IN THE SUPREME COURT OF FLORIDA

RIGOBERTO GARCIA, **

Petitioner, **

v. ** CASE NO: **73,555**

STATE OF FLORIDA, **

Respondent. **

ON DISCRETIONARY REVIEW FROM A
CERTIFICATE OF CONFLICT ENTERED BY
THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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Nature of the Case

This matter is here following a certification by the Third District Court of Appeal that its holding is in conflict with two decisions from two other district courts.

The Petitioner was convicted following a jury trial in the Eleventh Judicial Circuit for the crimes of Second Degree Murder and Unlawful Use of a Firearm in the Commission of a Felony. [1]/ (A. 1). He raised as his sole issue in the district court the failure of the trial court to re-instruct the jury with the definitions of justifiable and excusable homicide, as those terms are subsumed within the definition of manslaughter, when the jury requested re-instruction on the definitions of second degree murder and manslaughter. (A. 1) The State of Florida claimed in the district court that no justifiable and excusable homicide instructions were required at all, initially or on re-instruction. (A. 1,2).

The district court found the re-instruction was error, but the verdict of second degree murder made the error harmless. (A. 2,3). That decision certified that its holding was in conflict with other district courts, see, Niblack v. State, 451 So.2d 539 (Fla. 2nd DCA 1984) and Lowe v. State, 500 So.2d 578 (Fla. 4th DCA 1986), and this petition followed.

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[1]/ Petitioner will use the symbols T, R and A to refer to the transcript and record which will be furnished to this Court, and the appendix we have attached.

II.

The Course of the Proceedinss

The Petitioner, Rigoberto Garcia, was informed against in the Eleventh Judicial Circuit in and for Dade County, Florida, in April of **1987,** for the crimes of Second Degree Murder and Use of a Firearm in the Commission of a Felony. (R. 1-2A). At his trial, in late July of that year, Mr. Garcia admitted shooting a man in a barroom brawl, but contended that the homicide was both justifiable and excusable.

A. THE TRIAL

Rigoberto Garcia shot and killed Manuel Checalopez in the Blue Moon Lounge on April **3, 1987.** The State of Florida presented the testimony of but one eyewitness, who testified that Mr. Garcia overreacted with gunfire during a loud barroom argument and killed another patron. Mr. Garcia testified that he only shot Mr. Checalopez -- who was inebriated, under the influence of cocaine and had beaten and threatened Mr. Garcia on an earlier occasion -- after the deceased, following a violent ten minute harange, threw a pool ball at him and came at him with what appeared to be a weapon in his hand. (T. 46-52, A. 1).

The case was close, and the issues were narrowed for the jury. The defense refined for the jury in its opening statement the only issue in dispute: "Was Rigoberto Garcia legally justified in doing and taking the action that he took that day?." (T. 15). The trial court saw the case the same way: it agreed to the excusable homicide instruction, stating "the evidence is susceptible of [Mr. Garcia] engaging in **a** sudden combat. The

jury could sure believe that." (T. 269). Even the State argued "no one is saying the Defendant wasn't the one to fire the gun. The only thing in dispute was whether or not he was justifiable." (T. 291).

A recitation of the unique facts adduced at trial is unnecessary. The summary rendered by the Third District Court of Appeal, while overly simplistic, would suffice for the purpose of this appeal:

> The State's version [one witness] was that the Defendant silenced the verbally but not physically aggressive victim by shooting him; the Defendant's version was that two weeks before the shooting, the victim had beaten him and threatened to kill him, and that immediately before the shooting the victim [while drunk and under the influence of cocaine] threw a pool ball at him and kept coming toward him with what appeared to be a weapon despite the Defendant's warning shot. In short, if believed, the Defendant's testimony made out a case of self-defense, or, in legal terms, justifiable homicide.

(A. 1)

Closing argument by the defense was spent applying the facts of the case to the definitions of justifiable and excusable homicide the trial judge was about to read. For example, the lawyer told the jury that when Mr. Checalopez, "screaming.. ., drunk, coked out" threw a pool ball at the Defendant, "killing somebody, is lawful -- remember this, lawful when done in resisting a murder or the commission of a felony or imminent bodily harm to a person." (T. 330). The defense closed its argument by highlighting for the jury the definition of excusable homicide:

> The judge will also read you instructions as

> to excusable homicide. He will tell you that if you find that the killing was done in the heat of passion brought on by a sudden provocation sufficient to produce in the mind of an ordinary person the highest degree of anger, rage, or resentment that is so intense as to overcome the use of ordinary judgment, thereby rendering an ordinary person incapable of reflection, you'll find him not guilty.
>
> So, having this coked out, drunk man screaming at him for ten minutes, if that doesn't match that, nothing matches it.

