IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,990

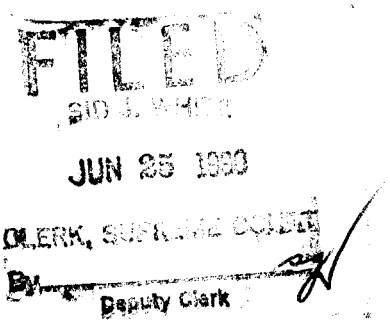
MARCUS PERKINS and
RODNEY GUY,

Petitioners,

-vs-

THE STATE OF FLORIDA,

Respondent.



ON APPLICATION FOR DISCRETIONARY REVIEW

PETITIONERS' BRIEF ON THE MERITS

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INTRODUCTION

This is the initial brief on the merits of petitioners Marcus Perkins and Rodney Guy on discretionary review of a certified question from the Third District Court of Appeal. Citations to the record are abbreviated as follows:

(R) - Clerk's Record on Appeal

(T) - Transcript of Proceedings

(A) - Appendix attached hereto

STATEMENT OF THE CASE AND FACTS

The petitioners were charged by grand jury indictment on May 18, 1988, with the first degree murder of Anthony Kimble with a firearm in violation of §782.04(1), Fla. Stat. (1987), conspiracy to traffic in cocaine over 400 grams in violation of §893.135, and attempted trafficking in cocaine over 400 grams in violation of §893.135.[1] (R: 1) The first degree murder charge alleged both premeditated murder and felony murder "while engaged in the perpretration of, or in an attempt to perpetrate, Trafficking in Narcotics, to wit: cocaine." (R: 1)

On October 24, 1988, the petitioners filed a motion in limine seeking a pretrial evidentiary ruling that the defense of self defense was available to the petitioners at trial on the charge of first degree felony murder. (R: 15) In their motion, the petitioners alleged they were charged with first degree felony murder with the underlying felony of attempted cocaine

[1] A third defendant, Calvin Lazier, was also charged, but he did not join in the circuit court motions which are the subject of this appeal.

trafficking, that the undisputed evidence was that the killing was the result of self defense of petitioner Perkins against the actions of the victim, Anthony Kimble, and that the petitioners sought to interpose the defense of self defense to the charge of first degree murder. (R: 15)

The hearing on the motion in limine took place on October 28, 1988. (T: 1) At the hearing, the state objected to the petitioners' efforts to use the defense of self defense and objected to any instruction on self defense. (T: 4) The state acknowledged the facts of the case were not in dispute and that the facts showed that Perkins acted in self defense. (T: 5, 39-41) The facts as outlined at the hearing were that the codefendant Lazier negotiated a drug deal whereby petitioners Perkins and Guy would buy cocaine from the victim Kimble. (T: 23) Perkins and Lazier met with Kimble in a car while Guy remained in the vicinity. (T: 3, 23) In fact, Kimble had no drugs with him, but instead brought a gun which he pulled out to rob Perkins. (T: 22-23, 26, 28, 39) Perkins grabbed the gun and shot Kimble in self defense. (T: 23, 26, 39) The state's position was that this was a felony murder committed during the drug trafficking deal and that the defense of self defense was not available in felony murder cases. (T: 5, 28, 39)

The defense maintained that self defense is an inherent right and a statutory right and that Florida statutes contain no exception for the unique circumstances here where Kimble acted independently of the underlying felony and attempted to rob Perkins whereby Perkins became the intended victim and shot the

robber, the ultimate "victim," in self defense. (T: 15-24) The court observed the legislature had never indicated that self defense was not available in this situation and the court felt that under these unusual circumstances, the petitioners should be able to raise self defense. (T: 29, 37) The court stated it would resolve all doubts in favor of the petitioners and then granted the motion in limine permitting the petitioners to raise the defense of self defense. (T: 37, 39)

