IN THE SUPREME COURT OF FLORIDA



ROBERT W. BROOKS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 69,759

# PETITIONER'S BRIEF ON MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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## STATEMENT OF THE CASE AND FACTS

On July 24, 1985, the state filed an information charging Petitioner with one count of second degree murder, in violation of Section 782.04(2), Florida Statutes (1985) and one count of possession of a firearm by a convicted felon, in violation of Section 790.23, Florida Statutes (1985). (R612) On August 1, 1985, these offenses were severed for purposes of trial. (R626) Petitioner proceeded to jury trial on the murder charge on August 12 - 16, 1985, with the Honorable Humes T. Lasher, Circuit Judge, presiding. (R1-543)

The evidentiary portion of Petitioner's trial lasted four days at which time the case was submitted to the jury for deliberations just before noon on August 15, 1985. (R527) Thereafter at 5:00 P.M., the court announced its intention to allow the jury to recess for the evening and resume deliberations the following morning. (R534) Defense counsel made the following statement:

MR. WILKES: On behalf of Mr. Brooks, we

> would like to request that the Jury be sequestered this evening to prevent any improper influences upon them during their recess, such as they do not ask for any help or have any outside influences imposed on the, either by the media, radio or television, if that would be necessary, or the press, if that were appropriate. We would ask that therefore the Jury be sequestered. (R534)

The trial court responded:

> THE COURT; All right, in regards to the, I believe it was a motion by the Defendant, Mr. Wilkes, I presume it was the request of your client that the Court sequester the Jury and that the absence of any showing of any aid, whatsoever, that there is any attempts in influences or any of the news conference up to the present time that has in any way be prejudiced to the Defendant's, no showing of any part of any tampering with the Jury, the Court is going to deny your request especially during the fact that this is not a capital case. If it was a capital case we would take another look at it, okay. (R535)

The court then brought the jury into the courtroom and recessed them for the evening. (R536-538) The jury reconvened the following morning and after further deliberations returned a verdict finding Petitioner guilty of manslaughter with a firearm. (R539)

On September 17, 1985, Petitioner appeared before the Honorable John Antoon and pursuant to a written plea agreement, entered a plea of guilty to the possession of a firearm by a convicted felon charge. (R638-640,544-558,642) On October 4, 1985, Petitioner again appeared before Judge Lasher for

sentencing. (R586-609) According to the guidelines scoresheet, Petitioner's recommended sentence was 17 - 22 years in prison. (R587) Judge Lasher adjudicated Petitioner guilty and sentenced him to fifteen years for the manslaughter conviction and a consecutive period of five years probation for the possession of a firearm conviction. (R603,606,646-649,662) Petitioner filed a timely notice of appeal. (R652) Petitioner was adjudged insolvent and the Office of the Public was appointed to represent him on appeal. (R661)

On appeal, the Fifth District Court of Appeal affirmed Petitioner's conviction on the authority of Taylor v. State, 481 So.2d 970 (Fla. 5th DCA 1986) and certified the following question of great public importance:

> After submission of the cause to the jury for deliberations in the trial of a non-capital case, is it reversible error per se for a trial court to authorize the jury to separate overnight, or for some other definite time fixed by the court, and then reassemble and continue its consideration of a verdict?

Brooks v. State, 11 FLW 2376 (Fla. 5th DCA, November 13, 1986).

On December 12, 1986, Petitioner filed his notice invoking this Court's jurisdiction.

## QUESTION PRESENTED

AFTER SUBMISSION OF THE CAUSE TO THE JURY FOR DELIBERATIONS IN THE TRIAL OF A NON-CAPITAL CASE, IS IT REVERSIBLE ERROR PER SE FOR A TRIAL COURT TO AUTHORIZE THE JURY TO SEPARATE OVERNIGHT, OR FOR SOME OTHER DEFINITE TIME FIXED BY THE COURT, AND THEN REASSEMBLE AND CONTINUE ITS CONSIDERATION OF A VERDICT?

## SUMMARY OF ARGUMENT

Pursuant to this Court's ruling in Taylor v. State, 11 FLW 648 (Fla., December 18, 1986), the certified question should be answered in the affirmative and the decision of the Fifth District Court of Appeal must be quashed. It is reversible error to allow a jury to separate after deliberations have begun in a non-capital case.

## ARGUMENT

### IT IS REVERSIBLE ERROR TO ALLOW A JURY TO SEPARATE OVERNIGHT AFTER BEGINNING ITS DELIBERATIONS.

Petitioner was tried on a charge of second degree murder. The jury began its deliberations shortly before noon of the fourth day of trial. (R527) Thereafter, at 5:00 P.M., the trial judge announced its intention to allow the jury to recess for the evening and resume deliberations the following morning. (R534) Defense counsel timely requested the trial court to have the jury sequestered for the evening. (R534) This request was denied and the jury was permitted to separate for the evening and resumed its deliberations the following morning. (R535-538) On appeal, the Fifth District Court of Appeal affirmed Petitioner's conviction on the authority of Taylor v. State, 481 So.2d 970 (Fla. 5th DCA 1986) wherein the court held that sequestration of the jury after deliberations had begun was not required in non-capital cases. The court further certified the same question as in the instant case.

Very recently, in Taylor v. State, 498 So. 2d 913 11 FLW 648 (Fla., December 18, 1986) this Court answered the certified question in the affirmative and quashed the Fifth District's opinion in Taylor, supra. This Court noted that in Livingston v. State, 458 So.2d 235 (Fla. 1984) it held that it is reversible error in a capital case to allow, over defendant's objection, a jury to separate after it has begun deliberating. This Court went on to trace the development of Florida law on jury sequestration,

noting the distinction made between capital and non-capital cases. In Taylor, supra, this Court concluded that the reasoning supporting the capital-case decisions is equally applicable to non-capital cases. As this Court noted:

> Defendants accused of noncapital offenses are guaranteed the same constitutional rights to a trial by an impartial jury as are defendants accused of capital offenses. Jurors in noncapital cases are just as likely to be subjected to a myriad of subtle influences as jurors in capital cases. Therefore, we see no reason to apply a different rule in noncapital cases as distinguished from capital cases.

11 FLW at 649.

In the instant case, Petitioner timely requested that the jury be sequestered, which request was denied. Thus the issued was preserved for appeal, as noted by the District Court below. Therefore, Petitioner is entitled to a new trial on the manslaughter charge.

## CONCLUSION

Based on the reasons and authority, Petitioner respectfully requests this Honorable Court to quash the decision of the District Court of Appeal and remand with instructions that Petitioner's conviction be reversed and remanded for a new trial.

Respectfully submitted,

JAMES B. GIBSON
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General in his basket at the Fifth District Court of Appeal and mailed to Robert Brooks, #A017055, Reception and Medical Center, P.O. Box 628, Lake Butler, FL 32054, on this 12th day of January, 1987.

Michael S. Becker
MICHAEL S. BECKER
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