IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ROLAND SMITH,

Respondent.

Case No. 73,822

DISCRETIONARY REVIEW OF THE DECISION OF
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The respondent, ROLAND SMITH, was indicted by a grand jury for first-degree murder on April 22, 1986 (R. 1089-1090) Following a jury trial, the respondent was convicted of murder in the second-degree (R. 1241, 1022-1024). The respondent appealed his judgment and sentence to the Second District Court of Appeal challenging, among other things, the adequacy of the trial court's instructions to the jury.

The district court found fundamental error in the trial court's failure to give the long form standard jury instruction on excusable homicide in conjunction with the manslaughter instruction, and remanded for a new trial despite the lack of objection to the giving of the short form excusable homicide instruction. Smith v. State, 14 F.L.W 541 (Fla. 2d DCA February 24, 1989). The district court noted that there was evidence to support the defense of excusable homicide,[1] and that the respondent had admittedly used a dangerous weapon in killing the victim. Id. at 542. The district court recognized that there could be several theories in requiring that the long form instruction on excusable homicide be given, and discussed two separate contexts for purposes of this case: (a) when evidence has been offered to support the defense of excusable homicide,

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[1] The petitioner respectfully takes issue with this finding by the district court.

and (b) when there is an alleged failure by the trial court to instruct accurately on the definition of excusable homicide as part of the definition of the lesser included offense of manslaughter.

As to the first situation, the district court found that there was no fundamental error in the failure to give the long form excusable homicide instruction since the short form excusable homicide instruction had been given. In so holding, the district court certified the following question to this Court as being of great public importance:

> WAS THE FAILURE TO GIVE THE LONG FORM INSTRUCTION ON THE DEFENSE OF EXCUSABLE HOMICIDE FUNDAMENTAL ERROR WHEN THE SHORT FORM EXCUSABLE HOMICIDE INSTRUCTION HAD BEEN GIVEN, WHEN THE DEFENDANT HAD NEITHER REQUESTED THE LONG FORM INSTRUCTION NOR OBJECTED TO THE GIVING OF THE SHORT FORM INSTRUCTION, AND WHEN THAT DEFENSE WAS SUPPORTED BY THE EVIDENCE?

As to the second situation, the court discussed the somewhat contradictory and inconsistent law in this area, and held that fundamental error was committed by the trial court's failure to include the long form instruction on excusable homicide in connection with its instruction on manslaughter. In so holding, the district court certified the following question to this Court as being of great public importance:

> WHEN A DEFENDANT WAS CONVICTED OF SECOND-DEGREE MURDER, WAS THERE FUNDAMENTAL ERROR WHEN THE TRIAL COURT HAD FOLLOWED THE

STANDARD JURY INSTRUCTIONS AND GIVEN THE SHORT FORM INSTRUCTION ON EXCUSABLE HOMICIDE AT THE OUTSET OF THE HOMICIDE INSTRUCTIONS AND HAD GIVEN NO FURTHER INSTRUCTION ON EXCUSABLE HOMICIDE IN CONNECTION WITH ITS INSTRUCTION ON MANSLAUGHTER?

Thereafter, the petitioner, STATE OF FLORIDA, filed a notice to invoke the discretionary jurisdiction of this Court pursuant to Rule 9.030(a)(2)(v), Fla.R.App.P. and the district court granted the petitioner's motion to stay issuance of the mandate.

SUMMARY OF THE ARGUMENT

I. No fundamental error is demonstrated by the trial court's failure to give the long form standard jury instruction on excusable homicide, despite the district court's finding that evidence was presented to support that defense. The jury was instructed on the short definition of excusable homicide, and that definition is not constitutionally infirm. Instructions as to a particular defense are within the province and responsibility of defense counsel. The district court properly answered the first certified question in the negative.

11. No fundamental error is demonstrated by the trial court's failure to give the long form excusable homicide instruction as part of the definition of the lesser included offense of manslaughter. The use of the short form definition of excusable homicide does not make the manslaughter instruction constitutionally infirm. A finding of fundamental error on these facts is inconsistent with the application of the harmless error doctrine. The jury had the opportunity to exercise its "pardon power" and convict the respondent of manslaughter, since it was properly instructed on the positive elements of that offense and the only error was in the definition of an exclusion to that offense which was necessarily rejected by the verdict of guilty of second-degree murder. Any error in a material element of an offense is harmless when that element does not apply to the facts

of the case, and such error does not destroy the value of the instruction as a whole.