At the conclusion of the hearing, the state noted that since the facts were stipulated, the court's granting of the motion in limine meant the case would be subject to dismissal on the murder charge. (T: 39-40) The court stated that if the facts were indeed stipulated and a motion made, he would grant the motion to dismiss. (T: 40)

On December 13, 1988, the petitioners filed separate sworn motions to dismiss pursuant to Rule 3.190(c)(4), Fla.R.Crim.P., alleging there are no material facts and the undisputed facts do not establish a prima facie case of guilt against the petitioners as the facts show the killing of Kimble was in self-defense. (R: 19-23) The pertinent facts as stated in these motions are:

> a) On or about April 29, 1988, the Defendants and co-defendant Lazier, met with victim, Anthony Kimbell, for the purpose of conducting a drug transaction, wherein the co-defendants believed they were buying a Trafficking amount of drugs from the victim.
>
> b) Investigation revealed that victim, Kimbell, appeared at this meeting without any drugs and pulled a firearm on the co-defendants in an attempted robbery and/or murder.

> c) Defendant, Marcus Perkins, became engaged in a struggle with the victim Kimbell, after Kimbell attempted to rob and/or murder Defendant at gunpoint.
>
> d) During this struggle both the victim and Defendant, Marcus Perkins, were shot. The victim died of gunshot wounds.
>
> e) All evidence possessed by the State suggests and is consistent with the killing of victim, Kimbell, being as a result of either:
>
> 1) the accidental shooting during a struggle over a firearm precipitated by the victim or
>
> 2) the actions of Defendant, Marcus Perkins, in self-defense to protect himself from death or serious bodily harm. (R: 19-23)

The state filed a demurrer to the sworn motion to dismiss asserting the state's position that the defense of self defense is not available to a felony murder charge. (R: 18)

A hearing was held on the sworn motion to dismiss on January 11, 1989. (T: 62) At this hearing, the defense and the state agreed to the wording of the order. (T: 64) This order states that the undisputed facts establish self defense and the court previously ruled that self defense is available in this case, and further states that since the essential element of unlawfulness in the felony murder was negated by the undisputed facts, the sworn motion to dismiss should be granted:

> Accordingly, inasmuch as the Defendants are charged with the unlawful killing of a human being by a person engaged in drug trafficking, and the State having admitted that the killing of Kimbell was done in self-defense, the Court must find there was no "unlawful killing of a human being" as required by Section 782.04(1)(a), Florida Statutes. Pursuant to Section 782.02, Florida Statutes, the use of deadly force is

> justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him. Such use of deadly force is not the unlawful killing of a human being. (emphasis in original) (R: 24-25)

The court then signed the order granting the sworn motion to dismiss. (T: 66)

The state appealed this order granting the sworn motion to dismiss to the Third District Court of Appeal. (R: 26) In its decision, the district court found that under §776.041(1), Fla. Stat. (1987), the defense of self defense is not available to an aggressor who commits or attempts to commit a forcible felony. (A: 3-4) The district court further stated that although §776.08, Fla. Stat. (1987), which defines "forcible felony," does not specifically list drug trafficking as a forcible felony, the court held that "the crime of drug trafficking is clearly embraced within the scope of the definition of forcible felony since the crime is the sort of felony which involves 'the use or threat of physical force or violence against an[] individual' as set forth in section 776.08." (A: 3-4) The court held the defense of self defense was not available to these petitioners and reversed the trial court's ruling on the motion to dismiss. (A: 4-5) The district court further certified "the issue addressed here" to this Court. (A: 4-5) The case is now before this Court on this certified issue.

SUMMARY OF ARGUMENT

The petitioners submit the Third District incorrectly held that drug trafficking is a forcible felony within the meaning of §776.08 so as to preclude the petitioners' use of self defense under §776.041(1), which states that self defense is not available to persons committing forcible felonies.

