IN THE SUPREME COURT OF FLORIDA

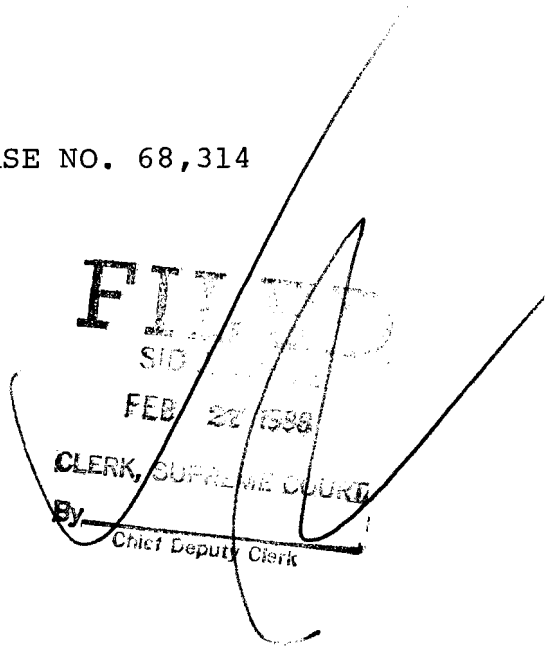
CARL ELBERT MOSLEY,

Petitioner,

v. CASE NO. 68,314

STATE OF FLORIDA,

Respondent.



BRIEF OF PETITIONER ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS
(cont'd.)

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

CARL ELBERT MOSLEY,	:	
Petitioner,	:	
v.	:	CASE NO. 68,314
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

CARL ELBERT MOSLEY was the defendant in the trial court and appellant before the District Court of Appeal, First District. He will be referred to in this brief as "petitioner," "defendant," or by his proper name. Reference to the record on appeal will be by use of the symbol "R" followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Count I of an amended information containing four charges alleged that petitioner, on March 24, 1984, committed second degree murder by shooting and killing Frederick B. Hendrickson with a pistol firearm, contrary to Sections 775.087 and 782.04, Florida Statutes (1983). Count II alleged that petitioner, on March 24, 1984, committed second degree murder by shooting and killing George W. Dyson with a pistol firearm, contrary to Sections 775.087 and 782.04, Florida Statutes (1983). Count III alleged that petitioner, on March 24, 1984, committed attempted second degree murder by shooting Randy Darwin Page with a pistol firearm, contrary to Sections 777.04 and 782.04, Florida Statutes (1983). Count IV alleged that petitioner, on March 24, 1984, used a firearm during the commission of a murder, contrary to Section 790.07(2), Florida Statutes (1983) (R-51-52).

Petitioner proceeded to a trial by a jury.

John Moore, a deputy in charge of communications at the Clay County Sheriff's Department, testified that at 8:53 p.m. on March 24, 1984, petitioner telephoned the sheriff's department. That conversation was recorded, and the following was played before the jury:

> "Clay County Sheriff's Office. May I help you?"
>
> "Yes, ma'am. This is Carl E. Mosley. I'm a special deputy sheriff and there's a bunch of damn drunks piled

up in a ditch over here in front of my house here, and I need you to send a deputy out there as soon as he can get here."

"Okay. Hold on just a minute, please. Okay, sir. Where are they at?"

"They are right here in front of 204 Deer Trail and 209 Deer Trail. I don't know. There are three or four damn carloads piled up over in that damn ditch over there, and I went over and told them who I was. I told them I was a deputy sheriff myself, and they said, 'To hell with you. I don't mind you. You don't mean a God-damned thing to me.

"So send me some help out here right quick. If you don't, I'm liable to take some action."

"Okay. Your phone number, please?"

"Yeah."

"Your phone number?"

"1769, 282."

"1769,282?"

"yeah."

"Okay. How many people out there partying?"

"Damn if I know. Three or four truckloads of them. Looks like they're piled up in the damn ditch over here."

"Okay. We'll get somebody out there. Okay? They're on Deer Trail, right?"

"Tell them to step on it right quick."

"Okay. They're on Deer Trail, right?"

"Yeah."

"Bye."

(R-213-214).

Officer Moore testified also that at 9:00 p.m. one Frances Templin phoned the sheriff's office. That conversation was also recorded, and the following was played before the jury:

> "Clay County Sheriff's Office. May I help you?"
>
> "yes, ma'am. My name is Frances Templin and there is a man out here waving a gun at everybody."
>
> "Okay. Out where, ma'am?"
>
> "On Deer Trail. I don't even--what's the address here? 203. I think they call him Mr. Mosley."
>
> "Okay. Where is he at right now?"
>
> "He's out on the road waving a gun."
>
> "Right on Deer Trail? Give me a land mark."
>
> "The address I just told you."
>
> "Okay. He's right in front of that residence?"
>
> "Yes, ma'am."
>
> "Okay. Did he say anything? Did he appear to be drinking?"
>
> "I don't know what his problem is. Some boys came down to our house because they'd put their truck in the ditch and asked us if we could pull them out. And we came out to pull them out and he's waving the gun at everybody, and I want somebody out here right now before he shoots somebody."
>
> "Okay, ma'am. Ma'am, calm down. I have somebody enroute out there right now. Can you give me some details as to what he's wearing? What this, what the gentleman is wearing?"

"I don't even know. I think he's wearing a green jumpsuit or something, and raving on about him being a deputy sheriff or something, and everybody's under arrest, and he's pointing guns at people's faces."

"Ma'am, ma'am, is it a gun or rifle?"

"It's a hand gun."

"Okay. Stay on the line. What's your phone number?"

"It's 282-1973."

"Okay. Stay on the line. I'll be back with you, okay?"

(R-215-216).

