IN THE SUPREME COURT OF FLORIDA

ROBERT LEWIS MILLER,

Petitioner,

vs. : Case No. 74,955

STATE OF FLORIDA, :

Respondent.

_____.

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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STATEMENT OF THE CASE AND FACTS

On September 29, 1989, the District Court of Appeal of Florida, Second District, issued its opinion in the instant case. The facts of the case are stated in the opinion as follows.

> On October 21, 1985, appellant was involved in a head-on collision with another automobile.... Three people in the other car were killed and a fourth was injured.... The accident occurred as appellant was fleeing from a pursuing police vehicle.... With the patrolman in pursuit, appellant began driving his vehicle south in the northbound passing lane of Highway 27, despite oncoming motorists who were forced to swerve off the road onto the median.... Appellant was travelling at a speed of between 50 and 80 m.p.h. with the patrolman following at the same speed at a distance of about ten car lengths behind. Although there is some testimony to the contrary, the patrolman testified that his overhead flashing lights and siren were activated during the pursuit. The accident occurred when the victims' vehicle pulled into the passing lane on Highway 27 North and immediately collided head on with appellant's vehicle.
>
> Appellant was charged with three counts of second degree murder, three counts of vehicular homicide, one count of culpable negligence, and one count of fleeing to elude. The jury found appellant guilty as charged except that it reduced the second degree murder charges to manslaughter.... The trial court departed upward from the recommended sentencing guidelines range, sentencing appellant [to a total of sixty-two years in prison].

Miller v. State, 14 F.L.W. 2300, 2300 (Fla. 2d DCA Sept. 29, 1989)

The district court disapproved three of the four reasons for departure but approved the fourth -- "appellant knowingly created a great risk of injury or death to a large number of persons." The court rejected a claim that the failure to give a complete instruc-

tion on manslaughter was fundamental error. Petitioner now asks this court to review the second district's decision.

SUMMARY OF THE ARGUMENT

I. The second district's decision that an incomplete instruction on manslaughter was fundamental error only if the defendant was convicted of second degree murder conflicted with Ortaaus v. State, **500** So.2d **1367** (Fla. 1st **DCA** 1987), which held that an incomplete instruction on manslaughter was fundamental error when the defendant was convicted of manslaughter.

11. The second district's decision that great risk of injury to others was a valid reason to depart in a manslaughter case conflicted with other decisions in several ways. First, the first district decided that a flagrant disregard for the safety of others was not a valid reason for departure because it was an inherent component of manslaughter. Second, the second district's decision conflicted with the rule that reasons to depart cannot relate to factors for which the defendant was not charged. The defendant in this case could have been but was not charged with culpable negligence for endangering the safety of others. Finally, the defendant was acquitted of the more extreme offense of second degree murder. Consequently, because the defendant was acquitted of extreme disregard for the safety of others, this disregard could not be used as a reason to depart for the lesser offense of manslaughter.

ARGUMENT

ISSUE I

THE INSTANT DECISION EXPRESSLY AND DIRECTLY CONFLICTED WITH ORTAGUS V. STATE, **500 SO.2D 1367** (FLA. 1ST DCA **1987).**

The trial court in this case recited "to the jury the short form, rather than the long form, standard jury instructions on justifiable and excusable homicide. Appellant's counsel neither requested the long form nor objected to the short form..." Miller, 14 F.L.W. at 2301. The second district refused to rule that the failure to give a complete instruction was fundamental error. The second district distinguished its prior decision in Smith v. State, **539** So.2d 514 (Fla. 2d DCA **1989)** (briefing schedule set March 9, **1989,** oral arguments scheduled for December 4, **1989),** which held that failure to give the complete instruction was fundamental error. The court in the instant decision decided that Smith was different because Smith was convicted of second degree murder while Miller was convicted of manslaughter.

Appellant does not understand how **a** failure to give a complete instruction on the offense for which a defendant was convicted could be less fundamental than a failure to give a complete instruction on an offense for which he was not convicted. If the jury in this case had received a correct instruction on manslaughter, it might have exercised its pardon power and reduced the charges to an offense lower than manslaughter. Furthermore,

this reasoning expressly conflicted with Ortaaus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987). In Ortaaus, the defendant was charged with first degree murder, but -- as in the present case -- the jury reduced the charge to manslaughter. Only the short form instruction for justifiable and excusable homicide was given. The court held that giving this incomplete instruction was fundamental error. The Ortagus court refused to determine whether the facts of the case supported the defense theory of excusable homicide.

