IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA, )
Petitioner, )
vs. ) Case No. 75,831
)
CANDICE JEAN SCHUCK,
Respondent. )

**RESPONDENT'S ANSWER BRIEF ON THE MERITS**

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## PRELIMINARY STATEMENT

Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit and Appellant in the Fourth District Court of Appeal. Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit and Appellee in the Fourth District Court of Appeal.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

R = Record on Appeal

IB = Petitioner's Initial Brief on the Merits

## STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts with the following additions and clarifications:

The evidence at trial established that Respondent, then 17 years of age, and Mark Hamilton, the decedent, who was quite a bit older, were paramours. Mr. Hamilton wished to sever the relationship because his wife had discovered his digression (R 337, 349).

Respondent and Violet Kelly went to the Lamp residence where they met Mr. Hamilton by chance (R 351-352). Respondent was seated on a couch as Mr. Hamilton stood in the kitchen with his back toward her (R 150). Respondent stated "oh yeah", picked up Mr. Hamilton's gun which was beside the couch and it went off (R 150, 153, 164, 336-337, 353-4). Respondent panicked and exclaimed she did not know the gun was loaded (R 154-156, 162). The incident happened so quickly that Respondent did not have time to aim the weapon (R 165). Respondent was hysterical (R 155-156, 157).

Frantic and crying, she left the residence with Ms. Kelly (R 181, 192). They went to Ms. Kelly's home where Respondent immediately telephoned the Lamp residence to determine Mr. Hamilton's condition (R 162-163, 241). She learned that Mr. Hamilton was dead (R 241). Still upset and crying, she returned to the scene with another friend (R 183, 204). Almost incoherent, she told this friend that she accidentally fired the weapon at Mr. Hamilton (R 210, 215).

At the Lamp residence, Respondent approached Detective King still upset, and stated that it was an accident. She loved Mr. Hamilton (R **243-244, 248).**

Respondent gave a voluntary tape recorded statement to Detective Williams at the Fort Lauderdale Police Station (R **335-336).** Respondent stated that as Mr. Hamilton walked towards the kitchen having told her that he no longer wanted to see her, Respondent replied that she loved him (R **337, 342).** Respondent picked up the shotgun, said "Watch this" and it went off (R **337, 340).** Respondent had no idea the gun was loaded (R **359).** She did not mean to shoot **Mr.** Hamilton (R **360).**

Contrary to Petitioner's statement of the case and facts that it "never took the position that this killing could not be excusable homicide...because a dangerous weapon was used" (IB 2), the Petitioner's theme throughout closing argument was that Respondent's use of a gun exhibited a lack of due care such that she was not committing a lawful act by lawful means (R **442).** Furthermore, one may not claim an accident occurred when one holds a gun pointed at someone's head (R **451-2).** In closing argument, Respondent summarized Petitioner's theory of guilt as follows:

> Is there ever an accident? No, I guess not. When somebody picks up a gun and there is a death, there is never an accident? They're always charged by the state. That's what he is saying. There can never be an accident. It is impossible.

(R **466).** Respondent countered that in fact an accident occurred even though a gun was involved (R **466).**

## SUMMARY OF ARGUMENT

Sub judice, the misleading instruction was given in the course of definingthe crime charged, manslaughter. It was the obligation of the trial court to ensure an accurate charge on this offense. The error related to an essential element of manslaughter, the exclusion of excusable homicide. Most significantly it related to a critical and disputed issue for resolution by the jury at bar for it was called upon to determine whether Mark Hamilton's death was an accidental shooting or the result of manslaughter. The instruction left only one conclusion for it eliminated the possibility of accidental homicide where a deadly weapon was used. The misleading language effectively directed the verdict for the state once it established that a deadly weapon, a shotgun, caused Mr. Hamilton's death. Based upon the instruction, the jury could only return one lawful verdict, that of manslaughter. Consequently, the giving of the instruction was fundamental error.

## ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL PROPERLY HELD THAT RESPONDENT WAS ENTITLED TO A NEW TRIAL ON HER MANSLAUGHTER CHARGE.

Respondent was charged and convicted of manslaughter with a firearm for the shooting death of her paramour Mark Hamilton (R 496, 492, 501).