Jennings Murrhee, Sheriff of Clay County, Florida, testified generally as to the duties of the Office of Sheriff. In order to be empowered to make an arrest, all regular deputies are required to take a 480 hour course; reserve deputies must be supervised by a full-time officer for 180 hours. Guns are to be displayed only in defense of the life of a citizen or that of an officer. Special deputies are appointed by the sheriff for a particularized purpose.

Sheriff Murrhee testified further that he has known petitioner for a long time. Petitioner served as constable, an elected position, for 16 years. In 1964 he was elected Sheriff of Clay County and served one term.

In January, 1984, Murrhee appointed petitioner a special deputy, in response to petitioner's complaints regarding speeders in his neighborhood. Referring to

Section 30.09, Florida Statutes (1983), relating to special deputies and authorizing their use in the event of natural disasters or to assist in quelling a riot or other breach of the peace when ordered to do so by the sheriff, Murrhee testified that he had not authorized petitioner to quell a breach of the peace on March 24, 1984 (R-217-225).

Frances Templin testified that at 8:45 on March 24, 1984, she, her son Shawn Young, and her friend Kent Young, were preparing to go to the grocery store when a man who identified himself as George Dyson approached them and requested assistance in removing a truck from a ditch. A person named Johnny joined them and all proceeded to the area where the truck was stuck. As they were in the process of attaching a rope to the truck, Templin observed a man approaching them, displaying a gun and yelling that all were under arrest. While over 100 feet away the man ordered that the rope not be attached to the truck. The man, petitioner, pointed a gun at Kent Young's face and told him not to move. George Dyson told petitioner that they knew one another, as Dyson had once helped petitioner build a fence. Petitioner replied that he did not care and that all were under arrest. Petitioner pushed the boys around, although, according to Templin, the boys were polite to petitioner. Templin and her friends then proceeded to a grocery store. On their

way they encountered a police officer and overheard an announcement over the radio that shots had been fired (R-232-245).

On cross-examination Templin testified that she did not notice petitioner had only one eye, nor did she notice his right hand (R-246-254).

Charles Kent Young testified that he and his girlfriend, Frances Templin, and their son, Shawn Young, were preparing to go to the grocery store when a man who introduced himself as George Dyson approached him and asked if Jerry, Young's neighbor, was home. Young explained that Jerry was not there. Dyson then explained that his truck was stuck and requested assistance. Young agreed to help. On their way to the house, Young picked up two more passengers, Bruce and Johnny, who wanted a ride to Bruce's house.

Dyson attached a rope between the stuck truck and Young's truck. Petitioner, displaying a gun, approached the group, ordered them to remove the rope, and ordered them to stay until the sheriff came. At one point petitioner pointed the gun at Young. Petitioner stated that they were all under arrest. Dyson and others explained to petitioner that they knew him. Petitioner replied that he did not care who they were; that all were to remain pending arrival of the sheriff. At one point petitioner referred to the boys as "a bunch of long-haired hippy mother fuckers."

Mr. Young noticed that Frances Templin had slipped away. Dyson told petitioner that the children in the area did not need to hear what was going on. Appellant stated: "Well, I have no reason to hold them [Young, Templin, Shawn Young, Bruce, and Johnny] here. He can go." Young left, along with Templin, Shawn Young, Bruce, and Johnny (R-254-267). Bruce Barbaro testified that he asked Charles Kent Young for a ride to John Hardy's house to get supplies so that Hardy and Barbaro could camp out next to Barbaro's house. They stopped where Dyson's truck was stuck. Barbaro's testimony corroborated that of the previous witnesses as to petitioner's waving a gun, informing people they were under arrest, and his profanity. From three to five times petitioner insisted that everyone stay until the police arrived.

Young dropped Barbaro and Hardy off at Barbaro's house. When Barbaro's father learned that petitioner had a gun, and that Barbaro's sister may be in that area, Barbaro's father directed Bruce to get his sister. Upon approaching the area Bruce heard several gunshots and saw George Dyson lying on the ground.

John Hardy, the next state witness, gave testimony that corroborated that of previous state witnesses Frances Templin, Charles Kent Young, and Bruce Barbaro (R-287-303).

Peter Lipkovic, M.D., was deemed an expert in pathology. He testified that he performed autopsies upon two persons,

George Dyson and Frederick Hendrickson. Both died from bleeding resulting from a gunshot wound. A bullet entered Dyson's neck, severed major arteries, and exited out of the other side of the neck. With respect to Hendrickson, a bullet entered his back and proceeded upward, fracturing a rib and perforating a lung, exiting on the fleshy part of the shoulder (R-304-315).

On cross-examination it was revealed that Dyson was shot at close range, a foot or less, and that his blood alcohol level at the time of the autopsy was .16. Hendrickson was carrying a knife (R-315-321).

Randy Darwin Page testified that he spent the day of March 24, 1984, drinking beer and fishing with friends, including George Dyson and Frederick Hendrickson. On their way to Dyson's house, Dyson's truck got stuck. Petitioner appeared on the scene, carrying a pistol. Later, petitioner shot the witness, Dyson, and Hendrickson from a distance of eight to ten feet. Seconds later, Page heard more shots fired. Page got up and ran (R-328-344).

On cross-examination Page admitted that all three had been drinking that day and that he was pretty intoxicated. In fact, Page remembered nothing about Young appearing on the scene and attaching a rope to the truck. Page admitted that they were hotrodding that night. Page could not recall petitioner insisting that they remain

until the police came, or that petitioner went to his house to make a telephone call (R-344-362).

Deputy Ralph Jones of the Clay County Sheriff's Department testified that he and Officer Woodruff were summoned to the scene. The witness first encountered Randy Page, who had been shot. The officers proceeded to the scene of the shooting. Petitioner, after three requests, relinquished his firearm and holster to the officers. Petitioner stated, "Come on down and join the fun. I just shot someone." Officer Jones also checked the bodies of George Dyson and Frederick Hendrickson for vital signs, finding none. Petitioner appeared to understand what was being said in his presence, because he responded to commands. To the officer, petitioner simultaneously seemed to be both "cocky" and "possibly in a state of shock." (R-364-384).

