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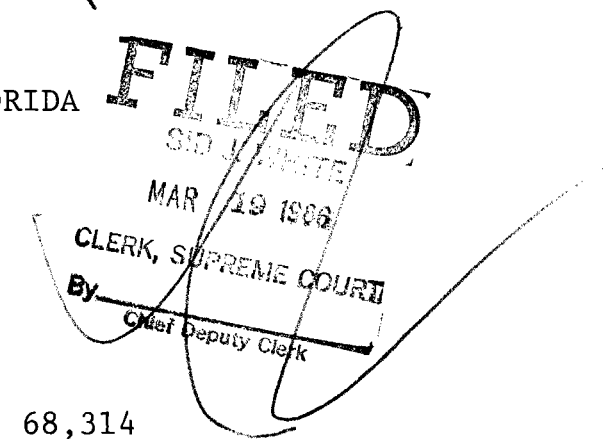
IN THE
SUPREME COURT OF FLORIDA



CARL ELBERT MOSLEY,

Petitioner,

vs. CASE NO. 68,314

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS
PRELIMINARY STATEMENT

Carl Elbert Mosley, the defendant in the trial court and the appellant before the District Court of Appeal, will be referred to as "petitioner." The State of Florida, the prosecuting authority in the trial court and the appellee before the District Court of Appeal, will be referred to as "respondent" or "the State."

The record on appeal consists of four volumes and a supplemental volume. References to the four volumes will be designated by "R" followed by the appropriate page number and enclosed in parentheses. References to the supplemental volume will be designated by "S" followed by the appropriate page number and enclosed in parentheses.

STATEMENT OF THE CASE AND FACTS

The State accepts the petitioner's statement of the case and facts as substantially accurate, but reserves the right to set forth in its discussion such facts as may be relevant to its argument under each issue. It should be noted at this time, however, that the precise question certified to this Court by the First District Court of Appeal was recently resolved against petitioner in Jones v. State, 11 F.L.W. 60 (Fla. February 13, 1986). As a result, the respondent will address petitioner's issue dealing with the certified question first (Issue IV) and then return to a discussion of the remaining issues in the order presented by petitioner.

SUMMARY OF ARGUMENT

ISSUE IV: Because the question certifed to this Court by the First District in Mosley v. State, 11 F.L.W. 316 (Fla. 1st DCA January 31, 1986), was recently resolved in Jones v. State, supra, the State urges this Court to exercise its discretion and decline to consider the three ancillary issues raised by petitioner in his brief on the merits and either to approve or to dismiss this cause on the authority of Jones.

ISSUE I: Because the proffered testimony of Martha Conway and Randy Page regarding victim George Dyson's prior DUI conviction did not go to prove a material fact in issue with regard to petitioner's defense of self defense, it was irrelevant and, thus, was properly excluded.

ISSUE II: Likewise, because the special eyeglasses sought to be introduced into evidence by the defense to simulate for normal-sighted individuals the poor eyesight of petitioner did not prove the condition of petitioner's vision on the night in question and because there was no assurance that the jurors, who would be using the glasses as evidence, possessed the near normal vision to accurately experience petitioner's eyesight, the glasses were porperly excluded as irrelevant. However, even in the glasses are found to be relevant, the court correctly concluded, after conducting an adequate inquiry, that the defense's discovery violation in not informing the State of its intent to use the glasses substantially prejudiced the State in the presentation of its case.

ISSUE III: The manner in which the trial court instructed and then reinstructed the jury on the use of force in making an unlawful arrest was not error inasmuch as there was no conflict between the wording of the reinstruction and that of the statute and the jury was able to properly consider petitioner's theory of defense.

ARGUMENT

ISSUE IV

(RESTATED) INASMUCH AS THE PRECISE QUESTION CERTIFIED BY THE DISTRICT COURT SUB JUDICE HAS RECENTLY BEEN RESOLVED AGAINST PETITIONER, THIS COURT SHOULD, IN ITS DISCRETION, DECLINE TO CONSIDER THE ANCILLARY ISSUES RAISED BY PETITIONER IN HIS BRIEF ON THE MERITS.

Under this issue, petitioner acknowledges that this Court's recent decision in Jones v. State, 11 F.L.W. 60 (Fla. February 13, 1986), resolved the certified question against him. Nevertheless, relying upon such supplemental authority as Trushin v. State, 425 So.2d 1126 (Fla. 1983) and Bell v. State, 394 So.2d 979 (Fla. 1981), he seeks review of three ancillary issues (Issues I-III of petitioner's brief on the merits), which, upon review by the district court, were determined with no elaboration, to be without merit.

Article V, section (b)(4) of the Florida Constitution provides that the supreme court:

> May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance . . .

This Court has construed this provision to mean that "Once the case has been accepted for review . . ., this Court may review any issue arising in the case that has been properly preserved and properly presented." Tillman v. State, 471 So.2d 32 (Fla. 1985); Trushin. (Emphasis supplied). In so concluding, however, this Court has in the past not been unmindful of the need to avoid the usurpation of the district courts' constitu-

tional function as courts of final jurisdiction. Specifically, in Trushin, this Court stated:

> While we have the authority to entertain issues ancillary to those in a certified case, Bell v. State, 394 So.2d 979 (Fla. 1981), we recognize the function of district courts as courts of final jurisdiction and will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified question.

Id. at 1130.

