IN THE FLORIDA SUPREME COURT

CASE NO. 73,555

RIGOBERTO GARCIA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

/

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

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner would reassert the Statement of the Case and Facts set forth in his original Brief as an accurate recounting of the development of this matter in the lower courts. We address here the Statement of the Facts rendered by the Respondent in its Answer Brief, as its contention -- there existed no evidence of self defense which required any instruction on justifiable or excusable homicide -- was rejected by the district court and is not borne out by this record.

1. The District Court's Factual Finding

The State of Florida argued in the district court that the erroneous manslaughter re-instruction was not error, as no evidence existed upon which a jury could have found the Defendant acted in self defense. The Third District Court of Appeal rejected that argument:

> Predictably, the State's and defendant's evidence concerning the killing were at odds. The State's version 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 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. That being so, we reject the State's argument that the evidence was insufficient as a matter of law to establish justifiable homicide, and, therefore, no reinstruction (and presumably no instruction in the first instance) was required.

Garcia v. State, 535 So.2d 290, 291 (Fla. 3rd DCA 1988).

The district court applied the harmless error doctrine, notwithstanding the ample evidence which supported the theory of justifiable 'homicide. Cf., Banda v. State, 536 So.2d 221, 223 (Fla. 1988) ("While 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.") Hence, the Respondent's claim -- the lack of evidence of self defense made any self defense instructions unnecessary -- was rejected in the district court.

2. The Evidence Of Self Defense

There was considerable evidence which supported the theories of justifiable or excusable homicide. Mr. Garcia told the jury that he first met the deceased one or two months earlier while sitting in the same bar (T. 209-211). Mr. Checalopez made threats towards another individual, and when Mr. Garcia intervened, he was beaten by Checalopez until he passed out (T. 211-213). This earlier attack was confirmed through the testimony of another witness (T. 202-204). Later, Mr. Garcia learned that the man who had beaten him was a dangerous individual, reputed to be involved in drug trafficking (T. 213, 214).

On the day of the shooting, the deceased provoked the incident by telling Mr. Garcia that, although he did not kill him before, he would do so now if Mr. Garcia did not leave the bar immediately (T. 216). Mr. Garcia left, but returned with a gun, ostensibly visible in his waistband, as a symbolic gesture toward Checalopez that Mr. Garcia wanted to be left alone (T. 239). Mr.

Garcia, not looking for additional difficulty, merely re-entered the bar and sat down at a nearby table and did not renew any confrontations with Mr. Checalopez (T. 217).[1/]

Mr. Checalopez, inflamed by his .24 percent blood alcohol level and his .09 percent cocaine blood level, approached Mr. Garcia's table and began screaming at the man. (T. 188). For ten minutes, Mr. Checalopez haranged and threatened over and over to kill Mr. Garcia (T. 217). Next, Checalopez picked up a pool ball and threw it at Mr. Garcia. Mr. Garcia ducked, pulled his gun from his waistband and said, "Don't pick on me." Checalopez ignored both the gun and the entreaty, and came at the Defendant with what appeared to be a shiny object in his hand, With remarkable restraint, Mr. Garcia simply fired once into the wall - a scene technician confirmed that testimony by finding a projectile in a wall. When the drunken, coked-out man did not cease his charge, Mr. Garcia shot him one time, causing his death (T. 247, 248).

3. The Respondent's Unfounded Claim

The State of Florida's claim -- "the evidence showed that the Petitioner did not act in self defense", -- Brief of Respondent at 2, is now seen as misleading. There was ample evidence to support the theory of self defense; we have recounted

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[1/] An individual who, through prior threats, has grounds to believe he is in danger of death or harm, may arm himself and go on about his business; yet, the use of justifiable force cannot absolve that person if he renews the difficulty when he could have avoided the difficulty. See, Instruction 3.04(d), Self Defense, Deadly Force, Fla. Stnd. Jury Inst. (Crim.).

that evidence, and the district court found "the Defendant's testimony made out a case of self defense. . ." We thus reject the Statement of Facts set out by the State of Florida.

I,

ARGUMENT

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.