Officer Bobby Woodruff of the Clay County Sheriff's Department testified that, after warnings, petitioner stated that he had been a lawman for 30 years, and that he had killed the sons of bitches. Petitioner stated further that two cars had been drag racing and became stuck in a ditch. After telephoning the police, petitioner went out to the cars and, carrying a gun, ordered everyone to stay until the police arrived. The boys took petitioner very lightly and threatened to beat him up. Two of them grabbed petitioner at each arm. The third, standing in front of petitioner, grabbed petitioner's neck. Petitioner first shot the person in front of him, and then shot the two

others as they were running away. When informed that one of the three persons shot was alive, petitioner stated if the police would let him go he would take care of that third person. Officer Woodruff detected a moderate odor of alcohol on petitioner's breath. Petitioner seemed angry and not remorseful. He appeared able to see and hear (R-392-420).

Annie Bell Mosley, married to petitioner's nephew and who is petitioner's next door neighbor, first observed three boys attempting to free a truck stuck in soft sand. Thereafter a woman asked to use the telephone to call the police, explaining that an old man was outside threatening people. The witness looked outside and saw petitioner. The woman called the police. The witness then held the phone, during which time several shots were fired (R-434-445).

Petitioner's nephew, Hilliard Mosley, testified that, at a distance of 100 feet, he observed three boys standing near a truck with petitioner. He then heard several shots fired. After the shooting the witness refused petitioner's directive to get more bullets. Standing over the body of one who had been shot, petitioner stated: "Die you son of a bitch. If I had another bullet, I'd shoot you again." At no time did any of the three boys behave aggressively toward petitioner. (R-455-463).

On cross-examination the witness admitted that he and petitioner had a falling out with one another, and had not

spoken to each other for over a year. The three boys were five to eight feet from petitioner (R-463-472).

At this point in the proceedings the state rested (R-473). Petitioner's motion for a judgment of acquittal was denied (R-473-480).

Deputy Thomas Waugh of the Clay County Sheriff's Department, the first defense witness, testified that at Sheriff Murrhee's direction he delivered a special deputy card and badge to petitioner (R-493-496).

The testimony of the next defense witness, Martha Conway, a deputy clerk, was proffered. Through her testimony the defense sought to introduce into evidence the judgment and sentence dated February 8, 1984, indicating that George Dyson, born May 8, 1962, entered a no contest plea to DUI, and had his driver's license revoked for six months. The state's objection to its introduction was sustained on relevancy grounds, rejecting defense counsel's argument that the exhibit was relevant to show Dyson's motive for wanting to leave the area where his truck was stuck before any deputies arrived (R-497-504).

Defense counsel then related that he had just spoken to Randy Page, and that Page would testify, if allowed, that the main reason he and the others wanted to free the truck quickly was because of Dyson's DUI conviction. The trial court ruled this testimony inadmissible (R-504-517).

David Warniment of the FDLE, deemed an expert in firearms, testified that he performed certain testing on petitioner's firearm. Fourteen pounds of pressure is required to pull the gun's trigger. Propellent powders present on Randy Page's shirt indicated that the muzzle end of the firearm was two to five feet from the shirt when fired. No such powder was discovered on a hat worn by Frederick Hendrickson, or on clothing worn by petitioner (R-517-529).

On cross-examination Warniment testified that no propellent powder was discovered on a shirt worn by Hendrickson (R-529-534).

As defense exhibit #2, the defense introduced into evidence a statement made by petitioner to Officer Padgett of the Clay County Sheriff's Department (R-534-535). In that statement petitioner related that he shot the men only after the men had threatened him, and one of them had grabbed his neck and the others grabbed his arms (R-16-17).

After a jury instruction conference during which defense counsel purported to waive, with petitioner's consent, all instructions and verdict options on lesser offenses (R-538-539), the defense presented the testimony of Thomas Edwards, an opthamologist. Dr. Edwards testified that he has known petitioner since September, 1970. According to the witness, petitioner lost his left eye in

a boating accident that occurred in 1943. In 1970, Dr. Edwards certified petitioner was totally and irrevocably blind. Pursuant to tests conducted October 1, 1984, petitioner could count fingers at a distance of five feet in bright light. A scarred retina area indicated that petitioner would strain to count fingers. The doctor also detected early signs of cataracts in appellant's remaining eye. Petitioner can detect forms, doors, and windows in front of him, and also people, although it is doubtful that petitioner could determine the person's race or sex. People with vision problems often adapt somewhat, and rely more heavily upon their remaining senses (R-567-583).

With the jury absent Dr. Edwards testified that he had constructed a special pair of glasses that one with normal or fairly normal vision looking through them would see approximately how petitioner sees under ideal conditions. The trial court ruled the glasses inadmissible in evidence because of a discovery violation and because the jurors could not compensate in the way petitioner has learned (R-584-589).

At the conclusion of Dr. Edwards' testimony the defense rested (R-592). Petitioner's renewed motion for judgment of acquittal was denied (R-594-598).

In instructing the jury, the trial court gave the following instruction:

> Use of any force by law enforcement officer or any person summed or directed to assist the law enforcement officer is not justified if the arrest is unlawful or it is known by the officer or the person assisting him to be unlawful.

(R-655).

