IN THE SUPREME COURT OF FLORIDA

CHARLES L. STOCKTON,

Petitioner,

v. CASE NO.

STATE OF FLORIDA,

Respondent.

_____/

72921

BRIEF OF PETITIONER ON JURISDICTION

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BRIEF OF PETITIONER ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the lower tribunal. Attached hereto as Appendix A is the opinion of the lower tribunal. Appendix B is petitioner's motion for rehearing. Appendix C is the order denying rehearing.

II STATEMENT OF THE CASE AND FACTS

The history of this case is briefly stated in the majority opinion of the lower tribunal:

> Appellant was tried upon the charge of second degree murder with a firearm, and the evidence established that the victim was killed during an altercation involving numerous individuals. Witnesses testified that appellant shot the victim after being heard to say, "I'll kill one of you." Other witnesses presented contradictory testimony. Appellant admitted discharging a firearm, but stated that he merely shot his gun into the air. Appellant also recanted an earlier admission that he had shot the victim.
>
> At the conclusion of the evidence the court indicated to counsel that a time

> limitation would be imposed for closing argument. Defense counsel requested an hour, explaining, "I'm not very well prepared." The court limited closing argument to 30 minutes per side, and overruled defense counsel's objection. Appendix A at 2.

Judge Zehmer, in dissent, set forth the conflicting testimony, on the crucial issue of whether appellant fired the shot which killed the victim, by quoting extensively from petitioner's initial brief. Appendix A at 7-10. Judge Zehmer characterized petitioner's counsel's closing argument as:

> poorly organized and reflect[ing] a manifest lack of of meaningful preparation and intelligible presentation to the jury which was attributable, in substantial part, to defense counsel's haste to cover all the evidence in detail in the limited time given him. Appendix A at 12.

On appeal, petitioner argued that the limitation of closing arguments to 30 minutes per side was reversible error, due to the number of witnesses, the severity of the charge and its penalty, the conflicting nature of their testimony on the crucial issue of whether appellant fired the shot which killed the victim, and the length of the testimony. The majority found no reversible error and affirmed. Appendix A at 2. In dissent, Judge Zehmer found:

> The only reason for the [30 minute] limitation discernible from this record was the court's expressed desire to accommodate the personal convenience of the jury--they could, if they so elected, finish the case late Friday night and avoid returning to court on Saturday. Because the state requested 45 minutes for argument, and defense counsel requested at least one hour, the court's 30-minute restriction conforming to his previous comment to the

> jury that closing argument would not "take more than an hour total" is patently arbitrary. Appendix A at 18-19.

Petitioner also argued that the jury should have been reinstructed on justifiable and excusable homicide. As stated by the majority:

> After the jury commenced deliberations it requested a reinstruction on the distinction between second degree and third degree murder. The court advised counsel that it would reinstruct the jury on these offenses, and also on manslaughter. Defense counsel requested a reinstruction on justifiable and excusable homicide, but the court denied this request. The jury was then reinstructed as to second degree murder, third degree murder, and manslaughter. Appendix A at 3.

The majority found no reversible error on this point as well. Appendix A at 3-4. Judge Zehmer again dissented, and reasoned:

> Had the trial court deemed that the jury's request could be satisfactorily answered by merely instructing on second and third degree murder, a different question would be presented. Although the specific request was to distinguish between second and third degree murder, ... the trial court undoubtedly determined that the similarity in degree and definition of criminal conduct made it necessary to include reinstruction on manslaughter as well as third degree murder. This was an eminently sound decision in my opinion. But, having made it, the judge also should have given a complete reinstruction on manslaughter. Appendix A at 20-21 (footnote omitted).

Petitioner's motion for rehearing and rehearing en banc or certification (Appendix B) was denied without comment on August 3, 1988 (Appendix C). A timely notice of discretionary review was filed on August 12, 1988.

III SUMMARY OF THE ARGUMENT

Petitioner will argue in this brief that the decision of the lower tribunal is in express and direct conflict with Hickey v. State, 484 So.2d 1271 (Fla. 5th DCA), rev. denied, 492 So.2d 1335 (Fla. 1986), May v. State, 89 Fla. 78, 103 So.2d 115 (1925), and other district court cases, which hold that the arbitrary limitation on a closing argument to 30 minutes is an abuse of discretion.

Petitioner will also argue in this brief that the decision of the lower tribunal is in express and direct conflict with Hedges v. State, 172 So.2d 824 (Fla. 1965), and other district court cases, which hold that a defendant is entitled to a jury instruction on justifiable and excusable homicide when the jury is reinstructed on manslaughter. This Court must accept review to resolve these conflicts.