(T. **335, 336).**

The trial court charged the jury following closing arguments, and fully instructed on the definitions of second degree murder, manslaughter, and justifiable and excusable homicide. **An** hour later, the jury sent out a written request: "Could we see the definition of second degree murder and manslaughter?" (T. **367).** This colloquy followed:

> COURT: You want me to reinstruct them?
>
> PROSECUTION: On everything or just those two?
>
> DEFENSE: I don't have a problem with that. I would then like justifiable and excusable also read with them.
>
> PROSECUTION: They are not requesting that.
>
> DEFENSE: I understand that. I am requesting that.
>
> COURT: Okay, denied. I will reinstruct them on the two definitions, if that is what they want. Bring them out.

(T. **367, 368).**

The jury was re-instructed in this limited fashion, and guilty verdicts as charged in both counts were returned. (T. **371, 372).**

B. THE DISTRICT COURT

Mr. Garcia raised the re-instruction issue as a sole point on appeal. (A. 1). The State of Florida answered by arguing "that the evidence was insufficient as a matter of law to establish justifiable homicide, and, therefore, no re-instruction (and presumably no instruction in the first instance) was required." (A. 1,2).

The applicability of the harmless error doctrine was not briefed by the parties in the district court: that theory was not advanced by the State of Florida in its brief or at oral argument (A. 3 at fn. 4).

III.

Disposition in the Lower Tribunal

The Third District Court of Appeal held the lower courts failure to re-instruct the jury with the definitions of justifiable and excusable homicide, as those terms comprise a part of the definition of manslaughter -- a definition requested by the jury -- was error. (A. 2). See, Hedges v. State, 172 So.2d 824 (Fla. 1965).

That court then considered, sua sponte, the application of the harmless error doctrine. Working backwards from the verdict of second degree murder, the court found that the jury's finding of "a depraved mind regardless of human life" negated the possibility "that the victims death was caused by the act, procurement, or culpable negligence of the Defendant." (A. 2). The vantage of hindsight caused the district court to conclude that the jury did not need to know a correct answer to its

written question.

The district court certified that its decision was in conflict with the Second District Court's opinion in Niblack V. State, 451 So.2d 539 (Fla. 4th DCA 1984)(second degree murder conviction reversed under identical circumstances) and the Fourth District Court's decision in Lowe v. State, 500 So.2d 578 (Fla. 4th DCA 1987)(third degree murder conviction in second degree murder prosecution reversed where jury mis-instructed following request for definitions of second degree murder, third degree murder and manslaughter). That certification resulted in this proceeding.

SUMMARY OF THE ARGUMENT

Mr. Garcia's defense was that his shooting of the deceased was justifiable and excusable homicide. Ample evidence supported that argument. When the jury asked to be re-instructed with the definitions of second degree murder and manslaughter, the trial court erred in failing to re-instruct, at the request of defense counsel, on the definitions of justifiable and excusable homicide. The Third District Court of Appeal's utilization of the harmless error doctrine was wrong for two reasons: that theory was inapplicable under the facts of this case, and it was improperly applied by the district court.

No court in Florida has ever held a preserved mis-instruction on manslaughter as a next-step included offense to be harmless error. Such a holding is particularly inappropriate where the entire defense focused upon the definitions erroneously

submitted by the trial court. This core defense made the harmless error rule uniquely inapplicable to this case.

Also, the district court's treatment of the harmless error doctrine was not in accordance with several decisions from this Court. First, harmless error was not raised by the State of Florida in its brief or at oral argument. See Ciccarelli v. State, 531 So.2d 129 (Fla. 1988). Second, the theory was not proven, beyond a reasonable doubt, to have had no effect on the jury's verdict. See State v. Lee, 531 So.2d 137 (Fla. 1988). Third, the theory was adopted by the district court working backward, drawing inferences from the jury's verdict, rather than from examining the evidence at trial to determine what effect the court's error may have had on the jury. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The harmless error rule, besides being inapplicable, was improperly applied for these three reasons.

I.

ARGUMENT

WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN APPLYING THE HARMLESS ERROR DOCTRINE TO AN IMPROPER RE-INSTRUCTION BY THE TRIAL COURT IN DEFINING, AT THE JURY'S REQUEST, THE CRIME OF MANSLAUGHTER, WHERE THE DEFENDANT WAS CONVICTED OF SECOND DEGREE MURDER.

The Third District Court of Appeal held in Turner v. State, 414 So.2d 1161, 1162 (Fla. 3rd DCA 1982), where the defendant had been charged with second degree murder and convicted of manslaughter, "when the jury's request necessarily elicits a re-instruction of manslaughter and the defendant is convicted of manslaughter, it is error to fail to re-instruct on excusable and

justifiable homicide as a necessary concomitant of manslaughter." That opinion did not determine whether the harmless error rule would apply to a conviction of a non-manslaughter charge. That court picked the Petitioner's case to apply that theory. There are two reasons why the district court picked the wrong case.

A.

THE HARMLESS ERROR RULE IS INAPPLICABLE TO THE FACTS OF THIS CASE, WHERE THE DEFENSE WAS JUSTIFIABLE AND EXCUSABLE HOMICIDE, AND THE JURY SPECIFICALLY ASKED FOR THE DEFINITION OF MANSLAUGHTER.

This Court, Hedges v. State, 172 So.2d 824 (Fla. 1965), and every district court require the definitions of justifiable and excusable homicide be re-read to a deliberating jury as a part of the re-instruction on the definition of manslaughter. Kelsey v. State, 410 So.2d 988 (Fla. 1st DCA 1982); Spaziano v. State, 522 So.2d 525 (Fla. 2nd DCA 1988); Turner v. State, 414 So.2d 1161 (Fla. 3rd DCA 1982); Gross v. State, 397 So.2d 313 (Fla. 4th DCA 1981); Reed v. State, _____ So.2d _____ (Fla. 5th DCA 1988), 13 F.L.W. 2043 (Sept. 1, 1988). That rule was violated here; the district court found as much. While in some circumstances a violation of that rule can be harmless error, this was not one of those cases.

Before one can determine when a violation of the Hedges rule can be harmless, the reasons for the rule itself must be examined; there are three. First, if a trial court is asked by a jury to re-define manslaughter, it must necessarily repeat the justifiable and excusable homicide instructions. Manslaughter is

a residual offense, and cannot be defined unless justifiable and excusable homicide are defined. Hedges v. State, supra; Pouk v. State, 359 So.2d 929 (Fla. 2nd DCA 1978); Delaford v. State, 449 So.2d 983 (Fla. 2nd DCA 1984). Second, any subject repeated on re-instruction by a trial court must be as complete as initially charged, to avoid undue emphasis or confusion. Hedges, supra; Carranza v. State, 511 So.2d 410 (Fla. 4th DCA 1987); Reed v. State, supra. Third, to understand what an unlawful homicide is, a juror must be told what a lawful homicide is. A juror's question which open-endedly asks about the definition of the degrees of homicide necessitates an instruction of when those definitions are inapplicable. See Henry v. State, 359 So.2d 864 (Fla. 1978).

The district court's opinion violates all three of these principles, as it countenances (1) answering a specific request with an incomplete answer, (2) providing re-instruction on a single subject that is not as equally broad as initially provided, and (3) unduly emphasizing the definitions of the charges without a contemporaneous explanation of applicable defenses, leaving the jury with a prosecution-weighted charge. There can be no beneficial impact from an application of the harmless error rule in this situation; only deleterious effects are apparent. That theory should only be reserved for a select set of circumstances.

A violation of the Hedges rule will be tolerated if the theories of justifiable and excusable homicide are not material to the case being tried. For example, in Banda v.

State, _____ So.2d ____ (Fla. 1988), 13 F.L.W. 709, (Fla. Dec. 8, 1988), this Court found "[w]hile the court should have given at least a minimal definition of excusable and justifiable homicide, Banda was not prejudiced because there was no evidence which would have supported either defense." But the opposite is true here. Petitioner presented substantial evidence, and vehemently argued to the jury his theory of self defense. The trial judge and the district court acknowledged as such. The failure of the trial court to re-read the definitions of justifiable and excusable homicide cannot be harmless on the theory the evidence did not support those defenses.

