 1985). Of particular significance, is that all three decisions distinguish the Harris decision (heavily relied

on by Petitioner herein, and the defendant in all three cases, including Redden), as requiring the defendant's personal waiver of such instructions, to capital cases only, contrary to Petitioner's interpretation of the Harris case. Id.[1]

A close examination of this Court's Harris decision, clearly supports the view of the Fourth District (and First and Fifth Districts, as well), that the import of such decision was confined to capital cases. In Harris, a death penalty case, this Court relied on the United States Supreme Court's holding in Beck v. Alabama, 447 U.S. 625, 100 S.Ct 2382, 65 L.Ed.2d 392 (1980), when it concluded in Beck that a state could not procedurally prohibit the giving of a lesser included instruction in a capital case. Harris, at 796-797. Additionally, the Beck court specifically relied upon the "death penalty is different" rationale, in concluding that a criminal defendant was entitled to a "lesser included offense" instruction, in a capital case, even while noting that the Court had never held such a finding, "as a matter of due process". Beck, supra, 65 L.Ed.2d, at 402-403, quoting Gardner v. Florida, 430 U.S. 349, 357-358, 97 S.Ct 1197, 51 L.Ed. 2d 393 (1977)(Stevens, J, concurring); also, see Lockett v. Ohio, 438 U.S. 586, 98 S.Ct 2954, 57 L.Ed.2d 973 (1978). Thus, the Harris court's reliance on the Beck decision, in any respect, mandates a conclusion that in this case, non-capital in nature, there is no right to a personalized waiver by Petitioner, of the subject instruction. Mosley; Jones; Redden; Harris; Beck. This conclusion is significantly substantiated by the Beck

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[1] In all three decisions, the applicability of the Harris "personal waiver" requirement to non-capital cases has been certified to this Court. Mosley, supra, at 317; Redden, at 2683; Jones, supra, at 476. Oral argument occurred before this Court, in Jones, on September 8, 1985.

court's refusal to extend this rationale to non-capital cases, thereby limiting its holding to cases involving the death penalty. Beck, 65 L. Ed.2d, at 403, n. 14. Subsequent Federal decisions, which have relied on Beck, have referred to the decision, as being expressly based on the magnitude of the stakes involved in a death penalty case, as initially noted in Gardner. Beck, at 402, 403; Casillas v. Scully, 769 F.2d 60, 63 (2nd Cir. 1985); Miller v. Stagner, 757 F.2d 988 (9th Cir. 1985), amended, 768 F.2d 1090, 1091 (9th Cir. 1985); Brooks v. Kemp, 762 F.2d 1383, 1400 (11th Cir. 1985)(en banc).[2] In view of these circumstances, Petitioner can not reasonably maintain that either Harris or Beck can or should be applied, in a non-capital case context.

Petitioner has sought to avoid this construction of Harris and Beck, and the Fourth District's appropriate interpretation of these cases, by relying on decisions in non-capital cases by this Court, which have essentially required that lesser included offense instructions be given, regardless of the existence of any evidence of proof of same, so as to enable juries to exercise an inherent "pardon power". State v. Bruns, 429 So.2d 307 (Fla. 1983); State v. Abreau, 363 So.2d 1063 (Fla. 1978); State v. Washington, 268 So.2d 901 (Fla. 1972); Brown v. State, 206 So.2d 377 (Fla. 1968). There is little question that Petitioner's argument, in support of the "personal waiver" requirement in non-capital cases, is based on the preservation of the "pardon power" concept, since the entire analysis, in the aforementioned cases, of the refusal to give certain les-

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[2] Although the Second Circuit specifically declined to reach the question of the application of Beck to non-capital cases, it is apparent, from the references and quoted passages from Beck, made in Casillas, that the Second Circuit viewed the Beck decision, as primarily, if not solely, based on the capital nature of the case. Casillas, supra, at 63.

ser included offense as jury instructions, and the harmful or harmless effect such refusal had on the verdicts therein, was predicated on this concept. Bruns, supra, at 310; Abreau, supra, at 1064; State v. Thomas, 362 So.2d 1340 (Fla. 1978). It is axiomatic that a jury's pardon power, permits a jury to exercise mercy in a verdict, and allows a jury to convict a defendant of a less serious crime, when proof is absent on a necessary element of a greater-charged offense. Bufford v. State, 473 So.2d 795, 796 (Fla. 5th DCA 1985); Cannon v. State, 456 So.2d 513 (Fla. 5th DCA 1984); Thomas, supra. However, contrary to Petitioner's position, approval of a "personal waiver by defendant" requirement, in this non-capital case, so as to foster and protect a jury's pardon power, would destroy, not enhance the integrity of the process of jury deliberations.