After the instructions, but prior to the time the jury commenced deliberation, the following occurred:

> THE COURT: Ladies and gentlemen of the jury, the attorneys have called to my attention I haven't learned to read yet. There is a certain one I will read again. There is also one I overlooked reading to you that I will read to you. Both of them relate to the charge on the use of deadly force.
>
> Use of any force by law enforcement officer or any person summoned or directed to assist the law enforcement officer is not justified if the arrest is unlawful. It is known by the officer or the person assisting him to be unlawful.
>
> The defendant's use of force is not justified and cannot be claimed as self-defense if the defendant initially provoked Frederick B. Hendrickson, George W. Dyson, and Randy Darwin Page's use of force against him unless Frederick B. Hendrickson, George W. Dyson, and Randy Darwin Page used such great force against the defendant that the defendant believed he was in imminent danger of death or great bodily harm and had already used every reasonable means to escape from danger except the use of force.
>
> Those are the charges they asked that I reread or read for the first time. You may now retire and consider your verdict.
>
> [The jury retired at 4:40 o'clock p.m. to consider their verdict.]
>
> THE COURT: Court will be in recess pending the jury verdict.

MR. McGUINNESS: Your Honor, I would renew the objection I made a moment ago that paragraphs one and two are supposed to read "and" and I believe the statute supports that.

THE COURT: Well, I read it like it's in the standard charge.

MR. McGUINNESS: I'm aware of that, Your Honor.

THE COURT: Thank you.

MR. McGUINNESS: But I would just like my objection to be noted.

THE COURT: So noted.

(R-665-666).

The jury returned verdicts finding petitioner guilty as charged on all four counts of the amended information (R-83). For Counts I and II of the amended information, second degree murder, appellant was sentenced to 22 years in prison with 206 days credit. For Count III, attempted second degree murder, appellant was sentenced to 15 years with 206 days credit. For Count IV, use of a firearm during a felony, petitioner was sentenced to 15 years in prison with 206 days credit. All sentences are to be served concurrently (R-116-123).

Notice of taking an appeal to the District Court of Appeal, First District, was timely filed (R-127), petitioner was adjudged insolvent (R-128), and the Public Defender of the Second Judicial Circuit was designated to handle the appeal.

On appeal before the District Court of Appeal, First District, the following issues were raised:

ISSUE I

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT GEORGE DYSON HAD BEEN PLACED ON PROBATION FOR DRIVING UNDER THE INFLUENCE, AND EVIDENCE THAT THE PRIMARY REASON DYSON WANTED TO LEAVE THE AREA WHERE THE ALLEGED OFFENSES OCCURRED WAS RELATED TO THE DUI CHARGE, SINCE SUCH EVIDENCE WAS RELEVANT TO THE DEFENSE OF SELF DEFENSE, THEREBY VIOLATING APPELLANT'S RIGHT TO PRESENT EVIDENCE TO SUPPORT HIS THEORY OF DEFENSE GUARANTEED BY AMENDMENTS VI AND XIV, UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16, FLORIDA CONSTITUTION.

ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO INTRODUCE A PAIR OF EYEGLASS LENSES INTO EVIDENCE, SINCE THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE INQUIRY INTO THE DEFENDANT'S BREACH OF DISCOVERY OR, ALTERNATIVELY, THE SANCTION OF EXCLUSION OF THE EVIDENCE AMOUNTED TO AN ABUSE OF DISCRETION, AND FURTHER, THE GLASSES WERE RELEVANT AND ADMISSIBLE AS AN EXPERIMENT.

ISSUE III

THE TRIAL COURT ERRED BY PRECLUDING THE DEFENSE FROM INTRODUCING APPELLANT'S FULL MEDICAL HISTORY THROUGH DR. EDWARDS BECAUSE IT FALLS WITHIN AN ESTABLISHED EXCEPTION TO THE HEARSAY RULE, AND THE TRIAL COURT COMPOUNDED THAT ERROR BY SUGGESTING THAT APPELLANT COULD HAVE BEEN LYING TO DR. EDWARDS ABOUT HIS MEDICAL HISTORY.

ISSUE IV

THE TRIAL COURT ERRED IN THE MANNER BY WHICH THE JURY WAS INSTRUCTED AND REINSTRUCTED PURSUANT TO SECTION 776.051(2), FLORIDA STATUTES (1983).

ISSUE V

APPELLANT IS ENTITLED TO A NEW TRIAL SINCE THE ERRORS OCCURRING IN THE TRIAL COURT COMBINED IN SUCH A WAY AS TO DEPRIVE HIM HIS RIGHT TO A FAIR

TRIAL GUARANTEED HIM BY AMENDMENT XIV, UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16, FLORIDA CONSTITUTION.

ISSUE VI

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY UPON LESSER INCLUDED OFFENSES SINCE THE RECORD DOES NOT SHOW APPELLANT PERSONALLY, EXPRESSLY, KNOWINGLY, AND INTELLIGENTLY WAIVED HIS RIGHT TO RECEIVE INSTRUCTIONS ON LESSER OFFENSES.

By opinion dated January 31, 1986, the judgment and sentences appealed were affirmed. The only issue discussed in the district court's opinion was the last one, relating to waiver of lesser offenses. The following question was certified to this Court as a question of great public importance:

> 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?

Notice of invoking this Court's discretionary jurisdiction was timely filed February 13, 1986. This brief on the merits follows.

III SUMMARY OF ARGUMENT

On conflicting evidence the jury rejected the self defense claim of petitioner, who had served both as Sheriff and Constable of Clay County, Florida, who is legally blind, missing two fingers on one hand, suffers arthritis and heart problems, and who was 69 years old at the time of the offense. The alleged victims in this case were all men under 30 years of age, in apparent good health. Why the jury rejected petitioner's claim of self defense, it is submitted, involves the proposition that petitioner was not allowed to present his defenses in full.