Error occurred in the re-instruction of the jury by the trial judge. The State of Florida concedes that, and the district court found as such. For that error to be harmless, the State of Florida must have raised that theory in the district court, and proven it beyond a reasonable doubt, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Ciccarelli v. State, 531 So.2d 129 (Fla. 1988). The Respondent did neither and does not claim that it did. Rather, the State postures that the trial, if not perfect, was fair. That is not the standard which this Court has established in reviewing harmless error claims.

The Brief of Respondent does two things. It simply adopts the text of the district court's opinion, without any attempt to support its unusual turn from established precedent, or to distinguish those cases which are certifiably in conflict. Next, Respondent concedes that it did not argue the harmless error doctrine in the district court. Instead, the State asks that its position -- no definition of justifiable or excusable homicide was required at all -- is an implicit harmless error argument. This Reply will address these two positions.

A.

The District Court's Decision Is
Out Of Step With Current Case Law

The district court held that an erroneous re-instruction in a self defense case which omitted the definitions of justifiable and excusable homicide, even though preserved, was harmless error, as the Defendant was convicted of second degree murder. That opinion is in direct conflict with Walker v. State, 527 So.2d 606 (Fla. 1st DCA 1987), and Niblack v. State, 451 So.2d 531 (Fla. 2nd DCA 1984), and cannot be reconciled with Lowe v. State, 500 So.2d 578 (Fla. 4th DCA 1986). The irony in the district court's holding is that since its decision, the debate among the several district courts is not whether this variety of error can be harmless, but whether it is fundamental, so that no objection is even required.

In Smith v. State, ____ So.2d ____ (Fla. 2nd DCA 1989) (Case No 86-3159, Op. filed Feb. 24, 1989) [14 F.L.W. 5411, a second degree murder conviction was reversed where the trial court had given a manslaughter instruction which included the short, rather than the long, definition of excusable homicide. The Second District Court of Appeal found the error fundamental:

> As to context (b), a jury instruction on manslaughter is incomplete if the jury is not also instructed on both excusable homicide and justifiable homicide. The reason is that the offense of manslaughter is a residual offense which may exist when the degrees of homicide do not exist and a killing is not justifiable or excusable. See, Hedges v. State, 172 So.2d 824 (Fla. 1965). In this case the trial court followed the standard jury instruction for manslaughter and had previously read to the jury the instruction on justifiable homicide and the short form

> instruction on excusable homicide. We hold in this context (b) that the failure to give the long form excusable homicide instruction was fundamental error, Alejo v. State, 483 So.2d 117 (Fla. 2nd DCA 1986). The giving of that instruction promotes the opportunity of the jury to exercise its inherent pardon power. See, State v. Abreau, 363 So.2d 1063 (Fla. 1978).

The Smith Court went further. In a footnote which may serve as a blueprint for this Court, the Second District explained why Garcia had been wrongly decided:

> The reasoning of Garcia was that because the jury, in convicting defendant of second-degree murder, found-that he had acted with a depraved mind, the jury could not have concluded that he had acted justifiably or excusably. However, we respectfully disagree with the application of that reasoning.
>
> We do not disagree that the fact that the jury found that defendant had acted with a depraved mind means that the jury could not have concluded that he had acted justifiably or excusably. Nonetheless, we do not conclude that that would mean that the jury could not have convicted defendant of manslaughter. Indeed, the conclusion that the jury thereby found no defense to manslaughter means that the jury could have convicted defendant of manslaughter. Thus, it appears to us that the Garcia conclusion is essentially that the fact that the jury convicted defendant of one offense meant that it would not have convicted him of an offense one step lesser if the jury had been correctly instructed on that lesser offense. We would disagree with that conclusion, especially having in mind a jury's inherent pardon power. As is stated in Abreau, 363 So.2d 1064, "the failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible."

Smith v. State, 14 F.L.W. at 544.