The substance and language of the Mosley decision, amply substantiates this conclusion. The First District, in adopting the Fourth District's decision in Redden, specifically rejected Petitioner's conclusions that an extension of Harris to non-capital cases would promote integrity in deliberations:

> It is only because the Supreme Court of Florida has adopted the phenomenon of the "jury pardon" as part of the jurisprudence of our State that a defendant can be heard to complain about the failure to instruct on lesser offenses notwithstanding the fact that he has been properly proved and found guilty of the offense charged. We do not believe that the Supreme Court intended in Harris that its holding adopting the above-referred stringent waiver requirements be extended to non-capital cases, particularly when defense counsel, as here, specifically requests, on behalf of his client, that the trial judge not instruct on any offense except that with which the defendant is charged. Such an extension of Harris would, we feel,

> be exalting the notion of jury pardons to a level beyond justification and reasons. Further growth of the jury's pardon power should not be encouraged because of conflicts with the jury's basic duty to decide the case in accordance with the law and the evidence and to disregard the consequences of its verdict. See Bufford v. State, 473 So.2d 795 (Fla. 5th DCA 1985); Gilford v. State, 313 So.2d 729 (Fla. 1975). This basic duty of the jury is carefully drawn and circumscribed throughout the standard criminal jury instructions.

(footnotes omitted)(e.a.) As the First District noted, it is entirely inconsistent to maintain that a "personal waiver" requirement would advance the motion of jury pardon, when defense counsel, with Petitioner's presence and acquiescence, specifically rejected any such "lessers", for a tactical, "all or nothing" approach. (R, 250, 257; 258-264). The integrity of the process of jury deliberations would be subverted, by permitting Petitioner the benefit of affording the jury an opportunity to convict her of a less serious offense, when Petitioner, through counsel, expressly indicated that she did not want the jury to exercise mercy, in the form of a verdict on a less serious offense, than the greater one charged. Mosley; Bufford, supra.

Furthermore, an extension of Harris, to non-capital cases, would permit and encourage defendants such as Petitioner to "sandbag" their trials, even though a defendant might have been present, when statements of waiver were made on their behalf. Williams v. State, 440 So.2d 1290 (Fla. 4th DCA 1983); Sessums v. State, 404 So.2d 1074 (Fla. 3rd DCA 1981). Taken to its logical conclusion, Petitioner would be rewarded, for acquiescing in her counsel's actions at trial, and choosing later not to be bound by such statements, because of the unfavorable outcome of her trial,

and her "all or nothing" strategy. German v. State, 379 So.2d 1013 (Fla. 4th DCA 1980). As the court in Mosley indicated, this probable scenario was clearly not intended by this Court in its Harris decision, especially in view of the fact that Petitioner, by her actions, did not want a jury pardon to be a possible alternative verdict available to the jury. Mosley, at 317.

Respondent does not doubt that Harris, supra, mandates that a waiver of instructions on necessarily included offenses is ineffective, if not expressly made by a defendant himself. Harris, at 797. There can be little doubt that no such express waiver was made by Appellant, but that Appellant was present and aware of defense counsel's unequivocal waiver of such instructions. (R, 250, 257). However, application of Harris herein would result in direct contravention of the United States Supreme Court's stated position, followed in this state, that the crucial inquiry, in determining the validity of a waiver of rights, is not its form, but whether or not the waiver was knowingly and intelligently made. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct 1755, 60 L.Ed.2d 286, 292 (1979); Jones v. State, 440 So.2d 570 (Fla. 1983); Lighthouse v. State, 438 So.2d 380 (Fla. 1983).