ARGUMENT

ISSUE I

WHETHER THE FAILURE TO GIVE THE LONG FORM INSTRUCTION ON THE DEFENSE OF EXCUSABLE HOMICIDE WAS FUNDAMENTAL ERROR WHEN THE SHORT FORM EXCUSABLE HOMICIDE INSTRUCTION HAD BEEN GIVEN, WHEN THE DEFENDANT HAD NEITHER REQUESTED THE LONG FORM INSTRUCTION NOR OBJECTED TO THE GIVING OF THE SHORT FORM INSTRUCTION, AND WHEN THAT DEFENSE WAS SUPPORTED BY THE EVIDENCE.

The district court found that the failure to give the long form instruction on excusable homicide did not amount to fundamental error, despite the fact that the defense of excusable homicide was supported by the evidence. It is respectfully submitted that this holding was proper and should not be disturbed by this Court.

The district court distinguished the line of cases, culminating with Tobey v. State, 533 So.2d 1198 (Fla. 2d DCA 1988), adopting the statement, "[t]he failure to give an instruction on a defense encompassed within the evidence is fundamental error and reviewable notwithstanding the absence of a requested instruction or an objection." 533 So.2d at 1200. The district court noted that statement appears to have been dicta, and would not apply to the case at hand where the arguably inaccurate short form excusable homicide instruction had been given. The district court opined that such a rule of fundamental error was not intended as a general rule, "...and

would place an unrealistically severe burden on trial judges concerning a matter which should properly be within the province and responsibility of defense counsel as a matter of trial tactics and strategy." 14 F.L.W. at 542.

The district court also cited this Court's opinion in Smith v. State, 521 So.2d 106 (Fla. 1988), as support for its holding. In Smith, this Court held that the giving of the jury instruction on insanity which had been disapproved in Yohn v. State, 476 So.2d 123 (Fla. 1985), did not amount to fundamental error requiring reversal in the absence of an objection. Although the disapproved standard jury instruction did not completely and accurately state the law as to insanity in Florida, this court noted that "[t]here was no constitutional infirmity in the old standard jury instruction because there is no denial of due process to place the burden of proof of insanity on the defendant." 521 So.2d at 107. The finding in Smith that there was no fundamental error, despite the fact that there was evidence presented to support the instruction at issue and the instruction itself was less accurate than the complete instruction put forth in Yohn, demonstrates that the district court in this case was correct in answering the first certified question in the negative.

ISSUE II

WHETHER THE FAILURE TO GIVE THE LONG FORM INSTRUCTION ON THE DEFENSE OF EXCUSABLE HOMICIDE WAS FUNDAMENTAL ERROR WHEN A DEFENDANT WAS CONVICTED OF SECOND-DEGREE MURDER, WHEN THE TRIAL COURT HAD FOLLOWED THE STANDARD JURY INSTRUCTIONS AND GIVEN THE SHORT FORM INSTRUCTION ON EXCUSABLE HOMICIDE AT THE OUTSET OF THE HOMICIDE INSTRUCTIONS AND HAD GIVEN NO FURTHER INSTRUCTION ON EXCUSABLE HOMICIDE IN CONNECTION WITH ITS INSTRUCTION ON MANSLAUGHTER.

Although the district court answered this second certified question affirmatively and reversed this case and remanded for a new trial, it recognized that "there is considerable disagreement and lack of clarity in this area of the law...". 14 F.L.W. at 542. It is respectfully submitted that the ultimate finding of fundamental error herein is inconsistent with this Court's reasoning in other cases applying a harmless error analysis, as demonstrated by the following argument.

The manslaughter instruction is unique, because manslaughter is "...a residual offense which is actually defined by reference to what it is not." Kelsey v. State, 410 So.2d 988 (Fla. 1st DCA 1982). Thus, the offense of manslaughter is comprised of positive elements (that the victim's death resulted from the act, procurement, or culpable negligence of the defendant) and negative elements (that the victim's death was not justifiable or excusable). §782.07, Fla. Stat. A finding of manslaughter is itself a two-step process. That is, the jury must find initially

that the positive elements of manslaughter have been proven by the state. Next, the jury must conclude from the evidence presented that the death was not legally justified or excused.