The State asserts that the instant case represents an instance in which this Court should refrain from using its authority to entertain those ancillary issues raised by petitioner sub judice. Not only is review of the certified question unnecessary sub judice inasmuch as the precise certified question was recently answered by this Court, but it is clear from a perusal of the three ancillary issues raised by petitioner, that they will not affect the outcome of the petition.

While this Court has in the past reviewed decisions of the district courts even where the certified question has already been answered, see, e.g., Tillman, this Court has made it clear that undertaking a review of ancillary issues in such a case is purely within its discretion. Trushin. Petitioner is not entitled to such review as a matter of right, and, under the facts of the instant case, for this Court to exercise its "authority" to review those issues, which are essentially factual in nature, when the purely legal certified question has already been resolved, could only have the undesirable effect of curtailing the constitutionally mandated function of the district

courts as courts of final jurisdiction.

If this Court truly intends to refrain from usurping the district courts' authority as the courts of final jurisdiction, the State respectfully submits that this Court must avoid the routine acceptance and review of issues ancillary to certified questions, especially when those questions have already been resolved. As a result, inasmuch as there is no longer any unresolved question of great public importance for this Court to consider in the instant case and inasmuch as the First District Court of Appeal in its capacity as a court of final jurisdiction considered the petitioner's remaining issues to be without merit, this Court should respect the First District's conclusion and either dismiss this cause in light of Jones or affirm on the authority of Jones but decline to consider petitioner's three remaining issues.

As to the merits of the certified question sub judice, inasmuch as petitioner concedes that this Court's holding in Jones is dispositive, the State stands on that decision as precisely resolving the certified question sub judice in its favor.

Finally, assuming this Court decides to consider the remaining three issues in petitioner's brief on the merits, the State now addresses each of those issues in the order presented by the petitioner in his brief.

ISSUE I

(RESTATED) THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE DEMONSTRATING THAT VICTIM GEORGE DYSON HAD BEEN PLACED ON PROBATION FOR DRIVING UNDER THE INFLUENCE INASMUCH AS THAT EVIDENCE WAS IRRELEVANT TO PETITIONER'S THEORY OF DEFENSE.

It is petitioner's contention that the trial court erred in not allowing him to introduce evidence which allegedly supported his defense of self-defense. Specifically, the petitioner sought to introduce into evidence court documents reflecting that approximately a month and a half before the incident George Dyson had been convicted of driving under the influence, which conviction resulted in his being placed on six months probation and the suspension of his driver's license for the same period of time. (R 71-77). The petitioner also sought to have Randy Page, the only surviving shooting victim, testify that the main reason they wanted to get the truck out of the sand that night was because of Dyson's DUI conviction. (R 504). Appellant asserts that the court's decision to exclude this evidence violated petitioner's right to present evidence in support of his theory of defense inasmuch as such evidence was allegedly relevant to show the decedent Dyson's "motive" for wanting to leave the area on the night in question.

Before addressing the merits of this issue, the State wishes to clarify the factual scenario presented by the petitioner in his brief under this issue. First, while it is true that George Dyson had at least a .16 blood alcohol level at the time of the shooting,

the testimony of the only "nonparticipating" eyewitness to the shooting (R 465), petitioner's nephew H.S. Mosley, was that from his vantage point on his porch, he could see the three boys lined up near the roadway (R 459-460) and that when the shots were fired, he did not see the boys either attack or rush petitioner.(R 460). Indeed, on cross, he testified that at the time of the shooting the boy nearest the petitioner was five to six feet away and the boy furthest away was only a few feet more. (R 464).

The petitioner's theory of defense was that the petitioner shot the boys in self-defense when they allegedly attacked him. The only evidence directly supporting this defense was petitioner's statement to police.

Near the beginning of the defense's case-in-chief, defense counsel proffered the testimony of Clay County Deputy Clerk Martha Conway. Through this testimony the defense sought to introduce several court documents, including a judgment and sentence, which all together reflected Dyson's alleged DUI conviction. (R 497-499). The State voir dired Ms. Conway, objecting to the relevance of the conviction and arguing that the defense had committed a discovery violation because the State had never been told that Martha Conway would be a witness. (R 499). The defense responded, inter alia, that the judgment and sentence was relevant to prove the "motive" behind George Dyson's wanting to leave the area quickly that night. (R 501). The State answered that the DUI conviction was completely irrelevant and asked how Dyson could have had such a "motive" when petitioner had a gun pointed at

Dyson and was waving it around in a threatening manner. (R 552).

The court ultimately sustained the State's objection, ruling that George Dyson's DUI conviction had "nothing to do with anything that occurred that night and would not warrant the introduction of this into evidence." (R 504).

Subsequently, defense counsel stated that he had briefly spoken with Randy Page regarding his testimony for the defense and that at that time, defense counsel asked Page if he was aware of Dyson's DUI conviction to which Page responded, "That's the main reason we were trying to get the truck out that night." (R 504). This was the extent of the defense's "proffer" inasmuch as the State ulitmately stipulated to the other matters to which Page was to testify, and the defense never called Page to the stand to obtain a proffer of his full testimony with regard to that statement.

After a great deal of discussion regarding the fact that there was no evidence that a crime had been committed, with the court pointing out that the commission of a crime was essential to a lawful arrest (R 505-508), the court, without stating a reason therefor, ultimately ruled that Randy Page could not testify as to why they wanted to pull the truck out of the sand. (R 512). In response, the defense moved for a mistrial on the ground that it prevented the defense from rendering effective assistance of counsel and thus the defendant from having a fair trial. (R 512). This motion was denied. (R 512).