As the Court stated in Butler, supra, an express written or oral waiver, while perhaps strongly indicative of a valid waiver, is not an absolute prerequisite to a finding of validity, of a waiver of right to counsel, and/or right to silence. Butler, 60 L.Ed.2d, supra, at 292. The Court mandated that a valid waiver can be inferred, "... in situations where the defendant did not expressly state as much", Butler, at 292, n. 4, by a defendant's silence, coupled with a "course of conduct indicating

waiver". Butler, at 292. (e.a.) Petitioner's conduct, in failing to protest, question or otherwise indicate dissatisfaction with his counsel's express waiver, on Petitioner's behalf, of "lesser included offenses" instructions, qualifies as a course of conduct, from which a clear waiver can be implied. Butler.

In so stating, Respondent acknowledges that Petitioner's silence alone might be argued by Petitioner,as an improper foundation for a finding of a valid waiver. Butler. However, the effect of Petitioner's silence should be viewed herein as analogous to an "admission by acquiescence", in evidentiary terms, where a defendant is presumed to have acquiesced to and admitted a statement which he does not deny, or is silent upon hearing, where other persons hearing the statement would deny it, if untrue. Privett v. State, 417 So.2d 805 (Fla. 5th DCA 1982); Daughtery v. State, 269 So.2d 426 (Fla. 1st DCA 1972); Johnson v. State, 249 So.2d 452 (Fla. 4th DCA 1971). In the context of this case, Petitioner's complete acquiescence, in his attorney's representations of an unequivocal waiver of the aforementioned instructions, should be deemed an admission of and/or concurrence in such a waiver. Privett, supra, at 806; Daughtery, supra; Johnson, supra.

This conclusion can clearly be substantiated, by examining the analogy of a waiver of a right to jury trial. This analogy is particularly apt, because of this Court's statement in Harris that a defendant can waive his right to a "lesser included offense" instruction, just as he can waive the right to a jury trial. Harris, at 797, citing Rule 3.260, Fla.R.Crim.P. (e.a.) Decisions interpreting the rule on waiver of a right to jury trial, have consistently held that it is not necessary for

a trial court to interrogate a defendant, as to the voluntariness of such a waiver, as long as he has signed a written waiver as required by rule, and has orally waived the right either personally, or through his counsel, in open court. Williams, supra; Dumas v. State, 439 So.2d 246, 251 (Fla. 3rd DCA 1983); Sessums, supra. In Sessums, a defendant's failure to object to counsel's waiver of his right to jury trial, in the defendant's presence and in open court, was held to be a valid waiver. Sessums, supra, at 1076. Given this Court's express reliance on this analogy in Harris, and the decisions which interpret the validity of a jury trial waiver in a manner entirely applicable and favorable to Respondent herein, Sessums, it is not possible to reconcile the broad application of Harris, urged by Petitioner.

It is additionally significant that appellate courts have distinguished the requisite requirements for a valid waiver, based on the particular right involved. The Third District has noted that a guilty plea requires a more formal and stringent set of findings, in order to constitute an effective waiver of the right of trial and appeal that are the consequences of such a plea, than a waiver of jury trial, precisely because a guilty plea forecloses adversary appellate proceedings, while a waiver of a jury trial does not. Dumas v. State, supra, at 250-251. For this reason, the Third District in Dumas found that a presumption of waiver would be raised by a waiver form signed by the defendant, without any additional need for an oral waiver in open court by counsel or defendants. Dumas, at 249-250. The same rationale must be applied to a right to a particular jury instruction, since a waiver of such right obviously does not preclude a trial or appeal. Id. Therefore, counsel's waiver of such

an instruction, in the in-court presence of Petitoner, should constitute an effective waiver, as it would if the right to jury trial were involved. Dumas; Sessums.