Section 782.07, Florida Statutes defines manslaughter as:

> The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of Chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

It is a residual offense whose definition is determined by what it is not. Hedaes v. State, 172 So.2d 824 (Fla. 1965). Complete and accurate jury instruction on the charge of manslaughter thus requires instruction on culpable negligence, excusable homicide and justifiable homicide. Failure to completely and accurately define these terms is error. Id., Garcia v. State, 552 So.2d 202 (Fla. 1990); Stockton v. State, 544 So.2d 1006 (Fla. 1989); Brown v. State, 467 So.2d 323 (Fla. 4th DCA), review denied 467 So.2d 1000 (Fla. 1985); Pouk v. State, 359 So.2d 929 (Fla. 1978); Campbell v. State, 306 So.2d 482 (Fla. 1975); Walker v. State, 520 So.2d 606 (Fla. 1st DCA 1987); Reed v. State, 531 So.2d 358 (Fla. 5th DCA 1988). Furthermore, as the trial court bears the responsibility to accurately define the elements of the crime charged when instructing the jury, Florida courts have recognized that the failure to contemporaneously charge the jury on excusable and

justifiable homicide in defining manslaughter results in fundamental error reviewable on appeal without objection. Aleio v. State, 483 So.2d 117 (Fla. 2d DCA 1986); Ortauus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987). This Court specifically approved the holdings of Aleio and Ortauus in Rojas v. State, 552 So.2d 914 (Fla. 1989).

In Rojas, the defendant was charged with first degree murder but convicted of second degree murder. In charging the jury the trial court gave the introduction to homicide generally as set forth in The Standard Jury Instructions in Criminal Cases. This included a brief definition of excusable and justifiable homicide as types of lawful homicides. In defining the lesser included offense of manslaughter however, the trial court did not contemporaneously define justifiable or excusable homicide or refer to its earlier definition of these terms. Thus the court's instruction omitted these elements from the definition of the lesser included offense, manslaughter. This Court found that the total omission of these elements constituted fundamental error.

At bar, Respondent was charged with and convicted of manslaughter. In defining said offense to the jury, the trial court gave the following instruction:

> In this case the defendant is accused of manslaughter. Manslaughter is unlawful. A killing that is excusable or was committed by the use of justifiable deadly force is lawful. If you find that Mark Hamilton was killed by Candice Jean Schuck, the defendant, you must consider the circumstances surrounding the killing in deciding whether the killing was manslaughter or whether the killing was excusable or resulted by the justifiable use of 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 was at the time of the killing.
>
> Excusable homicide. 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 sudden combat, without any danserous weapon being used and not done in a cruel and unusual manner.
>
> Manslaughter. Before you can find the defendant guilty of manslaughter the state must prove the following two elements beyond a reasonable doubt: (1) Mark Hamilton is dead. (2) The death was caused by the act, procurement or culpable negligence of Candice Jean Schuck. However, the defendant cannot be guilty of manslaughter if the killing was either justifiable or excusable, as I have previously explained those terms. I'll now define "culpable negligence" for you.
>
> 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 negligence. Culpable negligence is more than the 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 for 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.

(Emphasis added) (R 475-477). This definition of excusable homicide as an element of manslaughter is misleading and resulted in fundamental error. Schuck v. State, **556** So.2d **116** (Fla. 4th DCA **1990).**

Section 782.03, Florida Statutes defines excusable homicide as:

> Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with the usual ordinary caution, and without any unlawful intent, or by accident and 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.

The law recognizes three (3) alternative situations which may result in excusable homicide. Parker v. State, 495 So.2d 1204 (Fla. 3d DCA 1986) rev. denied 504 So.2d 768 (Fla. 1987). As each is independent of the other, to establish excusable homicide requires proof of only one of the three criteria. Colon v. State, 430 So.2d 965, 966 (Fla. 2d DCA 1983). Furthermore, the phrase "without any dangerous weapon being used" qualifies only the last of the three scenarios, sudden combat. Blitch v. State, 427 So.2d 785 (Fla. 2d DCA 1983).

The flaw in the Standard Jury Instruction on excusable homicide arises because the phrase "without any dangerous weapon being used", as read in Respondent's cause, inaccurately applies to the entire charge when it should be clearly limited to the sudden combat criteria. Id. at 787. Thus four of the district courts of appeal have held that the charge may mislead the jury to conclude that excusable homicide cannot exist if a dangerous weapon is used. Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA 1988); Blitch v. State, 427 So.2d at 787; Bowes v. State, 500 So.2d 290 (Fla. 3d DCA 1986) rev. denied 506 So.2d 1043 (Fla. 1987); Hoffert v. State, 559 So.2d 1246 (Fla. 4th DCA 1990). As the Fourth District Court of Appeal stated:

> There exists a need for explicit clarification that any one of the three elements, when proven, is itself sufficient to establish the defense of excusable homicide. Further, when the evidence supports the defense of sudden combat, the trial court should clearly instruct the jury that the dangerous weapon exception applies only to that defense.