In Issue I, infra, petitioner argues that he should have been allowed to present evidence that the driver of the vehicle that became stuck near petitioner's home had been recently convicted of DUI, and his fear of being again apprehended was his motivation for trying to depart from the area as soon as possible. The defense presented evidence suggesting that the victims assaulted petitioner only after petitioner announced he was a deputy sheriff, that they were under arrest, and were to remain until the sheriff arrived. In Issue II, infra, petitioner argues that the defense should have been allowed to introduce a pair of eyeglass lenses which, when looked through, would allow a person with normal or near normal vision to see the way petitioner does. The objections raised by the state and the trial court go to the weight of the evidence, not its admissibility. In Issue III, infra, petitioner, who was

appointed a special deputy, contends the trial court erred in giving instructions pertaining to the use of force by law enforcement officers, which instructions did not track the statute and amounted to an erroneous instruction of law. Lastly, in Issue IV, infra, it is asserted that the trial court erred in not giving instructions as to lesser offenses without first securing a waiver from the defendant personally.

IV ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT GEORGE DYSON HAD BEEN PLACED ON PROBATION FOR DRIVING UNDER THE INFLUENCE, AND EVIDENCE THAT THE PRIMARY REASON DYSON WANTED TO LEAVE THE AREA WHERE THE ALLEGED OFFENSES OCCURRED WAS RELATED TO THE DUI CHARGE, SINCE SUCH EVIDENCE WAS RELEVANT TO THE DEFENSE OF SELF DEFENSE, THEREBY VIOLATING PETITIONER'S RIGHT TO PRESENT EVIDENCE TO SUPPORT HIS THEORY OF DEFENSE GUARANTEED BY AMENDMENTS VI AND XIV, UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16, FLORIDA CONSTITUTION.

In Washington v. Texas, 388 U.S. 14 (1967) the Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.

388 U.S. at 19.

Petitioner argues that the trial court below denied him his right to fully present a defense. More specifically, the record reflects that on March 24, 1984, George Dyson was operating a pickup truck occupied by Randy Page and Frederick Hendrickson, when that truck became stuck in an area adjacent to petitioner's home. All three boys had been drinking heavily that day. Dyson, the driver, had a

blood alcohol level of .16 at the time of his autopsy, which means his alcohol level was necessarily greater than .16 at the time the truck was stopped (R-315-321, 344-362). According to the state's own witnesses, petitioner reported the incident to the Clay County Sheriff's Department (R-213-214) and, displaying a firearm, went to the area of the stuck truck and told Dyson and the others present that they were under arrest and could not leave before a deputy arrived (R-237,259, 272,279). A state witness added that Dyson and his friends, at least at first, appeared to totally ignore petitioner's directives and proceeded instead about their business of freeing the vehicle (R-302).

At this point the version of the events related by the state diverged dramatically from those related by the defense. The state's evidence suggested that petitioner, without provocation, fatally wounded Dyson and Hendrickson, and also wounded Page (R-459-461). Petitioner, however, defended on the basis of self defense in that he shot the three boys only after they had grabbed him by his arms and neck (R-416-418,431-433,535).

The defense sought to introduce into evidence several documents which collectively indicate that on January 29, 1984, Dyson ran a police officer off the road and was arrested for DWI. On February 8, 1984, less than two months

prior to the incident giving rise to this proceeding, Dyson entered a no contest plea to DUI, adjudication of guilt was withheld, Dyson was placed on probation for six months, and his driver's license was revoked for a period of six months (R-71-77). Therefore, at the time he got his truck stuck Dyson was not only again driving while drunk, but was doing so without having a valid license and while he was on probation. The defense also proffered the testimony of Randy Page and, when asked if Page was aware of Dyson's DUI conviction stated, "That's the main reason we were trying to get the truck out that night."

Documents relating to the DUI were ruled inadmissible on relevancy grounds and also because it was not shown that the George Dyson involved in the DUI was the same man who was involved in petitioner's case. The proffered testimony of Randy Page was ruled inadmissible because appellant had no authority to arrest any of the three boys (R-497-512).

Petitioner contends the trial court erred in excluding evidence that George Dyson had been placed on probation for driving under the influence, and evidence that the primary reason Dyson wanted to leave the area where the alleged offenses occurred was related to the DUI charge, since such evidence was relevant to the defense of self defense, thereby violating petitioner's right to present

evidence to support his theory of defense.

It should be recalled that petitioner's defense was self defense, and that this issue involves the right of an accused to present evidence relevant to his theory of defense. Florida courts have historically allowed such evidence to be presented. See Gurganus v. State, 451 So.2d 817 (Fla. 1984) (Defense wrongfully precluded from presenting expert testimony relevant to defense theory that accused did not have specific intent to commit first degree murder); Quintana v. State, 452 So.2d 98 (Fla. 1st DCA 1984) (Defense wrongfully precluded from introducing evidence of threats or violence by victim directed to accused and others, since such evidence was relevant to defense of self defense); and, Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979) (All doubts as to admissibility of evidence bearing on accused's theory of self defense must be resolved in favor of the accused).

Petitioner argues evidence pertaining to the motive of Dyson and his friends to leave the area prior to the arrival of the police is admissible pursuant to the so-called "Williams Rule." While the "Williams Rule" is in the vast majority of instances used against the accused, it should be noted that the codification of the "Williams Rule" makes no distinction as to which party is entitled to present evidence under the rule. Such a distinction would be unconstitutional because "...a core

purpose of the Sixth Amendment is that the defendant has the same rights to introduce evidence as the prosecution." Pettijohn v. Hall, 599 F.2d 476, 481 (1st Cir. 1976). Therefore, cases involving the application of the rule to the defendant are applicable.