The right of self defense is a basic inherent and statutory right available to persons even in the commission of felony murder. Although the legislature may restrict the right to some degree, it may not seriously curtail the right and statutes attempting to do so will be strictly construed. Drug trafficking may not be included within the catch-all provision of §776.08 because, even though it may frequently be accompanied by violence, it does not have the use or threat of physical force or violence as part of its very definition and elements as do the enumerated twelve forcible felonies. Thus, under the principle of *ejusdem generis*, whereby general words are limited by specific words, drug trafficking cannot be fit into the catch-all as a forcible felony. Furthermore, even if the statutory intent is unclear or ambiguous, since statutes in derogation of personal rights, such as the fundamental right to self defense, must be strictly construed in favor of the individual, drug trafficking may not be included as a forcible felony.

Consequently, the decision of the Third District Court of Appeal should be quashed.

ARGUMENT

THE DISTRICT COURT INCORRECTLY HELD THAT DRUG TRAFFICKING IS A FORCIBLE FELONY UNDER THE CATCH-ALL PROVISION OF §776.08 WHERE EVEN THOUGH DRUG TRAFFICKING MAY OFTEN BE ACCOMPANIED BY VIOLENCE, IT DOES NOT HAVE THE USE OR THREAT OF PHYSICAL FORCE OR VIOLENCE AS PART OF ITS VERY DEFINITION AND ELEMENTS AS DO THE ENUMERATED FORCIBLE FELONIES AND THUS, UNDER *EJUSDEM GENERIS*, DRUG TRAFFICKING MAY NOT BE INCLUDED AS A FORCIBLE FELONY FORECLOSING THE PETITIONERS FROM RAISING THEIR RIGHT OF SELF DEFENSE.

The petitioners are charged with the first degree felony murder of Anthony Kimble in violation of §782.04(1), Fla. Stat. (1987). (R: 1) The underlying felony is the crime of drug trafficking. (R: 1) Section 782.04(1) expressly states that first degree felony murder is "the unlawful killing of a human being . . . " (emphasis supplied). Section 782.02 states that "the use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him" and §776.012 states that a person is justified in the use of deadly force "if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another . . ." Thus, it is axiomatic that a killing that is justifiable self defense under §776.012 and §782.02 is not "unlawful." Wenzel v. State, 459 So.2d 1086 (Fla. 2d DCA 1984); Bolin v. State, 297 So.2d 317 (Fla. 3d DCA 1974).

It is undisputed that the killing of Kimble in this case was justifiable self defense. (R: 18; T: 5, 39-41) Consequently, if the defense of self defense is available to the petitioners, the trial court correctly granted the petitioners' sworn motion to

dismiss.[2] However, the district court held that self defense was not an available defense to the petitioners because the underlying felony of drug trafficking is a forcible felony under §776.08, thereby precluding the use of self defense under §776.041, which states that self defense is not available to persons committing forcible felonies. The petitioners submit the district court's decision is erroneous and should be quashed.

The right of self defense is one of the most basic inherent rights available to every individual. The right is a natural right and is based on the natural law of self preservation. Vigil v. People, 353 P.2d 82, 85 (Colo. 1960). It is said that this right "is founded upon the law of nature which existed before the formation of society," and that while every individual surrenders to society the right to punish for crime, "the possession and exercise of the right of self-defense by the individual are still deemed to be necessary to personal safety and security and not incompatible with the public good." 40 Am.Jur.2d, Homicide §140, p.430.