The aspect of this case which makes the harmless error rule inappropriate is the direct relationship between the omitted

instructions and the defense at trial - the shooting was justifiable and excusable. Where a mis-instruction relates to the defense at trial, the district courts have treated the error as fundamental. For example, the First District Court held in Williams v. State, ____ So.2d ____ (Fla. 1st DCA 1989) (Case No. 87-701, Op. filed Jan. 27, 1989) [14 F.L.W. 285], that an error in a defense-related instruction was fundamental, not merely harmless:

> Where a trial court deviates from a standard instruction and the erroneously-given instruction tends to negate a defendant's defense or a portion of it, the error is considered fundamental, prejudicial, and reversible. Lee v. State. 526 So.2d 777 (Fla. 2nd DCA 1988); Carter v. State, 469 So.2d 194 (Fla. 2nd DCA 1985); Doyle v. State, 483 So.2d 89 (Fla. 4th DCA 1986); Blitch v. State, 427 So.2d 785 (Fla. 2nd DCA 1983); Barnes v. State, 348 So.2d 599 (Fla. 4th DCA 1977); Crapps v. Murchek, 330 So.2d 173 (Fla. 4th DCA 1986). Objection at trial was consequently not required. A corollary principle is that materially erroneous charges will be considered harmful error if the jury was or could have been misled by them. Christian v. State 272 So.2d 852 (Fla. 4th DCA 1973) cert. denied, 275 So.2d 544 (Fla. 1973). Under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), and Butler v. State, 493 So.2d 451 (Fla. 1986), we believe there is a reasonable possibility that the error affected the verdict.

Id., 14 F.L.W. at 285, 286.

In Priestley v. State, 537 So.2d 690 (Fla. 2nd DCA 1989), self defense was asserted by the defendant, and the trial court made a mistake in the instructions to the jury on the law regarding justifiable use of deadly force. That Court held:

> Thereafter, the trial judge provided the jury with written jury instructions containing this same instruction, and the prosecutor, in

> closing argument, stated a deadly weapon was required to commit an attempted aggravated battery. The jury instruction and the prosecutor's statement were a misstatement of the law.
>
> Priestley's trial counsel failed to object to this instruction and agreed the instruction was correct. Because this instruction had the effect of negating Priestley's defense which the trial court found was supported by the evidence, we find that the giving of this erroneous instruction was fundamental error. See, Lee v. State, 526 So.2d 777 (Fla. 2nd DCA 1988)

Even the Third District, in an opinion reached by a panel different than Garcia's, suggests that the error here was not only harmful, but fundamental. In Segars v. State, 537 So.2d 1052 (Fla. 3rd DCA 1989), a man charged with second-degree murder offered an alibi defense, and was convicted of manslaughter. The manslaughter instruction read by the trial court omitted the definitions of justifiable or excusable homicide, with the consent of defense counsel, as those issues were immaterial at the trial. When the defense contended on appeal that the error was fundamental, that Court held:

> As a general rule, when the court gives an instruction on a lesser included offense, the instruction must be sufficiently complete and accurate so that it does not mislead the jury and negate the defendant's theory of defense. Alejo v. State, 483 So.2d 117, 118 (Fla. 2nd DCA 1986). Under the precise facts of the case before us, the error was not fundamental. This is so because no view of the evidence could support a finding of justifiable or excusable homicide. Banda v. State, 13 F.L.W. 709 (Fla. Dec. 8, 1988). It is clear that the victim was not killed while the perpetrators were resisting an attempt to commit a murder or felony by the victim, and that the killing was not committed by accident and misfortune in doing a lawful act, in the heat of passion, upon sudden and

> sufficient provocation, or upon sudden combat, without a dangerous weapon being used.

Yet in Garcia, the opposite was true. There was extensive evidence that the homicide was justifiable and excusable, Checalopez was killed while he was attempting to commit a felony upon the Defendant and/or in the heat of passion upon sudden provocation. Thus, the exception which existed in Segars would have mandated a reversal in Garcia.

These decisions indicate that the district courts are unclear as to when a manslaughter mis-instruction is fundamental error. We need not delve that deep; the error here was preserved, and presumptively harmful.

B.