This conclusion finds further support, in similarly apt analogous contexts. It is clear that counsel can effectively waive a defendant's rights of speedy trial, without a personal expression of waiver needed from the defendant, despite the fundamental nature of the relative right involved. Nelson v. State, 450 So.2d 1223 (Fla. 4th DCA 1984); State v. ex rel Gutierrez v. Baker, 276 So.2d 470 (Fla. 1973); Rule 3.191, Fla.R.Crim.P. (1984). Additionally, silence by counsel, rather than the making of a contemporaneous objection, serves as a valid waiver of a defendant's right to subsequently challenge the act that was unobjected to, including comments by prosecutors, Ferguson v. State, 417 So. 2d 639, 641-642 (Fla. 1982); comments on a defendant's silence, State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Clark v. State, 363 So.2d 331 (Fla. 1978); and the right to particular jury instructions. Castor v. State, 365 So.2d 701 (Fla. 1978). Significantly, the criminal rule governing jury instructions, in providing that the giving or failing to give a particular instruction is waived, if not appropriately raised or challenged at trial, does not require a personal express waiver by the defendant, to be considered effective. Rule 3.390(d), Fla.R.Crim.P. (1972); Austin v. State, 406 So.2d 1128, 1131-1132 (Fla. 4th DCA 1981)(on rehearing). In fact, this Court has ruled, in a case cited by Petitioner, that the very failure to request, and/or object to the absence of "lesser included offense" instructions, is in and of itself a waiver of the right to make such a claim on appeal, and procedurally bars Appellant's entire claim in

this regard. State v. Bruns, 429 So.2d 307 (Fla. 1983); Austin, supra.

Further, it appears that a personal waiver by defendant of his right to testify at trial need not be personal, but is appropriate if made by counsel, without a contemporanerous objection or challenge by the defendant. Cutter v. State, 460 So.2d 538, 539 (Fla. 2nd DCA 1984). This is particularly significant herein, because the decision of whether or not to place a defendant on the stand, is logically a strategic one, in the same vein as counsel's apparent strategic decision to go "all or nothing", on manslaughter or acquittal. (R, 258-264).

There is thus no logical or analogous context, which would support Petitioner's construction of the Harris language that a personal, express waiver by the defendant is the only effective waiver, in the context arising in this case. Petitioner's argument, if accepted, would require a trial court, without any indication from a defendant of a disagreement and challenge to counsel's actions, to nevertheless conduct an inquiry of a defendant, and presume, from his lack of objection, that he actually objects to such a waiver by counsel of lesser included offense instructions. To the contrary, trial courts have been permitted to presume, absent objections from counsel or clients, that multiple representations by one attorney of several clients have been "knowingly accepted" by all parties concerned, despite a risk of conflict of interest, without a need to inquire as to a possible Sixth Amendment violation. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct 1708, 64 L.Ed.2d 335, 345-346 (1980). As in Cuyler, supra, a trial court should not have to make inquiry of a defendant who does not object to or challenge his counsel's waiver, in his presence, of particular jury instructions. Sessums; Clark, supra; Castor, supra.

Furthermore, the propriety of Petitioner's counsel's waiver of the "lesser included offense" instruction, as questioned by Petitioner herein, is for all intents and purposes a collateral attack on counsel's actions in this regard, since, by definition and logic, Petitioner's first-time challenge on direct appeal to counsel's unequivocal waiver at trial, indicates disagreement with counsel's alleged decision to forego such an instruction, and go "all or nothing" with the jury on the manslaughter charge. Petitioner's argument, if logically extended, permits defendant, by merely alleging for the first time, in an unverified manner on direct appeal, that her counsel's waiver of a lesser included offense instruction was not her waiver, to reap the benefit of a per se reversal of her conviction under Harris. It is evidently more appropriate to require that a defendant in Petitioner's position raise this type of claim in a collateral proceeding, where Petitioner will be required to state in sworn, verified form that she did not agree with, or want an "all or nothing" strategy, regarding jury instructions, in the context of a claim of ineffective assistance of counsel. Rule 3.850, Fla.R.Crim.P. (1977). An acceptance of Petitioner's argument would amount to a de facto determination that counsel's waiver in this case was per se ineffective, without Petitioner's personal waiver, and would additionally prevent the State from the opportunity to argue or demonstrate that the lack of a personal express waiver was not prejudicial. Strickland v. Washington, ___U.S.___, 104 S. Ct 2052, 80 L.Ed.2d 674 (1984); United States v. Hasting, ___U.S.___, 103 S.Ct 1974, 76 L.Ed.2d 96 (1983). Such a construction has been rejected by this Court, as well as other appellate courts, in various contexts. Strickland, supra; State v. Stirrup, 469 So.2d 845 (Fla. 3rd DCA

1985); State v. Bucherie, 468 So.2d 229 (Fla. 1985); Anderson v. State, 467 So.2d 781 (Fla. 3rd DCA 1985). This potential result strengthens the concern that the application of Harris would be unreasonable, in a non-capital case, where Petitioner never objected or challenged the conduct of counsel that she in effect now challenges.