Petitioner now asserts that the trial court erred in excluding this evidence inasmuch as it was allegedly relevant to

petitioner's theory of defense.

It is the State's response, first, that any evidence regarding Dyson's DUI conviction was properly excluded by the court because such evidence was indeed irrelevant. "Relevant evidence is evidence tending to prove or disprove a material fact, § 90.401, Fla. Stat.; an accused is not constitutionally entitled to present irrelevant evidence." Doe v. United States, 666 F.2d 43, 47 (4th Cir. 1981). The burden of demonstrating the relevancy and, thus, the admissibility of evidence is upon the party offering it at trial. Nelson v. State, 395 So.2d 176 (Fla. 1st DCA 1981). "Relevancy is not a precise concept, and its use as a test for admissibility must often rest upon the [trial] court's informed notions of logic, common sense and simple fairness." Wadsworth v. State, 201 So.2d 836, 838 (Fla. 4th DCA 1967), reversed on other grounds, 210 So.2d 4 (Fla. 1968). For this reason, "[t]he trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed" on appeal. Welty v. State, 402 So.2d 1159 (Fla. 1981), Booker v. State, 397 So.2d 910 (Fla. 1981); Mikenas v. State, 367 So.2d 606 (Fla. 1968); Rodriguez v. State, 327 So.2d 903 (Fla. 3d DCA), cert. denied, 336 So.2d 1184 (Fla. 1976).

Sub judice, the trial court did not abuse its discretion in excluding the proffered evidence regarding Mr. Dyson's DUI. The court basically ruled that the evidence was irrelevant to the petitioner's defense, i.e., that the proffered evidence failed to

prove a material fact relating to petitioner's defense. Indeed, the proffered evidence proved only (1) that a George Dyson (presumably the victim) had been convicted of driving under the influence a month and a half before the incident and (2) that possibly because of that conviction he wanted to get the truck out of the sand that night. However, the evidence cannot be stretched to show that the DUI conviction allegedly not only caused George Dyson to want to get his truck out of the sand but also led him to attack the petitioner, an armed man. The link between the desire to get the truck out of the sand and the alleged assault upon the petitioner which allegedly caused him to shoot all three boys is and was sheer speculation on the part of petitioner. Even if it was absolutely clear that George Dyson on the night in question wanted to get his truck out of the sand because of his DUI conviction, there is absolutely no evidence which suggests any connection between that desire and the alleged attack which petitioner stated took place. One could reasonably speculate upon a number of reasons for such an alleged attack, not the least of which would be that petitioner had a gun on the boys, and fearing for their lives, they sought to protect themselves by attempting to wrestle the gun away from him. This theory has as much basis in fact as petitioner's. Each begins with a premise in fact but the vital factual link making the speculative inference drawn therefrom to reach the end result is missing. For this reason, the petitioner failed to meet his burden of proving the relevance of the proffered testimony, and thus the court did not abuse its discretion in excluding it.

Nevertheless, the petitioner contends that this issue involves the right of an accused to present evidence relevant to his theory of defense. In support of this assertion the petitioner cites Gurganus v. State, 451 So.2d 817 (Fla. 1984), Quintana v. State, 452 So.2d 98 (Fla. 1st DCA 1984) and Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979). However, each of those cases is easily distinguishable because each involves the proof of a material element of the accused's defense. In Gurganus, the defendant sought to present expert testimony relevant to whether the accused had the specific intent to commit first-degree murder. Specific intent is an element of premeditated first-degree murder to which voluntary intoxication is a defense. Thus, the appellate court held that it was error for the trial court to exclude expert testimoney regarding the effect of drugs and alcohol on the defendant's state of mind at the time of the offense. Likewise, in Hawthorne[1] and Quintana, the evidence sought to be admitted dealt with the deceased's reputation and propensity for violence and the actual threats made by the victim to the accused and others. In both cases, the defense sought to introduce this evidence to prove an element of self-defense, i.e., to prove the reasonableness of the defendant's apprehension. It is well settled that evidence of prior specific acts showing a propensity for violence or a violent

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[1] Petitioner's description of the holding in Hawthorne is overly broad. The holding is not that all doubts as to admissibility of any evidence bearing on an accused theory of self-defense must be resolved in favor of the accused. Rather, the holding is limited in that area to evidence of prior threats by the victim against the accused.

his full theory of defense into evidence. His statements to police clearly reflected his side of the story, that the boys allegedly attacked him while he held the gun on them and he had to shoot them in self-defense.

The holdings in Quintana and Hawthorne point up another interesting consideration. Here, the petitioner sought to prove that the decedent had a "motive" for leaving the scene. However, at no time was there any evidence presented that petitioner was aware of such "motive." In proving self-defense, it does not matter what was going through the decedent's mind; it matters only what the petitioner was thinking. In Quintana and Hawthorne, the defendants had a reasonable basis (the victims' reputations) for fearing for their lives and, thus, allegedly shooting in self-defense. Sub judice, the petitioner could not have reacted to the victim's "motive" for provoking an alleged attack because he did not know about any such "motive." Rather, he could only have reacted to the actual actions of decedent Dyson and the other two boys. Assuming for a moment, for purposes of argument, that the boys did attack the petitioner, the petitioner in shooting them would have been responding to, not Mr. Dyson's alleged "motive," but to the attack itself inasmuch as it would have been not the "motive" but the attack, which would have placed the petitioner in fear for his life. In Quintana and Hawthorne, it was the victims' overt acts at the time of their deaths coupled with their reputations for violence which allegedly caused the defendants in those cases to act in self-defense. Sub judice,

arguendo that petitioner acted in self-defense, it would have only been in reaction to the attack as the petitioner knew nothing else about his victims to cause him to fear for his life. Thus, the petitioner was not prevented from presenting his complete theory of defense. The alleged "motive" of George Dyson was a separate and irrelevant matter which in no way bolstered petitioner's defense because it did not go to prove any material fact with regard to any specific element of the defense itself.