In Tafero v. State, 403 So.2d 355 (Fla. 1981) it was determined that evidence that Tafero was on parole and that he stated he would never go back to prison was admissible as bearing upon his motive for shooting a law enforcement officer. In Heiney v. State, 447 So.2d 210 (Fla. 1984), the defendant shot and wounded a person in Texas and, when he learned Texas authorities were looking for him, Heiney requested a friend to give him a ride out of town, which the friend did. Heiney was eventually charged with murder occurring in Florida, and on appeal challenged the admission into evidence of the Texas events. This Court rejected the challenge, ruling that the Texas events were properly admitted to show a motive for the Florida murder.

Thus, in both Tafero and Heiney, evidence of events which showed a desire to avoid apprehension were deemed admissible to demonstrate a motive for crime subsequently committed. For exactly the same reason, motive to avoid apprehension, petitioner argues the fact that Dyson was on probation for drunken driving, and was driving without a license, gave Dyson and his friends a motive to do just

exactly what petitioner claimed they did, namely, that they jumped him upon learning the police had been called and that petitioner would not let them leave the area.

The Florida decisions discussed above support petitioner's position that evidence of Dyson's motive was to free his truck and leave the area as soon as possible should have been admitted, since such evidence supported petitioner's self defense claim. A Kansas case with facts parallel to those in the instant case, upon which petitioner relies and accordingly calls to this Court's attention, is State v. Bradley, 476 P.2d 647 (Kan. 1978).

In Bradley, the facts show that on the day he was shot, the deceased withdrew $1600 in cash from a local bank. The defendant dumped the body in a rural area and fled to Hawaii, where he was arrested three months later. The prosecution's theory of liability was that the victim was killed while the defendant was attempting to rob him. The defense was self defense. The defendant testified that he was lying on a bed when the deceased entered and fired a shot at him, which missed, at which point the defendant and the deceased struggled over the gun. The defendant sought to show that the motive for the deceased's attack on him was that the deceased had been involved in Topeka in an assault with a gun on a police officer. The decedent was facing charges for assaulting

the officer and in addition was facing charges for failure to appear. Law enforcement was looking for the decedent. The defendant was a known police informer and believed that the deceased had learned of the defendant's informer status. The defendant sought to establish that fear of being turned in by the defendant was the motive of the decedent for the attack upon the defendant. The trial court ruled the defendant was improperly attempting to smear the deceased's character (A rationale advanced by the prosecutor sub judice), and excluded the evidence. On appeal, the appellate court held that while the trial court was correct on the character rationale, the court erred in not admitting the evidence on the basis of intent and motive:

> The defendant's theory of defense as to why the attack occurred was excluded by the trial court. The defendant had a right to present his theory of defense. He had the right to introduce into evidence what he believed was the motive and intent by the deceased for what he claimed was an attack by the deceased upon his person. This was an integral part of his claim of self-defense or justifiable homicide. It is fundamental to a fair trial to allow the accused to present his version of the events so that the jury may properly weigh the evidence and reach its verdict. The right to present one's theory of defense is absolute. The trial court improperly used the evidentiary rules of establishing character to exclude relevant and material information pertaining to the defense.

576 P.2d at 650.

Petitioner submits Bradley is directly on point and its rationale should be adopted by this Court in the instant case.

The trial court's concerns over whether petitioner had legal authority to make an arrest, and whether the George Dyson who had been placed on probation was the same man who was involved in the instant case were not appropriate. First, any doubt as to identity was resolved because Randy Page apparently knew of the DUI case and that it involved his friend, George Dyson, rather than some other George Dyson. And whether petitioner had the legal authority to make an arrest is beside the point because the key facts of the proffered evidence was that Dyson thought the police would soon arrive.

The wrongfully excluded evidence went to the very heart of the defense of self defense and for that reason cannot be deemed harmless. A new trial is required.

ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO INTRODUCE A PAIR OF EYEGLASS LENSES INTO EVIDENCE, SINCE THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE INQUIRY INTO THE DEFENDANT'S BREACH OF DISCOVERY OR, ALTERNATIVELY, THE SANCTION OF EXCLUSION OF THE EVIDENCE AMOUNTED TO AN ABUSE OF DISCRETION AND, FURTHER, THE GLASSES WERE RELEVANT AND ADMISSIBLE AS AN EXPERIMENT.

The record reflects that, during the presentation of the defense's case, petitioner presented the testimony of Thomas Edwards, M.D., who was stipulated to be an expert in opthamalogy (R-568). Edwards testified that, for several years, he had personally treated petitioner. The doctor related that petitioner does not have a left eye at all (R-576), and that his vision in his right eye is severely impaired. Petitioner's vision in his right eye is 20-400, which means that petitioner can see at 20 feet what the average person can see at 400 feet (R-579).

Dr. Edwards prepared a special set of glasses with the left eye blocked off with a white Maddox Rod lens in the right eye position. According to Edwards, a person with normal vision looking through the specially prepared glasses would see things approximately the same way petitioner does. Even one with somewhat defective vision, such as 20/80 would still see very much like petitioner when looking through the special glasses (R-584-585). The glasses demonstrate petitioner's ability to see under

ideal conditions (R-588).

The trial court refused to allow petitioner to introduce the glasses into evidence. This refusal was based upon the fact that the defense failed to disclose his intent to use the glasses during discovery and because the jurors, unlike petitioner, had not had time within which to adapt to such a sharp curtailment of vision (R-589). It was later developed that three of the six jurors wore glasses (R-139), and the doctor, who also wore glasses, apparently had to use a special procedure in order to look through the special glasses.

Petitioner contends the trial court erred by not allowing the glasses into evidence, since exclusion of this evidence was too severe of a sanction to employ for a discovery violation, and the glasses were relevant and admissible to support petitioner's defense of self defense.

As noted, the first ground articulated by the trial court for excluding the glasses from evidence was the defense's failure to disclose its intent to utilize the specially prepared glasses. It should be noted that the defense claimed the glasses were disclosed, but it is recognized also that the state disputed this and the trial court's own recollection was consistent with that of the state (R-564-567). Thus, this discussion assumes that a discovery violation did, in fact, occur.