In sum, Petitioner's argument, in asserting the existence of her rights to lesser included offense instructions, "begs the question" involved herein, since the Record demonstrates that she substantively, knowingly and intelligently waived such instructions, through counsel. Because of the actual nature of Harris, the requirements for an effective waiver of other rights personally held by a defendant, and the inappropriate and illogical results Petitioner's argument would inevitably produce, the certified question should be answered negatively, and the Fourth District's affirmance of Petitioner's conviction should be approved.

Petitioner has further suggested that the giving of an instruction on the crime of aggravated battery with a firearm, was improper, chiefly because not included in the schedule of lesser included offenses promulgated by the Florida Supreme Court. This argument, to be valid, would require a conclusion that a trial court must follow said schedule as if etched in stone, even if not a correct statement of Florida law. Appellant's interpretation of the schedule as ultimately binding is incorrect, and not supported by the Supreme Court's adoption of instructions, or other cases.

In its 1981 revision of criminal jury instructions, the Florida Supreme Court referred to its adopted schedule of lesser included offenses as "authoritative", and "as complete a listing as possible for each crim-

inal offense". In re Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 597 (Fla. 1981). These conclusions directly suggest that the schedule of lesser included offenses therein was neither absolutely binding or exclusive. To substantiate this conclusion, it is important to note that despite deletion of the "circumstantial evidence" instruction as a standard instruction, the Court left the giving of such an instruction up to trial courts, if such a court felt that the instruction was warranted in a particular case. Standard Jury Instructions in Criminal Cases, supra, at 595.

Additionally, in its recent decision of Yohn v. State, 476 So. 2d 123 (Fla. 1985), this Court has held that the standard jury instructions were but mere guidelines, to be amplified or modified as needed, in order to reflect the state of the law in Florida accurately. Yohn, supra, at 127. Accordingly, the correct state of the law is that aggravated battery is considered a lesser included offense of manslaughter, by culpable negligence. Michaels v. Swanson, 403 So.2d 1023 (Fla. 2nd DCA 1981). In Michaels, supra, the Second District applied the logic of the decision in McCullers v. State, 206 So.2d 30 (Fla. 4th DCA 1968), noting that the only element not included in aggravated assault, that was in manslaughter, was death, and that this was equally applicable to aggravated battery. Michaels, supra, at 1024. Thus, because since manslaughter cannot be proved, without proof of all essential elements of aggravated battery, Michaels, supra, the jury was properly instructed that aggravated battery was a lesser included offense of manslaughter. Rotenberry v. State, 468 So.2d 971, 976 (Fla. 1985), quoting with approval, Baker v. State, 425 So.2d 36, 50 (Fla. 5th DCA 1982)(Cowart, J, dissenting opinion), disap-

proved, State v. Baker, 456 So.2d 419 (Fla. 1984); §775.021(4), Fla. Stat. (1983).

Petitioner attempts to distinguish Michaels, on the basis that said case involved considerations of double jeopardy, rather than of jury instructions. It is precisely because one cannot be convicted of both manslaughter and aggravated battery with a firearm, Michaels, at 1025, that one is a lesser included offense of the other. Rotenberry, supra; §775.021(4), supra. The very issue raised by Petitioner, as to the propriety of the instruction given, relates directly to the relative similarity of elements of the offense that are necessarily included in the greater offense of manslaughter. Thus, the lesser offense given as an instruction, was a proper reflection of the correct law in Florida, notwithstanding the lack of its inclusion as a Category 1 or 2 offense, in the Supreme Court's schedule of such offenses. Michaels; Yohn.

Assuming arguendo that aggravated battery was not a properly given lesser included offense of manslaughter by the trial court, the jury's verdict on the greater offense of manslaughter, renders the error harmless. Abreau, supra.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Court AFFIRM the Fourth District's ruling in this cause, and answer the certified question in the negative, and remand to the Fourth District, with instructions to proceed in a manner consistent with such an opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been furnished, by courier delivery, to ANTHONY CALVELLO, ESQUIRE, Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, this 14th day of February, 1986.

Richard G. Bartmon

Of Counsel