IV ARGUMENT

THE OPINION OF THE LOWER TRIBUNAL IS IN DIRECT AND EXPRESS CONFLICT WITH PRIOR DECISIONS WHICH HOLD THAT THE ARBITRARY LIMITATION ON CLOSING ARGUMENT TO 30 MINUTES IS REVERSIBLE ERROR, AND WITH PRIOR DECISIONS WHICH HOLD THAT THE JURY MUST BE REINSTRUCTED ON JUSTIFIABLE AND EXCUSABLE HOMICIDE WHEN REINSTRUCTED ON MANSLAUGHTER.

In its opinion, the majority of the lower tribunal found that the arbitrary limitation of petitioner's closing argument to 30 minutes was not reversible error. The majority opinion is in conflict with Hickey v. State, 484 So.2d 1271 (Fla. 5th DCA), rev. denied, 492 So.2d 1335 (Fla. 1986), in which the court held that the limitation of 30 minutes was error where the trial was bitterly contested, and consumed nearly 900 pages of transcript. The trial in the instant case was equally bitterly contested on the issue of who fired the fatal shot. The trial in the instant case lasted over three days, contained 15 witnesses, and consumed 938 pages of transcript.

In May v. State, 89 Fla. 78, 80-81, 103 So.2d 115, 116 (1925), this Court stated the applicable law with regard to the limitation on closing argument:

> [W]hen requested, reasonable time must be allowed. The question to be determined is what is reasonable time, and this depends upon the facts and circumstances of each case. ... But if it appear that that the time for argument is unreasonably limited, such action will be held an abuse of discretion requiring a reversal of the judgment for new trial.

See also Neal v. State, 451 So.2d 1058 (Fla. 5th DCA 1984) (25 minute limit error in second degree murder and robbery trial);

Stanley v. State, 453 So.2d 530 (Fla. 5th DCA 1984) (10 minute limit error in burglary and theft trial); Foster v. State, 464 So.2d 1214 (Fla. 3rd DCA 1984) (15 minute limit error in robbery trial); Rodriguez v. State, 472 So.2d 1294 (Fla. 5th DCA 1985) (15 minute limit error in burglary trial); and Cain v. State, 481 So.2d 546 (Fla. 5th DCA 1986) (15 minute limit error in sale of drugs trial), and compare with Garcia v. State, 501 So.2d 106 (Fla. 3rd DCA 1987) (1 1/4 hours enough in first degree murder and robbery trial). The majority has emasculated Hedges and its progeny. This Court must accept review.

In its opinion, the majority of the lower tribunal also found that there was no need to reinstruct on justifiable and excusable homicide when reinstructing on the residual homicide offense of manslaughter. This decision must be reviewed by this Court because it conflicts with a long line of cases holding to the contrary.

In Hedges v. State, 172 So.2d 824 (Fla. 1965), this Court held that a defendant is entitled to a reinstruction on excusable and justifiable homicide when the court reinstructs on manslaughter, because manslaughter, being a residual offense, cannot be understood unless reference is made to justifiable and excusable homicide. See also Martin v. State, 294 So.2d 414 (Fla. 4th DCA 1974); Clark v. State, 301 So.2d 456 (Fla. 3rd DCA 1974); Jackson v. State, 317 So.2d 454 (Fla. 4th DCA 1975); Henry v. State, 350 So.2d 512 (Fla. 4th DCA 1977), approved 359 So.2d 864 (Fla. 1978); Niblack v. State, 451 So.2d

539 (Fla. 2nd DCA 1984); Green v. State, 244 So.2d 167 (Fla. 2nd DCA 1971); Robinson v. State, 338 So.2d 1309 (Fla. 4th DCA 1976); Pouk v. State, 359 So.2d 929 (Fla. 2nd DCA 1978); Nelson v. State, 371 So.2d 706 (Fla. 4th DCA 1979); Reifsnyder v. State, 428 So.2d 738 (Fla. 2nd DCA 1983); and Delaford v. State, 449 So.2d 983 (Fla. 2nd DCA 1984).

The majority of the lower tribunal relied on Henry v. State, 359 So.2d 864 (Fla. 1978), and held that these cases were not on point, because the jury had not requested reinstruction on manslaughter, even though the judge had chosen to give it. In Henry, the jury wished for clarification between first and second degree murder. The judge complied, but did not reinstruct on anything else. The jury never was reinstructed on manslaughter, and so there was no need to reinstruct on justifiable and excusable homicide. Here, the jury did receive reinstruction on manslaughter, and so Henry is not good authority for the majority's decision.

Indeed in Henry, this Court anticipated this case by noting:

> We can contemplate numerous situations where the jury's request does not suggest necessarily that they have already determined whether a homicide has been lawful or unlawful. In those situations, the defendant is entitled to reinstructions on lawful homicide. 359 So.2d at 868.

The majority has emasculated Hedges and its progeny. This Court must accept review.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court accept jurisdiction to review the erroneous interpretation of the law by the lower tribunal, and the violation of petitioner's right to a fair trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief on Jurisdiction has been furnished by delivery to Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, #098565, Post Office Box 500, Olustee, Florida, 32072, this 16 day of August, 1988.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER