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STATEMENT OF THE CASE

Petitioner was indicted by the Grand Jury of Orange County, Florida, for first-degree murder, and was charged by an information with two counts of kidnapping. (R 753, 7, 9-10) He was tried by a jury on April 20 through 23, 1987, and found guilty of second-degree murder with a deadly weapon and two counts of false imprisonment. (R 655, 793, 794) He appealed his judgment and concurrent prison terms totalling twenty-two years to the Fifth District Court of Appeal and on December 22, 1988, his convictions and sentences were affirmed. Rojas v. State, 14 FLW 29 (Fla. 5th DCA December 22, 1988).

Petitioner's notice to invoke this Honorable Court's jurisdiction was given on January 20, 1989.

STATEMENT OF THE FACTS

In the late evening of October 28-29, 1986, Tammy Howard and Maria Steverson met Petitioner's nephew, Ricky Delgado, at a club on Orange Blossom Trail in Orlando, Florida, and rode with them to a store or white building in Eatonville in Orange County, where the women said that several black men approached the car. (R 178, 179, 180, 181, 182, 195, 211, 212, 213, 214, 232) They said they did not hear any conversation except someone's saying, "Don't rip me off like in New York." (R 183, 216, 217, 236) Petitioner drove away suddenly, they said, with a black man hanging half in and half out of the vehicle. (R 184, 217, 218, 256) The car stopped about two blocks down the road, where they said Petitioner and the man fought outside the car in the street. (R 185-186, 202, 208, 219, 223, 246) They said after Petitioner hit the man a couple of times, he got back in the car. (R 186, 187, 200, 203, 221)

A sixteen-year-old cocaine "runner" testified that he was present at the Rainbow Club when James Lorenzo Richardson sold Petitioner a twenty-dollar piece of crack cocaine, and when Petitioner did not pay him, Mr. Richardson leaped into the car and grabbed Petitioner's steering wheel. (R 252, 253, 254, 255, 290, 291, 292; 454, 455, 456, 457, 458, 472)

James Richardson died from two stab wounds to his heart via one chest wound. (R 356) No one saw Petitioner stab Mr. Richardson, and no one saw, or ever found, a knife. (R 187, 200, 224, 240, 261, 286, 324, 358, 390, 400, 461)

SUMMARY OF ARGUMENT

As acknowledged by the District Court in its opinion herein, the District Court's decision is in direct and express conflict with Walker v. State, 520 So.2d 606 (Fla. 1st DCA 1987), and Spaziano v. State, 522 So.2d 525 (Fla. 2d DCA 1988). The decision is also in direct and express conflict with Alejo v. State, 483 So.2d 117 (Fla. 2d DCA 1986); and Ortagus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987).

ARGUMENT

THE DISTRICT COURT OF APPEAL'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISIONS IN WALKER v. STATE, 520 So.2d 606 (Fla. 1st DCA 1987); SPAZIANO v. STATE, 522 So.2d 525 (Fla. 2d DCA 1988); ALEJO v. STATE, 483 So.2d 117 (Fla. 2d DCA 1986); AND ORTAGUS v. STATE, 500 So.2d 1367 (Fla. 1st DCA 1987).

At Petitioner's trial for murder, the trial court instructed the jury by reading the standard jury instruction on manslaughter:

THE COURT:

In connection with the accusation of murder in the first degree, murder in the first degree includes the lesser crimes of murder in the second degree, murder in the third degree, and manslaughter, all of which are unlawful.

A killing that is excusable or was committed by the lawful use--excuse me, by the use of justifiable deadly force is lawful.

If you find James Lorenzo Richardson was killed by Joey Luis Rojas, you will then consider the circumstances surrounding the killing in deciding if the killing was murder in the first degree or was murder in the second degree, or whether the killing was excusable or resulted from justifiable use of deadly force.

The killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant, or to commit a felony in any dwelling house in

which the defendant may have been at the time of the killing.

The killing of a human being is excusable and, therefore, lawful when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident or misfortune in the heat of passion upon any sudden and sufficient provocation, or upon a sudden combat without any dangerous weapon being used, and not done in a cruel or unusual manner.

(R 629-630, 797)

After defining first-degree murder and second-degree murder, the trial court read:

THE COURT: Before you can find the defendant guilty of manslaughter, the State must prove the following two elements beyond a reasonable doubt:

One, that James Lorenzo Richardson is dead.