**559 So.2d** at **1249.**

Here, the Fourth District correctly held that the misleading nature of the instruction gave rise to fundamental error. In Respondent's cause, the contested instruction was given as part of the introduction to homicide. It was referred to again in defining manslaughter the crime charged (R **475-476).**[1]

"'Fundamental error'...is error which goes to the foundation of the case or goes to the merits of the cause of action." Clark v. State, **363** So.2d **331, 333** (Fla. **1978).** It must constitute a denial of due process. Ray v. State, **403** So.2d **956, 960** (Fla. **1981).** Sometime ago, this Court recognized the due process considerations placed the duty upon the trial court to accurately instruct the jury on the elements of the crime charged:

> It is an inherent and indispensable requisite of a fair and impartial trial under the

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[1] Petitioner suggests that because the court used the approved language "the defendant cannot be guilty of manslaughter if the killing is justifiable or excusable homicide as I have previously explained those terms" no error results (IB **10).** However the quoted language refers the jury to the original misleading instruction. It directs the jury that a homicide is not excusable if a dangerous weapon is used. Thus while the language may track the standard jury instruction, it does not alleviate the error at bar. As this Court recognized approval of standard jury instructions does not "relieve the judge of his responsibility under the law to charge the jury properly and correctly in each case as it comes before him". In the Matter of the Use of the Trial Courts of The Standard **Jury** Instructions in Criminal Cases and The Standard Jury Instructions in Misdemeanor Cases, No. **57,734** and **58,799** (Fla. April **16, 1981).**

> protective powers of our federal and state constitutions as contained in the due process of law clauses that a defendant be accorded the right to have a Court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence. Such protection afforded an accused cannot be treated with impunity under the guise of "harmless error". (Citations omitted).

Gerds v. State, 64 So.2d 915, 916 (Fla. 1953); Christian v. State, 272 So.2d 852 (Fla. 4th DCA 1973). Recently, the Third District concisely stated the law of fundamental error as it applies to a jury instruction on the offense charged as follows:

> Fundamental error in jury instructions does occur "when an omission or error in the definition of a crime is pertinent or material to what must actually be considered by the jury in order to convict" (Citation omitted). The omitted or misstated instruction must relate to a critical and disputed jury issue in the case (citation omitted), and not to an issue on which there is no real dispute (citation omitted).

Delva v. State, 557 So.2d 52, 54 (Fla. 3d DCA 1989) (failure to instruct on knowledge element in trafficking in cocaine case constituted fundamental error when knowledge of contents of package was disputed).

Sub judice, the misleading instruction was given in the course of defining the crime charged, manslaughter. The trial court was obliged to accurately charge the jury on this offense. Gerds; Christian; Delva; Croft v. State, 117 Fla. 832, 158 So. 454, 455 (Fla. 1935) ("...it is the duty of the court to define to the jury the elements of the offense with which the accused is charged...."). The error related to an essential element of manslaughter, the exclusion of excusable homicide. Hedges; Rojas. Most

significantly it related to a critical and disputed issue for resolution by the jury at bar for it was called upon to determine whether Mark Hamilton's death was an accidental shooting or the result of manslaughter. The instruction left only one conclusion for it eliminated the possibility of accidental homicide where a deadly weapon was used. The misleading language effectively directed the verdict for the state once it established that a deadly weapon, a shotgun, caused Mr. Hamilton's death. Based upon the instruction, the jury could only return one lawful verdict, that of manslaughter. See e.g. Butler v. State, 493 So.2d 451 (Fla. 1986).

Petitioner's reliance upon Banda v. State, 536 So.2d 221, 223 (Fla. 1988), cert. denied ___ U.S. ___, 109 S.Ct. 1548 (1989) is misplaced for it fails to focus upon the context in which the error arose (IB 8-9). Respondent stresses that the incorrect statement of law at bar occurred during the course of definina the crime charaed for it was specifically referred to at that juncture (R 475-477). The instant error did not arise in the context of defining the defense of excusable homicide. A critical distinction arises between the offense and the defense instructions. The law is well settled that a defendant is only entitled to an instruction on his theory of the defense where there has been some evidence introduced to support it. Palmes v. State, 397 So.2d 648 (Fla. 1981). In Banda, a first degree murder case, the failure to give the minimal definition of excusable homicide during the introduction to homicide instruction was harmless because "there was no evidence which would have supported either defense". 536 So.2d at 221.