Petitioner also argues that the instant case is similar to an application of the "Williams Rule" in reverse. The "Williams Rule" is codified in section 90.404(2)(a), Florida Statutes, and provides:

> Similar fact evidence of other crimes, wrongs or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent preparation, plan knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

It does not appear that a reverse "Williams Rule" has ever been adopted or utilized by a Florida court. Nevertheless, assuming the existence of such a rule, it has no application here. The facts surrounding Dyson's DUI conviction are not similar enough to the facts of the instant case to establish a motive on the part of Dyson to allegedly attack petitioner. While Dyson may have run a deputy off the road while driving under the influence, resulting in his conviction, such a conviction does not suggest a "motive" for allegedly attacking petitioner when the reason for Dyson's truck becoming stuck in the sand was not related to the

commission of any crime or infraction. Rather, according to one witness, getting stuck in the sand on the unpaved road was a common occurrence. (R 438).

In support of his "Williams Rule" argument, petitioner cites Tafero v. State, 403 So.2d 366 (Fla. 1981) and Heiney v. State, 447 So.2d 210 (Fla. 1984) for the proposition that "evidence of events which [show] a desire to avoid apprehension [are] deemed admissible to demonstrate a motive for crimes subsequently committed." He then applies this proposition to the facts of the instant case, asserting that Mr. Dyson's past DUI conviction caused him apprehension to the point that he allegedly attacked petitioner in order to leave the area. However, this argument must fail.

In Tafero and Heiney, the evidence that Tafero was on parole at the time he shot the law enforcement officer and the evidence that Heiney requested a friend drive him out of town when he learned that Texas authorities were looking for him in connection with the shooting of an individual in Texas, went to prove the defendant's motive for the subsequent crimes of murder, obviously relevant to a finding of guilty by the jury. Sub judice, the petitioner sought to introduce the evidence of Mr. Dyson's prior DUI conviction to prove that petitioner acted in self-defense. However, as pointed out earlier, Mr. Dyson's prior conviction does not prove any material fact in relation to an element of self-defense and, therefore, was not relevant to petitioner's defense. In Tafero and Heiney, the evidence of the defendants' motives

was directly relevant to proving their subsequent criminal acts and that was why such evidence of "motive" was sought to be introduced by the prosecution in those cases. In the instant case, the defense sought to introduce evidence of Dyson's alleged "motive" to support petitioner's alleged subsequent act of self-defense. However, such an alleged "motive" bears no relevance to proving a rationale for petitioner's alleged act of self-defense. Thus, the difference between the instant case and Tafero and Heiney is that in Tafero and Heiney the reason the evidence was sought to be introduced was because it explained the defendants' subsequent acts; in the instant case, the reason the defense sought to introduce the evidence of Mr. Dyson's DUI conviction was to explain why the petitioner acted in self-defense. However, inasmuch as Mr. Dyson's alleged "motive" was not known to petitioner, it has nothing to do with explaining the petitioner's actions on the night in question. In this vein, petitioner's reasoning with regard to the application of a reverse "Williams Rule" must fail.

Finally, petitioner relies upon State v. Bradley, 576 P.2d 647 (Kan. 1978) to support his argument. The significant facts involving the defendant's theory of defense were as follows:

> The defendant testified that he was lying on the bed with his girl friend when the deceased came into the room in an intoxicated condition. The deceased was armed and fired a shot at the defendant with the bullet striking the mattress near defendant's head. The defendant contended that he jumped up from the bed and struggled with the defendant [sic] in an effort to turn the gun away from himself. The defendant sought to show that the motive for this unprovoked

> attack upon him by the deceased was that the deceased had been involved in Topeka in an assault with a gun on a Topeka police officer. Charges were brought against the deceased in connection with that incident and an additional charge was brought when the deceased failed to appear. The deceased was being sought by Shawnee County authorities in connection with this incident. The defendant was a known police informer and believed that this latter fact had been communicated to the deceased by the deceased's nephew shortly before the incident in question. The defendant sought to establish that fear of being turned in to the authorities by the defendant was the motive of the decedent for the attack.

Id. at 649-650. The Supreme Court of Kansas found that the exclusion of such evidence was error and was compounded by the fact that the trial court had allowed the State to present evidence of the deceased' character in its case-in-chief.

The facts of Bradley are easily distinguished from the instant case. Here, the petitioner admitted in his statement to polcie that, unlike Bradley, he was the initial aggressor; he was the one who came to the scene waving a gun around in a threatening manner. The decedent George Dyson did not arrive at the scene with the express motive of attacking petitioner. Petitioner's actions were separate and distinct from any "motive" on the decedent's part. Moreover, in Bradley, the defendant asserted that the attack was unprovoked. Sub judice, because the petitioner was the one with the gun, i.e., the aggressor, any alleged attack upon him was clearly provoked by his use of the weapon in an attempt to keep the boys there. Thus, any reason the boys may have had for allegedly attacking petitioner was at that point

clearly irrelevant to petitioner's defense of self-defense.