Moreover, the right of self defense "is not derived from, and is not, nor can be, superseded by any law of society." 40 C.J.S., Homicide §114, p.983. Although society may pass certain laws affecting the exercise of self defense, society may not restrict the application of self defense to any considerable degree and such statutes will be construed so as not to cut off

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[2] A sworn motion to dismiss lies where the defense of self defense is established by the pleadings in a murder case. State v. Smith, 376 So.2d 261, 262 (Fla. 3d DCA 1979); accord Ritter v. State, 390 So.2d 168, 169 (Fla. 5th DCA 1980).

the right of self defense:

> "Society may curtail the right somewhat and restrain its exercise in many particulars, but the right itself is brought by the individual with him when he enters society, and is not derived from it. He consequently retains the plenary right, except so far as it has been restrained by the laws of society. The extent of the right of defense is necessarily undefined by the law of nature. Its only limit is necessity. So deeply rooted, indeed, is the principle that no statutory enactment will be deemed to curtail its application in any considerable degree. On the contrary, statutes will be so construed as not to cut off the right of self-defense."

40 Am.Jur.2d, Homicide §140, p.430.

This inherent right of self defense extends to the felony murder situation as well. The general rule is that an accused "is not deprived of his right to claim self-defense merely by reason of his having been engaged in the commission of an offense at the time of the killing." 40 C.J.S., Homicide §119, p.991. A person engaged in an unlawful offense may nonetheless protect himself from an unlawful attack and kill in self defense. Id; See Bowes v. State, 500 So.2d 290 (Fla. 3d DCA 1986) (excusable self defense is a defense to third degree felony murder committed while the accused and victim were engaged in the crime of sale of marijuana); State v. Leaks, 103 S.E. 549 (S.C. 1920) (defendant had right of self defense when he killed the deceased while both were engaged in illegal gambling game); Miller v. State, 75 Fla. 136, 77 So. 669 (1918) (an accused escaping from homicide he just committed could exercise right of self defense against an unlawful attack); People v. Dillard, 284 N.E.2d 490 (Ill.App.Ct. 1972) (defendant may use firearm in self defense while committing

crime of armed trespass); Womack v. State, 253 P. 1027 (Okl.Cr.Ct. 1927) (same); Wilson v. State, 171 So.2d 903 (Fla. 2d DCA 1965) (defendant committing offense of illegal possession of firearm could claim self defense while using that firearm); People v. King, 582 P.2d 1000 (Cal. 1978) (same); Moore v. State, 160 S.W. 206 (Ark. 1913) (same); State v. Doris, 94 P. 44 (Or. 1908) (same); 40 C.J.S., Homicide §119, p.991; 40 Am.Jur.2d, Homicide §141, p.431; cf. Segars v. State, 537 So.2d 1052 (Fla. 3d DCA 1989) (court held that failure to instruct on justifiable and excusable homicide in felony murder case not error where evidence showed defendants committed homicide during burglary or robbery and that victim was not killed while defendants were resisting an attempt to commit a felony on them by the victim); Maugeri v. State, 504 So.2d 22 (Fla. 3d DCA 1987) (counsel not ineffective for failure to request instruction on self defense during felony murder prosecution where defendant did not avail himself of self defense but instead claimed he did not commit the underlying felony).[3]

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[3] This is different from the long standing principle that if the accused was the aggressor or provoked the difficulty in which he killed his assailant, he cannot invoke the right of self defense to justify or excuse the homicide unless he withdrew from the combat or unless he was a nonviolent aggressor and the assailant escalated to deadly force. 40 C.J.S., Homicide §117, p.987; 40 Am.Jur.2d, Homicide §140, p.431; LaFave and Scott, Criminal Law §53, p.394-395. One may not provoke a difficulty and having done so, act under the necessity produced by that difficulty, then kill his adversary and justify the homicide as self defense. Mixon v. State, 59 So.2d 38, 39 (Fla. 1952); see also McCoy v. State, 175 So.2d 588 (Fla. 2d DCA 1965). However, not every wrongful act by a person that produces a difficulty, in the course of which a necessity to kill another arises, makes one an "aggressor" depriving him of the right of self defense. Bassett v. State, 44 Fla. 2, 33 So. 262, 265 (1902); 40 C.J.S., Homicide §118, p.989; 40 Am.Jur.2d, Homicide §146, p.435.