A violation of the Hedges rule is sometimes tolerated if a defendant is convicted of first degree murder, which is twice removed from the lesser offense of manslaughter. This Court made that finding in Squires v. State, 450 So.2d 208, 211 (Fla. 1984), holding "[w]here defendant is convicted of first-degree murder an error or omission in an instruction on the lesser included offense of manslaughter is not fundamental error." See State v. Abreau, 363 So.2d 1063 (Fla. 1973)(error or omission in once - removed lesser included offense harmless). But this exception is also inapplicable here. Petitioner was convicted of second-degree murder, the next highest offense from manslaughter. It cannot be said that the error in the manslaughter instruction had no part in the jury's deliberation, when it convicted of the next highest offense.

Sometimes a violation of the Hedges rule can be overcome by examining the nature of the question posed by the jury. For

example, in Henry v. State, 359 So.2d 864, 865 (Fla. 1978), the jury asked to be explained "the difference in murder in the first degree and murder in the second degree," and the trial judge limited its response to those definitions. This Court held this narrow response was proper; Hedges was distinguished because there, the jury had asked for a definition of the different degrees of homicide, while in Henry the jury had narrowed its inquiry to the differences between first degree murder and second degree murder. Likewise, in Engle v. State, 438 So.2d 803 (Fla. 1983), a jury question concerning first degree murder provoked a narrow response. This Court again affirmed, limiting Hedges to those jury requests which have not foreclosed the applicability of a lawful homicide.

But this end-run of Hedges is also inapplicable here. The Petitioner's jury plainly asked "[c]ould we see the definition of second degree murder and manslaughter?" (T. 367). The Hedges rule, rather than Henry exception, was applicable.

Finally, the Hedges rule may not apply if, from the nature of the jury's question, it can be readily determined that the jury has already found the homicide was unlawful. That was the case in Henry, supra, where the question requested "merely a clarification of the 'difference' between first and second degree murder." Id., 359 So.2d at 868. But the Henry Court went on to state the rule to be applied -- like here -- when the jury's question is not so transparent, and lawful homicide has not been precluded by the jury in its deliberation:

> 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 re-instructions on lawful homicide. [3]
>
> [3] This is so particularly in view of the fact that while supplemental instructions must be considered as a whole and must be viewed in the light of other instructions already given, they cannot reasonably be considered as other language in the basic charge, since the jury will rely more heavily on such instructions than on any single portion of the original charge. [citations omitted] [emphasis supplied].

Every prior justification for countenancing a mis-instruction of manslaughter does not apply. Mr. Garcia's defense was that his actions were justifiable and excusable, and evidence supported those theories. The jury specifically asked for a definition of manslaughter, and was mis-instructed over a defense objection. It cannot be inferred from the jury's question that it did not need to know when a homicide is lawful or unlawful. In sum, this was the wrong case to apply the harmless error rule to a Hedges violation.

Moreover, acceptance of the district court's theory would mean more than overruling the two decisions which are certifiably in conflict - Niblack v. State, supra and Lowe v. State, supra. [3]

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[3] Niblack is identical to our case. The Second District Court of Appeals, in a panel which included then Judge Grimes, reversed a second degree murder conviction. In Lowe, the defendant was charged with second degree murder, and the jury was mis-instructed on manslaughter when it asked for a re-definition of first degree murder, third degree murder and manslaughter. The Fourth District Court of Appeal reversed, finding the mis-instruction on the lesser offense reversible error.

Acceptance of that theory will modify the rule that "a defendant is entitled to a re-instruction that is complete on the subject involved." Carranza v. State, 511 So.2d 410 (Fla. 4th DCA 1987); Hedges v. State, supra; in other words, the rule which states that "the re-instruction on manslaughter should be as complete as was the original instruction, i.e., it should include a contemporaneous definition of excusable and justifiable homicide, Spaziano v. State, 522 So.2d 525 (Fla. 2nd DCA 1988); Ortegus v. State, 500 So.2d 1367 (Fla. 4th DCA 1987)." Reed v. State, ____ So.2d ____ (Fla. 5th DCA 1988), 13 F.L.W. 2043, 2044 (Sept. 1, 1988).