As to petitioner's comments about the trial court's concerns over whether petitioner had legal authority to make an arrest and whether the George Dyson who was on probation for DUI was the same man involved in the instant case (see petitioner's brief at 28). It is important to note that these comments were not the express basis for the court's exclusion of the evidence, and, regardless, because the evidence was irrelevant, whatever the court's reason for excluding the evidence, it was the correct holding and must be sustained. See Robinson v. State, 393 So.2d 33 (Fla. 1st DCA 1981).

As its final argument, the State contends that even assuming the evidence of Dyson's DUI conviction was relevant, its exclusion was harmless error. As pointed out above, the evidence, contrary to petitioner's assertion, does not go to the "very heart of the defense."

The proper test in determining whether an error is harmless is whether there is a reasonable possibility that the lack of the evidence complained of might have contributed to the conviction. Schneble v. Florida, 403 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972). Applying that test sub judice, it is clear that the exclusion of the evidence of Dyson's DUI conviction was proper inasmuch as the exclusion did not contribute to petitioner's conviction. The court clerk's proffered testimony went to the fact that Dyson had a prior DUI conviction and the legal documents reflecting that conviction were sought to be introduced by the

defense. Mr. Page's "proffered" testimony was limited to the reason the boys wanted to get their truck out of the sand that night. There was no proffer of evidence, direct or otherwise that showed that Dyson's DUI conviction was also the reason for the alleged attack upon petitioner.[2] Thus, there was no evidence presented which would have in any way negated the elements of the State's case or bolstered the elements of self-defense. Even if the proffered testimony was placed in evidence the result would have been the same. There was substantial evidence supporting petitioner's guilt especially since it remained undisputed that the petitioner was the aggressor and the only one with a gun. As a result, the exclusion of the evidence pertaining to Dyson's DUI conviction, if relevant, was clearly harmless.

Thus, based upon the foregoing, the trial court did not commit reversible error in excluding the proffered evidence regarding Dyson's DUI conviction, and therefore, the First District correctly held this issue to be without merit.

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[2] Indeed, with regard to Randy Page's alleged testimony, it should be noted that this Court does not specifically know what the extent of Page's testimony would have been because the defense did not proffer Mr. Page's testimony after it was excluded. Thus, under Nava v. State, 450 So.2d 606 (Fla. 4th DCA 1984), this Court is not able to evaluate the proposed testimony's weight, relevancy and competency in determining the effect of the exclusion, and, thus, cannot properly address that portion of petitioner's argument dealing with the exclusion of Page's testimony.

ISSUE II

(RESTATED) THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW THE DEFENSE TO INTRODUCE INTO EVIDENCE A PAIR OF EYEGLASS LENSES ALLEGEDLY SIMULATING THE PETITIONER'S EYESIGHT.

Through expert witness Dr. Thomas Edwards, a opthamologist who had previously treated the petitioner, the defense sought to introduce into evidence a special set of eyeglasses Dr. Edwards had prepared to allegedly demonstrate to any person of normal vision the petitioner's eyesight under ideal circumstances. (R 583-584).

Prior to Dr. Edwards being called to the stand, the State objected to any attempt to introduce these special glasses into evidence inasmuch as the defense had not noticed the State, pursuant to Florida Rule of Criminal Procedure 3.220, of its intent to use the glasses at trial. (R 564-565). The defense counsel asserted that he had told the State of its intent to use the glasses about a week before in the presence of the court. (R 505). The court stated that it did not hear the defense make any such statement. (R 563-566). Without making a ruling, the court allowed Edwards to testify in the presence of the jury until he was ready to testify about the glasses, at which time the jury was removed and the doctor's testimony was proffered. (R 583-584).

On voir dire, the doctor testified that because his vision was not 20/20, he had to wear his own glasses in order to correct his vision to 20/20 before he could accurately utilize the special

lenses to experience the simulated effect of petitioner's eyesight. (R 585). He further testified that someone with poor vision would not see what an individuals with normal vision would see when looking through the glasses. (R 585).

Moreover, the doctor stated that in preparing the glasses he had not taken into consideration the lighting conditions on the night in question. (R 586). Rather, he testified that the glasses were prepared with ideal lighting conditions in mind, i.e., "a very bright, clear, high noon day." (R 586).

Finally, the doctor stated that someone with petitioner's eyesight eventually learns to adjust and compensate for his poor vision by sharpening his other senses. (R 587-588).

At the close of voir dire, the prosecution reiterated its earlier discovery argument and additionally asserted that the glasses were unreliable and irrelevant inasmuch as they did not demonstrate what appellant's vision was like on the night in question. (R 588). The State also argued that the members of the jury may not have possessed the normal vision required to properly utilize the special glasses. (R 588). Indeed, the court later noted for the record that three of the six jurors wore glasses. (R 592).

The court sustained the State's objection on the basis of the discovery violation and because "there are compensating factors that have taken place, and these people [the jury] would be seeing that vision for the first time in this courtroom today and I don't see how that could be in any way an approximation of

of the way the man sees who has lived 14 years with that vision and there are things he can and can't do subject to those limitations." (R 589).