In Richardson v. State, 246 So.2d 771 (Fla. 1971)

this Court set forth the proper procedure to employ when a party breaches the rules of discovery. The first step is to conduct an inquiry into whether the breach was willful or inadvertent, whether the violation was trivial or substantial and, most importantly what effect the breach had upon the ability of the opposing party to prepare for trial. Indeed, it has been recognized that the key question to any discovery violation is one of prejudice. Holman v. State, 347 So.2d 832 (Fla. 3d DCA 1977). The term "prejudice" in the discovery violation context refers to procedural rather than substantive prejudice. Wilcox v. State, 367 So.2d 1020 (Fla. 1979). Further, where the inquiry does not occur or is not adequate, reversal without consideration of the harmless error doctrine follows, for an appellate court is not equipped to ascertain prejudice on an incomplete record. See Smith v. State, 372 So.2d 86 (Fla. 1979) and Kilpatrick v. State, 376 So.2d 386 (Fla. 1979).

Once the trial judge ascertains all of the circumstances surrounding the violation, the trial court is then in a position to exercise its discretion as to what sanction to employ because of the violation. Richardson v. State, supra. Here, the trial court imposed the most extreme sanction available, exclusion of the evidence. And although the choice of sanction is within the trial court's discretion, the trial court's discretion is

reviewable on appeal on the abuse of discretion standard. State v. Del Gaudio, 445 So.2d 605 (Fla. 3d DCA 1984). In the discovery context, relevant evidence should not be excluded from the jury unless no other remedy suffices. State v. Bowers, 422 So.2d 9 (Fla. 2d DCA 1982).

Petitioner argues the inquiry here was not sufficient, and therefore a new trial must be ordered without regard to the harmless error doctrine. Alternatively, assuming an adequate inquiry occurred, petitioner argues the trial court abused its discretion in imposing the extreme sanction of exclusion of the evidence.

It is submitted that the only inquiry made in response to the state's objection dealt with whether a discovery violation occurred. After determining a violation did occur, a proffer was conducted to ascertain if the evidence was admissible with respect to factors other than the discovery rules. No inquiry whatsoever was made as to whether the breach was trivial or substantial. No inquiry was ever made as to whether the breach was inadvertent or willful. More importantly, no inquiry was made as to the amount of prejudice the state would suffer should the evidence be admitted. In addition, the trial court made no findings whatsoever on these issues and, while such findings are not absolutely required, they should be made. See Boynton v. State, 378 So.2d 1309 (Fla. 1st DCA 1980). Since the inquiry was not adequate, a new trial is required. Bradford v. State,

278 So.2d 624 (Fla. 1973) and Carroll v. State, 414 So.2d 247 (Fla. 4th DCA 1982).

But even if an adequate inquiry was made, petitioner argues the trial court's use of the extreme sanction of exclusion of the evidence amounted to an abuse of discretion. This is so because it affirmatively appears that the state's case, or its preparation, was not prejudiced in the least by the discovery breach.

The record shows quite clearly that the state fully anticipated both the defense of self defense and the fact that appellant would rely upon his physical handicaps in connection with that defense. The state posed no objection to Dr. Edwards' testimony, only to the exhibit he prepared to be used in conjunction with his testimony. The state carefully brought out during the testimony of Frances Templin that the area of the incident was well lit (R-243), and that she saw nothing suggesting petitioner had an eye problem (R-245). The state elicited similar testimony from Charles Kent Young (R-266-267). From Officer Jones the state elicited testimony that there was no indication petitioner had trouble seeing (R-391-392).

Thus, it is clear that the state's trial preparation was not hampered in the least and, therefore, the state was not prejudiced. Since the state was not prejudiced, the trial court abused its discretion in excluding the glasses from evidence.

Petitioner argues further that the glasses were relevant to his defense of self defense and should have been admitted on that basis.

The admissibility of a test or experiment is within the discretion of the trial court. Stevens v. State, 419 So.2d 1058 (Fla. 1982). A court should, however, admit evidence of scientific tests or experiments if the reliability of the results are widely recognized and accepted among scientists. See Delap v. State, 440 So.2d 1242 (Fla. 1983). While earlier case law required substantial similarity between the experiment and the actual occurrence, Hisler v. State, 52 Fla. 30 (1906) and McClendon v. State, 90 Fla. 272 (1925), that requirement has been eroded and the current view of this Court is that any alleged lack of similarities between the experiment and the actual conditions go to the weight of the evidence, not its admissibility. Johnson v. State, 442 So.2d 193 (Fla. 1984). It matters not whether, as here, the experiment is one devised for use in a single case. Coppolino v. State, 223 So.2d 68 (Fla. 2d DCA 1969). All of these principles are consistent with the policy of allowing all relevant evidence to be admitted. Section 90.402, Florida Statutes (1983).

Applying the above principle to the instant facts, the error of the trial court becomes apparent. The proposition that the validity and accuracy of glasses

and lenses is accepted among scientists as beyond debate. Put differently, no person could seriously dispute that one's vision can be altered, and the alterations measured objectively, through the use of lenses. Any person who wears glasses can so attest.

The concerns expressed by the trial judge, namely, the fact that the jurors had not had time to adapt to the loss of vision and the difficulty of persons wearing glasses using the lenses, in addition to the possibility that not all the jurors had perfectly normal vision, all go to the weight of the evidence and not its admissibility. Johnson v. State, supra. As to lack of adaptation, the doctor testified that, over time, the vision does not change but that other senses are hightened or developed. Interestingly, since the witness testified that the glasses illustrated petitioner's vision under ideal conditions, some of the differences between the experiment and the actual conditions favored the state, not the defense. Specifically, to the extent the lighting at the scene of the shooting was less than that used when the glasses were prepared, jurors looking through the glasses in a well lit area could see better than petitioner did on the night in question.