The rule which precludes incomplete, misleading or confusing instructions will also have to be altered. See Cole v. State, 353 So.2d 952, 954 (Fla. 2nd DCA 1978):

> When a jury returns to the courtroom and asks to be re-instructed, the trial court should ordinarily limit its re-instructions to whatever is necessary to answer the jury's specific question. But the additional charge must be complete in respect to the subject on which the jury requests re-instruction; otherwise, a partial instruction can lead to undue emphasis on the part given as against the part omitted [citations omitted]:

Accord, Blitch v. State, 427 So.2d 785 (Fla. 2nd DCA 1983)

> In light of the sobering observation that, [p]articularly in a criminal trial, the judges last word is apt to be the decisive word, Bollenbach v. United States, 326 U.S. 607, 612, 66 S.Ct. 402, 405, 90 L.Ed. 350, 354 (1946), a judges instruction on a theory of defense should not be equivocal, incomplete or confusing.

See Parker v. State, 495 So.2d 1204, 1206 (Fla. 3rd DCA 1986) ("the erroneous instruction [on excusable homicide] placed

appellant in a disadvantageous position and cannot be considered harmless.")

The rule of law we propose is but an amalgamation of this Court's earlier decisions. A curtailed re-instruction on manslaughter, which does not define justifiable and excusable homicide, is error. That error can be harmless when the lawfulness of the homicide is not in issue from the evidence (i.e., a defense of alibi or mis-identification) or has become immaterial from the nature of the question posed by the jury (i.e., the Henry or Engle situations). Neither of those exceptions are applicable in this case.

B.

THE HARMLESS ERROR RULE WAS MISAPPLIED WHEN THAT THEORY WAS NOT PRESENTED NOR ADVANCED BY THE STATE, AND NOT SHOWN TO BE APPLICABLE BEYOND EVERY REASONABLE DOUBT.

The district court's holding suggests that it misapplied the guidelines handed down by this Court in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), and its progeny. We present here an alternative ground for reversing that decision.

It is easiest to begin with Justice Shaw's "truncated summary" of the Court's holding in DiGuilio:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the

> error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id., 491 So.2d at 1139.

Our initial complaint with the district court's approach to harmless error concerns how the issue was raised - sua sponte by the court in its opinion, without the benefit of briefing from the parties. As that court conceded, in a footnote to its opinion, the doctrine of harmless error was not raised by the State of Florida in its brief or at oral argument. This Court held in Ciccarelli v. State, 531 So.2d 129, 131 (Fla. 1988), that when the state does raise the doctrine of harmless error, the course is clear:

> We reject the state's contention, like that reported in Lee v. State, 508 So.2d 1300 (Fla. 1st DCA 1987), approved, 531 So.2d 133 (Fla. 1988), that it is the court's burden rather than that of the state:
>
> > The state offered no argument on harmless error in its brief, and at oral argument counsel insisted it was an obligation of the court to apply the harmless error test without argument or guidance from the state.
>
> Id., at 1302. The district court in that case correctly noted that the harmless error rule requires that the state demonstrate beyond a reasonable doubt that the error did not affect the jury verdict. Id., at 1303 [citations omitted] [emphasis added]. Accordingly, if the state has not presented a prima facie case of harmlessness in its argument, the court need go no further.

The burden appropriately rests upon the shoulders of the state to raise and prove the error was harmless. That burden was not shouldered here, nor carried.

The district court also erred by focusing upon the jury's verdict, rather than the evidence presented, in arriving at its conclusion. This Court has repeatedly admonished the lower courts to apply as its standard of review "whether there is a reasonable probability that the error contributed to the conviction." State v. Lee, 531 So.2d 133, 136 (Fla. 1988); Holland v. State, 503 So.2d 1250 (Fla. 1987). Yet the district court focused on the verdicts, rather than the evidence. Several pitfalls exist when the analysis "works its way backwards," as the district court did.

First, it is impossible to tell what effect the mis-instruction had on the jury. Clearly, the jury's question was not answered. Just as obvious is the fact that the jury was not re-instructed on when a homicide can be lawful, yet its deliberations had not foreclosed such a finding. If the jury thought its question would apprise them of when a killing is lawful and when it is unlawful, it received a prosecution-oriented version which was incomplete and rife with undue influence.