Petitioner now asserts that this ruling was error and makes three essentially alternative arguments. First, he asserts that the trial court did not make an adequate inquiry into the discovery violation asserted by the State before excluding the glasses; second, he asserts that even if an adequate inquiry was made, the trial court abused its discretion in imposing such a severe sanction as exclusion; and, finally, the petitioner contends that, regardless, the glasses were relevant as an experiment and should have been admitted on that basis.

The State agrees that it is a well-settled rule that in a discovery context, "relevant evidence should not be excluded from the jury unless no other remedy suffices." Cooper v. State, 336 So.2d 1133 (Fla. 1976); State v. Bowers, 422 So.2d 9 (Fla. 2d DCA 1982) (emphasis supplied). However, the word "relevant" is the key to the above statement. Obviously, if evidence were irrelevant to the State's or the defense's case, whether a party had been noticed with regard to such evidence would be inconsequential.

In this vein, it is the State's contention, first, that the eyeglasses were irrelevant to the defense's case and, second, because the eyeglasses were irrelevant, the issue of whether the trial court conducted an adequate inquiry into the discovery violation is itself irrelevant. As an alternative argument, the

State asserts that even if the evidence was relevant, the court did conduct an adequate inquiry.

Taking petitioner's discovery violation issue first, the following discussion assumes that the special eyeglasses were in fact relevant to petitioner's defense.

In Richardson v. State, 246 So.2d 771 (Fla. 1971), the Court held that a

> . . . a trial court has discretion to determine whether the non-compliance [with discovery rules] would result in harm or prejudice [in this case, to the State], but the court's discretion can be properly exercised only after the court has made an adequate inquiry into all surrounding circumstances.

Id. at 775. The Court further held that the inquiry should reveal "whether the state's violation was inadvertent or wilful, whether, the violation was trivial or substantial, and most importantly, what effect, if any, did it have upon the ability of [a party] to properly prepare for trial." Id.

Prior to Dr. Edwards' testimony, the State objected to the use of the specially prepared glasses inasmuch as the State had not been noticed of the defense's intent to sue the glasses at trial. Defense counsel asserted that "last week in your chambers with the State present and Your Honor present, I informed them that we had spoken to Dr. Edwards and he examined Mr. Mosley and that we would be using him as a witness and that he was preparing a set of eyeglasses." (R 565). The following exchange then took place between defense counsel, Mr. McGuinness and the court:

THE COURT: No, sir, I don't recall that. It surprised me when you used it on your opening statement.

MR. McGUINNESS: I can assure the court and Mrs. Peek this was brought to their attention last week on that same day.

THE COURT: I did not hear it. The only part I did not hear about was the eyeglasses. You're correct when you say we talked about calling Dr. Edwards, but not about using eyeglasses. I signed a transport order to transport him down there to have him reexamined.

MR. McGUINNESS: That had been known previously. That was handled by Mr. Durrance.

The day I was in chambers with the state, and as a matter of fact if you recall, I also at that time said that I had spoken to him, told him the state would undoubtedly be contacting him, and to furnish complete information.

THE COURT: That's correct. You informed the state he would be a witness.

MR. McGUINNESS: I also made him an available witness.

THE COURT: That's correct. Nobody's arguing that. The only thing I want to correct is I don't recall any statement about making up a set of eyeglasses.

(R 565-566). The State then clarified that it was not objecting to Dr. Edwards as a witness, but only to any attempt to introduce the eyeglasses as demonstrative evidence. (R 566). Subsequently, the court decided to allow the doctor to testify but stated that "If it goes to that [the glasses], it will be a proffer." (R 566). As described above, the subsequent proffer and voir dire revealed that the eyeglasses would not accurately simulate the petitioner's

eyesight on the night in question, especially in view of the fact that petitioner had learned to compensate for this poor vision by sharpening his other senses. (R 583-588).

It is submitted that while the trial court did not make any express findings (and petitioner agrees that express findings are not necessary, petitioner's brief at 32), regarding whether the defense's violation was inadvertent or willful, trivial or substantial, and prejudiced the State in its preparation for trial, nevertheless, the court's inquiry was adequate because the record reveals that the violation was willful, substantial and prejudicial.

First, the court had been present when, according to defense counsel, the State was orally noticed of the defense's intention to use the glasses. The court, however, while recalling that the defense had told the State that it planned to call Dr. Edwards, did not recall any statement regarding the use of the specially prepared glasses. This indicates that the defense's omission was willful. Moreover, the omission was substantial because had the glasses been admitted, assuming they were relevant, they would have supported the defense's assertion that the petitioner's eyesight was very poor on the night in question, and the State, never having been noticed would not have been able to adequately rebut such evidence with its own demonstrative evidence or expert testimony. The resulting prejudice to the State would then be obvious. Thus, because the court's inquiry together with the defense's proffer and the State's voir dire clearly reveals the surrounding circumstances as well as the effects of the defense's discovery violation, the court's inquiry was more than sufficient.

Petitioner's second assertion under this issue, is that assuming an adequate inquiry was made, the trial court still abused its discretion by imposing the allegedly extreme sanction of excluding the evidence inasmuch as the State's case was in no way prejudiced by the discovery violation.

As noted by the Richardson court, "the trial court has the discretion to determine whether the non-compliance would result in harm or prejudice" to the opposing party. The State asserts that in the instant case the trial court did not abuse its discretion in excluding the eyeglasses inasmuch as the prejudice to the State's case as well as its preparation was clearly evident. As a result, exclusion was the only appropriate remedy.