Ortagus expressly contradicts the second district's theory in the present case that an incomplete instruction on justifiable and excusable homicide is fundamental error only if the defendant is convicted of second degree murder rather than manslaughter. Accordingly, this court should accept review in this case.

ISSUE II

THE SECOND DISTRICT'S DECISION CONFLICTED WITH OTHER DECISIONS WHICH HELD THAT (1) FLAGRANT DISREGARD FOR THE SAFETY OF OTHERS WAS AN INHERENT COMPONENT OF MANSLAUGHTER, AND (2) GUIDELINES DEPARTURES MAY NOT BE JUSTIFIEDBYREFERENCETOFACTORSFOR WHICH THE DEFENDANT HAS BEEN ACQUITTED OR NOT BEEN CHARGED.

The second district upheld as a reason for departure that "appellant knowingly created a great risk of injury or death to a large number of persons." Miller, **14 F.L.W.** at **2300.** Appellant, however, was convicted of manslaughter. The second district's decision therefore expressly and directly conflicted with Mayo V. State, **518** So.2d **458, 460** (Fla. 1st **DCA 1988)** which stated that flagrant disregard for the safety of others was inherent in the crime of manslaughter and therefore was not a reason to depart. Mayo was based on the definition of culpable negligence, a statutory component of manslaughter. According to the standard instruction of culpable negligence read to the jury in this case,

> [c]ulpable negligence is a course of conduct showing reckless disreaard of human life or of the safety of persons exposed to its dangerous effects or such an entire want of care as to raise a presumption of a conscious indifference to consequences or which shows wanton negligence or recklessness or a grossly careless disreaard of the safety and welfare of the public or such an indifference to the rights of others as is equivalent to an intentional violation of such rights. The negligent act or omission must have been committed with an utter disrecrard 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 harm.

As this standard instruction shows, "[a] great risk of injury or death to a large number of persons" was inherent in the definition of manslaughter and therefore was not a valid reason to depart.

The second district distinguished Mayo by claiming that Mayo involved acts against the victim while Miller flagrantly disregarded the safety of persons other than the victim. This distinction expressly and directly conflicted with cases holding that departure cannot be based on factors relating to offenses for which the defendant was not charged. Felts v. State, 537 So.2d 995 (Fla. 1st DCA 1989) (high speed chase and resulting fatal accident were circumstances surrounding the offense of robbery for which convictions were not obtained); McIntyre v. State, 539 So.2d 603 (Fla. 3d DCa 1989) (defendant's reckless driving in fleeing the crime scene and creating a safety risk to others not a valid departure reason because the defendant was not charged with reckless driving). In the present case, the appellant's alleged acts which disregarded the safety of others constituted acts of culpable negligence for which he could have been charged but was not. Because he was not charged with these offenses, they could not be used as reasons to depart. Id. Flagrant disregard for the safety of others can be a valid reason for departure, but only if it does not involve other chargeable offenses.

Relying on its decision in Manis v. State, 528 So.2d 1342 (Fla. 2d DCA 1988), the second district decided that, since disregard for the safety of others was a valid reason to depart in

Manis (a second degree murder case) and since, "in this case, appellant was not convicted of the more serious offense of second degree murder," Miller, 14 F.L.W. at 2301, this reason for departure must also be valid for the less serious offense of manslaughter. This bizarre reasoning expressly and directly conflicted with cases holding that reasons for departure may not relate to charges for which the defendant was acquitted. Pendleton v. State, 493 So.2d 1111 (Fla. 1st DCA 1986). The jury in this case acquitted the appellant of second degree murder, an offense which required a showing of a "depraved mind regardless of human life." § 782.04(2), Fla. Stat. (1985). This acquittal meant that appellant's disregard for the safety of others was not *so* flagrant that it warranted a conviction for second degree murder. The second district effectively but erroneously reasoned that, because the jury acquitted the defendant of a flagrant, extreme, and extraordinary disregard for the safety of others (i.e., second degree murder), this disregard for safety could then be used as a reason to depart from the lesser offense of manslaughter. This consideration of the greater offense as a reason to support departure for the lesser offense was clear error. Vanover v. State, 498 So.2d 899, 901 (Fla. 1986) (trial court improperly used the higher crime -- for which there was no conviction -- as a significant element in the determination to depart).

Because the second district's decision conflicted with numerous other decisions, including Mayo, Felts, Pendleton, and Vanover, petitioner asks this court to grant further review.

CONCLUSION

Petitioner asks this court to accept jurisdiction in this case.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room **804, 1313** Tampa St., Tampa, FL **33602, (813) 272-2670, on** this 30 day of October, **1989.**

Respectfully submitted,

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