Secondly, that his death was caused by the act, procurement or culpable negligence of Joey Luis Rojas.

I will define culpable negligence for you. Under the law each of us has a duty to act reasonably towards others. If there is a violation of that duty without any conscious intention to harm that violation is referred to as negligence.

Culpable negligence is more than a failure to perform that duty or more than a failure to use ordinary care for others. For negligence to be called culpable negligence it must be gross and

flagrant,

The negligence must be committed with utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known or reasonably should have known was likely to cause death or great bodily injury.

(R 632-633, 800)

It has been held that failure to include full definitions of justifiable and excusable homicide and culpable negligence as part of the instruction on manslaughter is fundamental error. In Alejo v. State, 483 So.2d 117 (Fla. 2d DCA 1986), the District Court reiterated that an instruction defining justifiable and excusable homicide is necessary to provide a complete instruction on the crime of manslaughter, and that the court's failure in that case to give a complete instruction was reversible error, notwithstanding defense counsel's failure to make a timely objection. Alejo was convicted of second-degree murder. The First District Court of Appeal, in Ortagus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987), made it clear that the complete definition of excusable or justifiable homicide must be given "as part" of the instruction on manslaughter:

Florida courts have consistently held, starting with Hedges v. State, 172 So.2d 824 (Fla. 1965), that when a trial court gives an instruction on manslaughter it is reversible error for the court to fail to give an instruction on justifiable and excusable homicide. [Citations omitted.] Therefore, we are called upon to determine whether

the trial court's summary definitions on excusable and justifiable homicide given at the beginning of the jury instructions, and not in connection with the instruction on manslaughter, satisfied this fundamental obligation. We find it did not.

Id., 500 So.2d at 1370. In Ortagus, the jury received the same definition of manslaughter as did Petitioner's jury, plus "a brief and general definition of excusable and justifiable homicide ." Id., 500 So.2d at 1369. The Ortagus Court found that the incomplete manslaughter instruction

. . . , failed to cover material elements of the offense, making the instruction necessarily misleading and prejudicial to the accused. [Citations omitted.] [Emphasis supplied.]

Id., 500 So.2d at 1370.

In Walker v. State, 520 So.2d 606 (Fla. 1st DCA 1987), the defendant was convicted of second-degree murder. A different panel of District Judges relied upon the holding in Ortagus that:

. . . even though the jury was given an abbreviated instruction on justifiable and excusable homicide at the beginning of the homicide instructions, it was reversible error not to read the justifiable and excusable homicide defenses in their entirety contemporaneously with the manslaughter instruction given later. Ortagus at 1370. This is because manslaughter is a residual offense, defined by what it is not. See Kelsey v. State, 410 So.2d 988 (Fla. 1st DCA 1982). Consequently, the failure to fully instruct on the applicable defenses results in omitting material ele-

ments of the offense, which is necessarily misleading and prejudicial to the accused. [Citations omitted.] [Emphasis supplied.]

Id.

In this case, the District Court acknowledged that the First and Second District Courts of Appeal have held that the failure to fully instruct a jury on justifiable and excusable homicide, as part of and contemporaneous with an instruction on manslaughter, is fundamental and reversible error where the defendant is convicted of second-degree murder. Walker, supra; Spaziano, supra; Ortagus, supra. The District Court, however, relied on the Third District Court of Appeal's decision in Garcia v. State, 13 F.L.W. 2350 (Fla. 3d DCA October 28, 1988), that the failure to give a complete manslaughter manslaughter instruction was harmless error and not fundamental error. In the instant case, the District Court said:

We realize this opinion is in conflict with Walker, supra; Spaziano, supra (as modified by Tobey [v. State], 13 F.L.W. 2541 (Fla. 2d DCA Nov. 18, 1988)).

Because, as the District Court acknowledged, the decision herein is in direct and express conflict with other District Courts' decisions on the same question of law, this Honorable Court should exercise its discretionary jurisdiction and resolve the conflict.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and review the District Court's decision in this cause.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
112-A Orange Avenue
Daytona Beach, Florida 32014-4310
904-252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Joey Luis Rojas, P. O. Box 518, Zephyrhills, Florida 34283, this 26th day of January, 1989.



ATTORNEY