Attempting to divine the impact of the error on the jury's deliberations cannot be condoned. Deliberations by a jury are a secret process, and often take improbable turns. A verdict is simply the end result of the often convoluted turns and bends the deliberative road may take. This Court, in Holland, supra, foresaw the difficulty of applying the harmless error test when, like here, there is an "absence of information," id., 503 So.2d at 1252 (emphasis in original), and cautioned against the

"unguided speculation" which that analysis would require.

What can be discerned from the error is that it was directly related to the defense of the case, and the error was extraordinarily highlighted. First, the defense was that the homicide was lawful. It is self-evident that, of all the instructions omitted by the trial court, it was the one aspect of the case which was most critical to the Defendant. The bulk of the opening and closing remarks by defense counsel were spent applying the facts of the case to the definitions of justifiable and excusable homicide. This Court held in Ciccarelli, supra, at 511 So.2d 132, that the analysis "entails an evaluation of the impact of [the error] in light of the overall strength of the case and the defenses asserted." In that vein, the error here was enormous, and that standard was not applied by the district court.

Second, this Court held in Lee, supra, that the error must be viewed in the context of the entire trial to determine whether it was highlighted. It is beyond argument that jury re-instruction is the most critical point in a case, as the judges last words in response to a specific question by a jury have a uniquely powerful impact. See State v. Blitch, supra.

Third, it is equally clear that the instruction provided the jurors with an incomplete understanding of the degrees of homicide, and was misleading and prejudicial. Irrespective of the jury's ultimate verdict, a confusing or prejudicial instruction on excusable homicide cannot be harmless, where that is the defense. See Parker v. State, **495** So.2d 1204 (Fla. 3rd

DCA 1986) (erroneous excusable homicide instruction reversible); Colon v. State, 430 So.2d 965 (Fla. 2nd DCA 1983) (accord).

Two other factors must be weighed. This Court, in Holland, supra at 503 So.2d 1252, set out the comments of Professor Mause, in his article entitled Harmless Constitutional Error: The Implication of Chapman v. California, 53 Minn.L.Rev. 519, 519-20 (1969), as a backdrop to the purpose of the harmless error rule. One caution set out in that article is the fear that an overbroad application of the rule will lead "to a whittling away of the impact of the rule of law which defines the error." That fear applies here. This Court cannot favor an erosion of the rules of law which concern jury instructions. These few remarks from the judge at the close of a trial are the sole rein the criminal justice system uses to impact on a jury's direction. Erroneous instructions permit lawless and boundless deliberations. While we all incant the notion that "the system is not perfect," that is not a reason to make it unnecessarily so.

This Court in Holland chose to highlight one sentence of Professor Mauses' words which also apply here: "[t]o state the interest to be balanced is to emphasize that uncertainty should almost always be resolved in favor of the criminal defendant." Id., 503 So.2d at 1252 (emphasis in original). That belief is most appropriate here. Given the sheer speculation which is involved in divining what course the deliberations took from the verdict alone, the district court erred in not giving the defendant the benefit of the doubt - and established precedent.

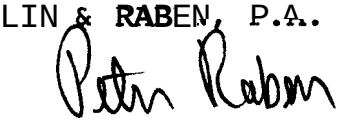
CONCLUSION

It was error for the district court to apply the harmless error doctrine under the facts of this case. Where the defense of the case required that the jury understand when a homicide was lawful, and the jury's specific question required the trial judge to re-explain when a homicide is lawful and when it is unlawful, application of the harmless error doctrine to the conceded error in this case was wrong. In any event, the district court's opinion reflects that it improperly applied the harmless error doctrine, where the state did not raise the issue nor prove the application of the doctrine beyond a reasonable doubt.

Based upon the authorities cited herein, it is respectfully requested that this Honorable Court quash the opinion of the Third District Court of Appeal, and remand this matter.

Respectfully submitted,

BRESLIN & RABEN, P.A.



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IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing was mailed to: Michelle Prescott, Assistant Attorney General, 401 N.W. 2nd Avenue, Room 820, Miami, Florida, this 6th day of FEBRUARY, 1989.