Because the defense was self defense, the jurors were called upon to, in effect, stand in petitioner's shoes and ascertain the reasonableness of his actions. Petitioner's

apprehension of danger, in turn, is a function of his physical limitations, particularly his blindness. The glasses were not only obviously relevant to the defense of self defense, but their proposed use by the jury would have placed them in a most unique position to accurately assess petitioner's claim of self defense.

The point here is that the glasses and lenses are relevant and should have been admitted. Of course, Dr. Edwards could and should be cross-examined on the subjects of concern expressed by the trial court and the jury, not the judge, ascertain the weight to be given to the glasses.

ISSUE III

THE TRIAL COURT ERRED IN THE MANNER BY WHICH THE JURY WAS INSTRUCTED AND RE-INSTRUCTED PURSUANT TO SECTION 776.051(2), FLORIDA STATUTES (1983).

As a result of petitioner's complaints about speeding vehicles in his area, and after deputies had been dispatched to the area, petitioner requested the Sheriff of Clay County, Jennings Murrhee, to make him a special deputy (R-221). Although Murrhee expressed the personal view that petitioner had no power to arrest or use deadly force in this case, which view was predicated upon Section 30.09, Florida Statutes (1983), inscribed upon the special deputy card, Murrhee never communicated these views to petitioner (R-221-230). Rather, another deputy, Waugh, was dispatched to give petitioner the card and badge (R-230), and Waugh did so without explaining petitioner's scope of authority (R-495). It is doubtful that petitioner read the card given him, since he is legally blind (R-576). In any event, when petitioner approached the three alleged victims, petitioner told them he was a deputy sheriff and that they were all under arrest (R-238). Factual disputes were presented to the jury, the state claiming petitioner shot the alleged victims without provocation, the defense claiming petitioner shot them in self defense only after they had threatened and grabbed him.

Based upon the foregoing, the defense requested an instruction (R-549-555) based upon Section 776.051(2),

Florida Statutes (1983), which provides:

> Use of force in resisting or making an arrest; prohibition.—
>
> * * *
>
> (2) A law enforcement officer, or any person whom he has summoned or directed to assist him, is not justified in the use of force if the arrest is unlawful and known by him to be unlawful.

After granting the request, the jury was originally instructed as follows:

> Use of any force by law enforcement officer or any person summoned or directed to assist the law enforcement officer is not justified if the arrest is unlawful or it is known by the officer or the person assisting him to be unlawful.

(R-655) (emphasis supplied by petitioner).

The trial court later instructed the jury as follows:

> Use of any force by law enforcement officer or any person summoned or directed to assist the law enforcement officer is not justified if the arrest is unlawful. It is known by the officer or the person assisting him to be unlawful.

(R-665). Defense counsel objected on the basis that the statute required use of the word "and" and the trial court remarked that he simply gave the standard charge (R-666).

Petitioner contends the trial court erred in the manner by which the jury was instructed and reinstructed pursuant to Section 776.051(2), Florida Statutes (1983).

Where the standard jury instructions conflict with the law, the law prevails. See Linehan v. State, 442

So.2d 244 (Fla. 2d DCA 1983) and Bragg v. State, 433 So.2d 1375 (Fla. 2d DCA 1983). In adopting the instructions, this Court recognized that its approval of the standard instructions did not relieve trial judges of their responsibility to charge the jury correctly in each case. In Re Use By Trial Courts Of Standard Jury Instructions In Criminal Cases, 431 So.2d 594 (Fla. 1981).

It is apparent that both instructions given in this case failed to include the statute's use of the word "and." According to the statute, only if the jury finds the arrest unlawful and was known by petitioner to be unlawful would the jury then be allowed to deem petitioner's use of force unjustified. The initially given instruction erroneously allowed the jury to conclude petitioner's use of force was not justified if they found either the arrest was unlawful or that petitioner knew it was unlawful. This error was not cured by the reinstruction, based upon the standard charge. The failure to affirmatively use the statutory term "and," with the result that the jury was left in the dark as to whether one or both factors need to be found before they could find petitioner's use of force was not justified, resulted in confusion. The point to be made here is that neither instruction tracked the statute.

The erroneous instructions prejudiced petitioner because it did not accurately inform the jury how to evaluate his claim based upon his status as a special deputy. For this reason the error is not harmless and a new trial is required.

ISSUE IV

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY UPON LESSER INCLUDED OFFENSES SINCE THE RECORD DOES NOT SHOW PETITIONER PERSONALLY, EXPRESSLY, KNOWINGLY, AND INTELLIGENTLY WAIVED HIS RIGHT TO RECEIVE INSTRUCTIONS ON LESSER OFFENSES.

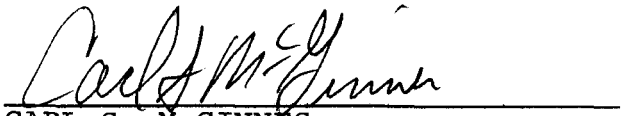
Petitioner is aware that this Court's recent decision in Jones v. State, (Fla.S.Ct. Feb. 13, 1986) (11 FLW 60) resolved the certified question against petitioner. Petitioner simply notes that, at the time of this writing, Jones is not a final decision.

V CONCLUSION

Based upon any or all of the four issues discussed herein, petitioner requests that the judgments and sentences appealed be reversed, and the cause remanded to the trial court with instructions to conduct a new trial.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



CARL S. McGINNES
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Ms. Patricia Conners, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Respondent; and, a copy has been mailed to petitioner, Mr. Carl Mosley, #095536, Post Office Box 229, Lawtey, Florida, 32058, this 27 day of February, 1986.

Carl S. McGinnes

CARL S. McGINNES