This Court's discussion in Rojas v. State, 552 So.2d at 916 emphasizes the distinct standards to be applied in evaluating whether fundamental error is reversible in the context of defining the crime versus that of explaining the defense. This Court noted that a Hedaes error will be harmless where the defendant is convicted of a crime two steps removed from that charged. **Id.** at n.1. Additionally, this Court specifically stated that it was not addressing the issue of whether the evidence warranted the long form defense instruction on excusable or justifiable homicide. **Id.** at n.3. Likewise, the Ortagus decision which this Court specifically approved in Rojas v. State, 552 So.2d at 916 refrained from discussing whether the evidence supported an instruction on the defense of excusable homicide while finding that the failure to accurately cover the material elements of manslaughter was fundamental error. 500 So.2d at 1370; see also Smith v. State, 539 So.2d 514 (Fla. 2d DCA 1989).

This reasoning distinguishes the holding of Barry v. State, 547 So.2d 969 (Fla. 3d DCA 1989) relied upon by Petitioner from the error at bar. In Barry, the defendant was charged with and convicted of manslaughter. The issue on appeal did not concern the accuracy of the excusable homicide instruction as part of the definition of the crime charged, manslaughter. Rather Mr. Barry claimed fundamental error in the failure to give the long form theory of defense, excusable homicide, instruction where the evidence established that he pointed a gun at the victim and pulled the trigger resulting in the victim's death. The Third District Court of Appeal held as a matter of law that this evidence did not support the defense of excusable homicide so that the failure to

instruct on the defense was not fundamental error. By contrast, Respondent challenges the instruction on excusable homicide as a residual element of the crime charged, manslaughter.

Furthermore Barry is factually distinguishable from the instant cause. Contrary to Petitioner's claim (IB 9), at bar a jury question was raised as to whether Respondent aimed the weapon at Mark Hamilton and pulled the trigger. Violet Kelly, the state's eyewitness, testified that the incident occurred so quickly that Respondent did not have time to aim (R 165). Moreover Respondent in her statement to police did not say she aimed the weapon (R 336). Rather she maintained that she picked it up and it went off (R 337). This evidence, although contested by the state, is consistent with excusable homicide. See McArthur v. State, 351 So.2d 972 (Fla. 1977). A jury question was thus presented as to whether Mr. Hamilton's death was manslaughter or excusable homicide which required resolution based upon accurate instructions. Hicks v. State, 9 So.2d 799 (Fla. 1942).

Petitioner's argument that the instruction on excusable homicide as a defense cured any earlier misleading instruction does not excuse the error at bar (IB 11-12). As discussed at length the court has the obligation to properly instruct on the material elements of the crime charged. This is not alleviated by a theory of defense instruction. Furthermore as the Blitch court wisely recognized:

> We are aware, of course, that the jury may not have been naively misled by the instruction given. However, we refuse to sustain appellant's conviction on such a fragile assumption.

427 So.2d at 787.

Finally, the state's closing argument echoed in its initial brief illustrates the prejudice to Respondent's cause as a result of the misleading instruction on manslaughter. The gist of the state's claim is that pointing a weapon cannot, as a matter of law, result in an excusable homicide for it cannot constitute a lawful act (R 442, 453-454, 460, 461 IB 9). The state thus postulates that once use of a gun, a deadly weapon, has been established a verdict of guilty of manslaughter must ensue. The contested instruction incorrectly directs the jury that this conclusion is the only appropriate one. Blitch.

In Butler v. State, 493 So.2d at 453 this Court held:

> Any assertion that the errant jury instruction was harmless beyond a reasonable doubt is clearly rebutted when the jury instruction is combined with comments made by the prosecutor during closing argument.... The posture of this case is identical to that of Harvey v. State, 448 So.2d 578 (Fla. 5th DCA 1984), in which the court held that the trial judge's misleading instruction combined with the prosecutor's repeated misstatements of law resulted in jury confusion and reversible error.

Respondent submits that the holding of this Court in Butler v. State applies with equal force to the instant cause in light of the prosecution's theory of the case as presented in closing argument.

In sum, the Fourth District correctly held that the excusable homicide instruction was fundamentally erroneous in Respondent's manslaughter trial. It must be affirmed.

## CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court to affirm the opinion of the Fourth District Court of Appeal in Schuck v. State, 556 So.2d 116 (Fla. 4th DCA 1990).

Respectfully Submitted,

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CERTIFICATE OF SERV

I HEREBY CERTIFY that a copy hereof has been furnished by courier to John Tiedemann, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 20 day of August, 1990.

Counsel for Respondent