The Manslaughter Instruction Was Prejudicial To The Defense

The prejudice which is manifest from the court's mis-instruction is both obvious and subtle, While the burden here is not ours -- it should be the responsibility here of the Respondent to demonstrate the absence of prejudice -- we address the matter as if the burden was the Petitioner's,

First, the context. The defense was that Mr. Garcia shot Checalopez while the latter was attempting to kill him, and the affray was a misfortune, done in the heat of passion upon the sudden provocation of the deceased. There existed evidence upon which a jury could find both justifiable and excusable homicide. While deliberating, the jury asked for the definitions of second-degree murder and manslaughter, which were read without reference to any definition of what a justifiable or excusable

homicide could be. In this light, the prejudice to the defense was monumental.

For example, the jury had yet to decide whether the homicide was lawful or unlawful when it asked for the definitions. The instructions provided for second-degree murder included as an element that there be "an unlawful killing" for proof of that crime. Yet no definitions were given for when a killing can be lawful. Absent an explanation of when a homicide can be lawful -- the justifiable or excusable homicide instructions -- the jury was not properly or fairly instructed. When the only issue to be resolved by the jury was the lawfulness of the homicide, the jury was acutely deprived of the key information it needed. The prejudice from this omission to the defense was patent.

The real result of the mis-instruction was a charge to the jury which was prosecution-oriented. The charge by the judge let the jury know how to convict, but not when it should acquit. There can be nothing more prejudicial than a deliberating jury being told how it can reach but one verdict.

A second layer of prejudice is not as apparent from the record; the effect on the jury of the error is incalculable. *An* inference by the district court of harmlessness was drawn from the verdict. The irony is that it is impossible to determine what effect the trial court's error had on the deliberations which reached that verdict. For example, a minority juror, believing the homicide was justifiable or excusable, may have requested the re-instruction, knowing that his request should include an explanation as to when the homicide was lawful. Yet

the response, devoid of any reference to when a homicide is lawful, may have cowed that juror into abandoning his belief. Surely, another juror could have divined from the trial court's limited response the notion that the court felt the jurors did not need these defense-oriented explanations of when a homicide is lawful.

The approach taken by the district court is unacceptable. That court found no prejudice, holding the verdict of second-degree murder -- an evil mind rather than a negligent act -- foreclosed the need for a correct manslaughter instruction. That view fails to accord the Defendant the jury's right to pardon him of the next lesser offense. It also places a verdict on too lofty a plateau. If jurors did not err, no conviction would ever be vacated for insufficiency of the evidence. Too much is at stake to allow admittedly material mis-instructions to be considered harmless error. Such a departure in the law would create confusion, rather than promote harmony, among the district courts.

C.

The Harmless Error Rule Was Not Raised Nor Proven By The Respondent

The State of Florida has acknowledged that it did not raise the issue of harmless error in the district court. Brief of Respondent at 10. Instead, it suggests that its argument -- the Petitioner was not entitled to a proper self defense instruction because he did not prove that the killing was in self defense -- was an implicit harmless error argument which should suffice under this Court's rule in Ciccarelli v. State, supra. That

argument is transparently unworkable. Its acceptance would wreak havoc within the district courts of this State, and erode the rule that a timely and specific objection is required to preserve an issue on appeal. For example, a defense lawyer may, at the close of the State's case, simple rise and say "we move for judgement of acquittal." Implicit within that broad statement is a whole host of claims. Yet this Court would never tolerate such a skeletal motion, nor a subsequent defense argument that this broad statement really meant the evidence was insufficient, or venue had not been proven. The State of Florida's claim, while creative, would set this Court back twenty years in its jurisprudence.

II.

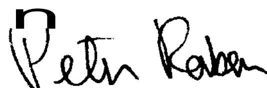
CONCLUSION

This was the wrong case to apply the harmless error doctrine to a mis-instruction on the definitions of manslaughter at the request of a jury. Because (1) this case hinged upon the jury's understanding of when a homicide is lawful, and (2) its quest for additional information toward making that decision was thwarted by the trial court's error, and (3) the issue was preserved by defense counsel, a reversal of Mr. Garcia's conviction is appropriate.

IT HEREBY CERTIFIED that a true and correct copy of the foregoing was mailed to: Yvette Rhodes Prescott, Assistant Attorney General, 401 N.W. 2nd Avenue, Room 820, Miami, Florida this 7th day of APRIL, 1989.

Respectfully submitted,

BRESLIN & RABEN, P.A.
Attorney for Petitioner



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