The giving of the short form excusable homicide instruction does not interfere with the jury's ability to conclude that the positive elements of manslaughter have been proven. Therefore, a jury is not denied the opportunity to exercise its inherent "pardon power" and convict a defendant of manslaughter. The danger presented when only the short form definition has been given is that a jury may convict a defendant of manslaughter when the facts found by the jury demonstrate that the death was excusable. However, when a judgment of guilty of second-degree murder has been returned, the jury has necessarily rejected the positive elements of manslaughter in favor of the more serious charge, and the danger that the jury was misled by the short definition of excusable homicide is irrelevant. The giving of the short form excusable homicide instruction therefore amounts to harmless error under this Court's decision in State v. Abreau, 363 So.2d 1063 (Fla. 1978).

This reasoning was implicitly adopted by the third district in Garcia v. State, 535 So.2d 290 (Fla. 3d DCA 1988) and explicitly rejected by the second district in this case. The court below noted:

> "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 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 at 1064 'the failure to instruct on the next immediate lesser included offense (one step removed) constitutes error that is per se reversible.'" 14 F.L.W. at 543-544, fn. 2. (emphasis in original).

The second district's reasoning that the jury was denied the opportunity to convict the defendant of manslaughter is based on the conclusion that the manslaughter instruction was incomplete, without examining how the instruction was incomplete or how the incompleteness affected the instruction as a whole or its impact on the jury. While this reasoning is sound and consistent with established rules (that fundamental error is committed when an element of an offense is inadequately defined, and the error is harmless if the inadequate definition involves an offense more

than two steps removed from the offense for which a defendant is convicted), the uniqueness of the manslaughter offense should demand flexibility in the application of these rules when the fairness of a defendant's trial has not been impeded.

Therefore, this Court should recognize that the giving of the short form excusable homicide instruction does not amount to fundamental error when a defendant is convicted of second-degree murder, because the jury could not have been misled by the definition of an exclusion to the offense of manslaughter when that exclusion necessarily did not apply to the facts of the case. As the district courts in both Garcia and the instant case recognize, the finding that a defendant acted with a depraved mind is inconsistent with the finding that the killing in question was excusable. It belies common sense to suggest that the fairness of a defendant's trial was infected by an incorrect definition to an element of manslaughter that did not apply to the facts. While it is logical to conclude that the jury was denied an opportunity to exercise its inherent "pardon power" and convict a defendant of manslaughter when an element of manslaughter was improperly defined, it is not logical to ignore the fact that the improper definition could not have affected the jury and find that fundamental error has been committed on these facts.

This argument is supported by the district court's finding that no fundamental error has been presented on the facts of the first certified question examined in Issue I herein. In order to find fundamental error from the giving of an inadequate manslaughter instruction, it is necessary to find that the definition of manslaughter which included the short form excusable homicide definition was constitutionally infirm. Smith v. State, 521 So.2d 106 (Fla. 1988). To date, no one has suggested and no district court has found the instruction to be constitutionally infirm. Although Blitch v. State, 427 So.2d 785 (Fla. 2d DCA 1983) noted that the instruction appears to be inaccurate, and Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA 1988) agrees that the instruction is misleading, an arguably misleading instruction is still a long way from being constitutionally infirm. The short form excusable homicide instruction has been used since at least 1942, Caingetti v. Chapman, 149 Fla. 497, 6 So.2d 380 (1942), and it has probably been used since the enactment of the statute in 1868. 5782.03, Fla. Stat. Yet no difficulty was identified with the instruction until Blitch was rendered in 1983.

In conclusion, it is respectfully submitted that this Court should expand the holding of State v. Abreau, supra, to reject the finding of fundamental error on the facts presented herein. Consistent with the reasoning of Abreau, the jury was given the

opportunity to exercise its inherent "pardon power" when the positive elements of the manslaughter offense were correctly stated, and the justifiable and short form excusable homicide definitions were given. The interests of justice simply do not compel the finding of fundamental error on the facts of this case.

CONCLUSION

Based on the foregoing arguments and citations of authority, the petitioner respectfully requests this Honorable Court to reverse the district court's order for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to DEBORAH K. BRUECKHEIMER, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830, this 3rd day of April, 1989.

CAROL M. DITTMAR

OF COUNSEL FOR PETITIONER