Specifically, petitioner contends that no prejudice to the State existed below because the record shows that the "state fully anticipated both the defense of self-defense and the fact that petitioner would rely upon his physical handicaps in connection with that defense." (Petitioner's brief at 33). Moreover, the petitioner notes the State objected only to the exhibit Dr. Edwards prepared and not to the doctor's testimony and that the State elicited testimony from State witnesses that the area of the incident was well lit and that the petitioner at no time appeared to have any trouble seeing.

This argument begs the question. The State may very well have anticipated the petitioner's defense and, as a result, presented testimony regarding petitioner's eyesight. However, because the defense did not give notice to the State with regard

to its plan to introduce the specially prepared glasses, the State did not have advance warning to present its own demonstrative evidence in its case-in-chief or to impeach the preparation of the petitioner's demonstrative evidence through either medical or scientific evidence in order to effectively rebut the defense's use of the glasses. Thus, simply because the State may have presented evidence as to petitioner's ability to see on the night in question does not mean that the State would not have been prejudiced by the introduction of the eyeglasses into evidence.

Finally, as his third contention the petitioner asserts that the glasses were relevant to his defense and should have been admitted on that basis. Recall that the State began its discussion under this issue with the argument that the eyeglasses were irrelevant and, as a result, whether a discovery violation occurred below was insignificant inasmuch as a discovery violation presupposes that the evidence is relevant and would have been admissible but for the discovery violation. As noted in the previous issue, "relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. The burden of demonstrating the relevancy and, thus, the admissibility of evidence is upon the party offering it at trial, Nelson, supra, and because a trial court has wide discretion in this area, a trial court's ruling will not be disturbed unless an abuse of discretion can be shown. Welty, supra; Booker, supra.

Sub judice, the trial court did not abuse its discretion in excluding the eyeglasses. The doctor's testimony clearly

supported this exclusion on the basis of irrelevance. First, the doctor testified that the glasses were designed to simulate for a person of normal vision the petitioner's eyesight under ideal circumstances. (R 583-584). Thus, a juror who had poor eyesight and was not aware of it or someone who wore bifocals (R 585), would not be able to see what a person of normal vision would see in using the glasses. Indeed, the record indicates that three of the jurors wore glasses. (R 592).

It appears that the only way the defense could have ensured that the glasses were utilized for the proper effect would have been to conduct eye examinations upon each of the jurors to make certain that each had near normal vision. To undertake such a task would have been highly impractical.

The doctor also testified that he knew nothing of the conditions on Deer Trail the night of the incident and had not designed the glasses with those conditions in mind. (R 586). He also stated that someone with petitioner's eyesight eventually learns to adapt by compensating for his poor vision with the use of his other senses. (R 587-588). This testimony supports the State's assertion below that the glasses were both unreliable and irrelevant inasmuch as neither the conditions on the night of the incident nor the petitioner's adaptive abilities were taken into consideration when the glasses were prepared.

Consequently, the eyeglasses neither proved nor disproved any material fact, with regard to petitioner's defense that he killed the boys in self-defense that night. While they apparently showed a simulated version of what petitioner's eyesight would

be under ideal circumstances, the glasses did not prove what the petitioner's vision was like on the night of March 24, 1984 and they could not reveal how the petitioner compensated for his reduced vision. Moreover, the prejudice to the State was clear: there was no assurance that each of the juror's possessed the near normal vision necessary to properly utilize the eyeglasses. Thus, even assuming the eyeglasses were relevant to prove the petitioner's poor vision and no more, that fact had already been introduced into evidence through Dr. Edwards' detailed testimony (R 574-582) and, therefore, the introduction of the eyeglasses would have been cumulative[3] and unnecessarily prejudicial to the State's case.

Petitioner's only assertion with regard to relevance in his brief is that the eyeglasses were relevant as a test or experiment and should have been admitted on that basis. However, because the petitioner at no time argued this specific ground as a basis for admitting the evidence below, and, thus, the trial court was never given an opportunity to rule upon it, petitioner did not preserve this contention for appeal, and therefore, this Court should not now consider the argument on certiorari.

Assuming, however, that this Court nevertheless addresses the merits of petitioner's contention, the argument must still fail. First, there is nothing in the record to indicate that

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[3] In this vein, the State would assert that because of the cumulative nature of the evidence, if this Court for some reason determines that the eyeglasses were relevant, the court's decision to exclude the glasses was nevertheless harmless.

the eyeglasses were the result of a "scientific test" or "experiment." Unlike such cases as Coppolino v. State, 223 So.2d 68 (Fla. 1968), where tests were conducted on the deceased to determine the presence in the body of any toxic substances, and Johnson v. State, 442 So.2d 183 (Fla. 1983), where the alleged murder weapon, a gun, was fired into paper to determine the range at which the victims had been shot, the eyeglasses in the instant case were neither part of a test nor an experiment. They were simply prepared as demonstrative evidence. The doctor did not begin with certain hypotheses nor end with a "result." There was no attempt to narrow possibilities down to a single reasonable conclusion. Rather, as an opthamologist, Dr. Edwards simply utilized his skill to prepare a set of glasses, and there was no doubt as to the outcome of that preparation.

Petitioner further asserts that the judge's concern over the fact that the jurors did not have the benefit of the adaptation of the other senses which the petitioner had experienced went to the weight of the evidence and not to its admissibility. However, this argument presupposes that the glasses were relevant as a test or experiment, or for that matter, relevant at all, and, as the State has argued, that is not the case. Because the eyeglasses do not prove a material fact in issue with regard to petitioner's defense of self-defense, the issue of the weight of the evidence is as irrelevant as the evidence is itself.

In fact, the petitioner's argument under this issue supports the fact that the eyeglasses were irrelevant because petitioner

asserts that "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 action." (Petitioner's brief at 35). (Emphasis supplied). As repeatedly noted above, by using the eyeglasses, the jurors would not have been able to "step into petitioner's shoes" on the night in question, and, would not have been able to "ascertain the reasonableness of his actions" on that night. Therefore, the glasses have no relevance to the petitioner's defense.

As a result, because petitioner has not met his burden of proving the relevance of the eyeglasses, the trial court did not abuse its discretion in excluding the evidence, and given that the evidence was clearly irrelevant the questions of whether a discovery violation occurred and whether the court made an adequate inquiry into the violation are moot. This is especially the case because the court made two findings, one based on the discovery violation and one evidentiary in nature. Thus, based on the premise that if a court's order is sustainable under any theory revealed by the record, it is sustainable on review, notwithstanding that the trial court may have relied upon different, or (although not the case here) even erroneous reasons, Robinson, supra, the trial court's order sub judice, excluding the eyeglasses must be upheld.

Based on the foregoing, there is no question that the First District was correct in concluding this particular issue to be without merit.

ISSUE III

(RESTATED) THERE WAS NO REVERSIBLE ERROR IN THE MANNER IN WHICH THE TRIAL COURT INSTRUCTED AND THEN RE-INSTRUCTED THE JURY ON THE USE OF FORCE IN MAKING AN UNLAWFUL ARREST.

At the charge conference, defense counsel, inter alia, requested that certain portions of the standard jury instruction for the justifiable use of deadly force be given. (R 549-555). Defense counsel ran through those instructions they felt were applicable to the instant case, and specifically requested the instruction appearing on page 43 of the Standard Jury Instructions in Criminal Cases, which covers the use of deadly force in making an unlawful arrest and provides 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:
>
> 1. The arrest is unlawful.
>
> 2. It is known by the officer or the person assisting him to be unlawful.

Contrary to what the petitioner suggests in his argument under this issue, defense counsel at no time requested that the court give section 776.051(2), Florida Statutes,[4] as the instruction

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[4] Section 776.051(2), Florida Statutes (1983) provides:

> Use of force in resisting or making an arrest; prohibition.—
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> * * * * *
>
> (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.

but rather, specifically requested that the court give the instruction as it appears at page 43 of the Standard Jury Instructions. (R 549-550; 552).

In giving that instruction, the court stated:

> 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 665). Subsequently, although it is unclear at whose instigation, the court reinstructed 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 ground that section 776.051(2) used the word "and" between paragraphs one and two and the court had not. (R 666). The court noted the objection.(R 666).

Petitioner now asserts that the trial court erred in the manner by which it instructed the jury with regard to this particular jury instruction. First, petitioner asserts that where the standard jury instruction conflicts with the law, the law prevails. However, neither the cases cited by petitioner for that proposition nor the proposition itself has any relevance to this issue. This is so, because there is no conflict between the standard jury instruction and the statute. The statute specifically reads "and" and, although the jury instruction does not expressly use the conjunction, neither does it suggest otherwise. The instruction

simply indicates as do many of the other standard instructions, that a jury must find both paragraphs one and two before it can properly conclude that the use of force by a law enforcement officer was not justified.

Thus, contrary to petitioner's argument, when the court reinstructed the jury by reading the standard jury instruction again, it cured any error it may have made in originally reading the instruction.

Moreover, it was the petitioner's counsel who originally requested the instruction as it is set forth on page 43 of the Standard Jury Instructions, and , thus, petitioner cannot now be heard to complain because the court reinstructed the jury using the exact phrasing of the instruction defense counsel had specifically requested. In this vein, if there was any error, it was invited. Sullivan v. State, 303 So.2d 632 (Fla. 1974).

Finally, it is the State's contention that if there was any error sub judice, assuming it was not invited, it was certainly harmless. First, it is well settled that a trial court's instructions are to be taken as a whole, and even if an isolated passage might be error if standing by itself, that alone is not sufficient ground for reversal. Stanley v. State, 357 So.2d 1031 (Fla. 3d DCA), cert. denied, 364 So.2d 891 (Fla. 1978).

Sub judice, the jury was fully instructed on all aspects of self-defense as they related to the facts of the instant case. Simply because the court initially used "or" as opposed to "and" with regard to a minute section of that instruction and then

corrected that instruction by reading verbatim the specific instruction from the Standard Jury Instructions in Criminal Cases, does not mandate reversal. Moreover, the evidence was overwhelming (through the testimony of Clay County Sheriff Murrhee) that the petitioner as a special deputy, had neither the authority to make an arrest nor the "right" to use deadly force. under the circumstances of this case. (R 221-225). As a result, because the evidence overwhelmingly suggests that the petitioner overstepped his bounds as a "special deputy" on the night in question, any error in the trial court's instruction was harmless.

Based on the foregoing, the First District Court of Appeal properly affirmed the trial court with regard to this issue.

CONCLUSION

Based upon the foregoing, this Court should approve this cause on the authority of Jones, supra, and decline to address petitioner's ancillary issues or, in the alternative, this Court should affirm petitioner's judgments and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Carl S. McGinnes, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 on this the 19th day of March, 1986.

Patricia Conners

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