In Florida, the legislature has restricted the use of self defense under certain circumstances set forth in §776.041 of the Florida Statutes. Section 776.041 states in pertinent part:

> 776.041. USE OF FORCE BY AGGRESSOR. - The justification described in the preceding sections of this chapter is not available to a person who:
>
> (1) Is attempting to commit, committing, or escaping after the commission of, a forcible felony;

The legislature has defined "forcible felony" in §776.08 as follows:

> 776.08. FORCIBLE FELONY - "Forcible felony" means treason; murder; manslaughter; sexual battery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

Thus, by these statutes, Florida has taken away the right of self defense in the limited circumstance when it is established that one is an aggressor by attempting to commit, committing, or escaping after the commission of a forcible felony.

The issue here is whether the legislature intended to include the crime of drug trafficking as a forcible felony under these statutes, thereby restricting the petitioners' fundamental right of self defense. It is clear from §776.08 that the legislature has enumerated twelve separate forcible felonies and that drug trafficking is not included in this list.[4] It is a

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[4] This is so despite the fact that the legislature subsequently amended the first degree felony murder statute, §782.04(1), in 1982, ch. 82-69, s.1, to include the underlying offense of drug trafficking. The legislature has never amended §776.08 to (Cont'd)

general principle of statutory construction that the mention of one thing implies the exclusion of another, *expressio unius est exclusio alterius*, and that where a statute enumerates the things on which it is to operate, "it is ordinarily to be construed as excluding from its operation all those not expressly mentioned." 49 Fla.Jur.2d, Statutes §126; Towerhouse Condominium, Inc. v. Millman, 475 So.2d 674 (Fla. 1985).

In addition to these twelve enumerated felonies, the statute concludes with the catch-all provision, "and any other felony which involves the use or threat of physical force or violence against any individual." The district court here held that the crime of drug trafficking was embraced as a forcible felony within the scope of this catch-all provision, as it "is the sort of felony which involves 'the use or threat of physical force or violence against any individual.'" (A: 3-4) The district court cites to several decisions recognizing that participants in

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include drug trafficking. Common sense tells us that if the legislature had meant to include drug trafficking within the definition of forcible felonies, it would clearly have done so at the same time it included drug trafficking in the definition of first degree murder.

Moreover, even after the district court in Bowes v. State, 500 So.2d 290, 291 (Fla. 3d DCA 1986), found the crime of sale or delivery of drugs to be a nonforcible felony, the legislature did not amend §776.08. It is, of course, well-settled that the legislature is presumed to know the existing law when it enacts and reenacts a statute, Foley v. State, 50 So.2d 179 (Fla. 1951), and further, the "legislature is presumed to be aware of existing law and judicial construction of former laws on the subject of its enactments." Seddon v. Harpster, 403 So.2d 408, 411 (Fla. 1981); State ex rel. Quigley v. Quigley, 463 So.2d 224, 226 (Fla. 1985); 49 Fla.Jur.2d, Statutes §166. Where the legislature, after a judicial appellate decision construing a state statute, simply reenacts the statute without change, it can be presumed that the legislature agrees with the construction of the appellate court. State v. Harris, 537 So.2d 1128, 1129 (Fla. 2d DCA 1989); 49 Fla.Jur.2d, Statutes §166.

transactions involving large quantities of narcotics are "likely to be armed to protect the drugs," State v. Sayers, 459 So.2d 352, 353 (Fla. 3d DCA 1984), review denied sub nom. Zzie v. State, 471 So.2d 44 (Fla. 1985), and that the "potential for violence in a drug related felony, particularly in Florida, is high and cannot be discounted." State v. Amaro, 436 So.2d 1056 (Fla. 2d DCA 1983); see also Martinez v. State, 413 So.2d 429 (Fla. 3d DCA 1982). (A: 4)

A return to the principles of statutory construction shows that drug trafficking cannot be fit into this catch-all provision. By this inclusion, the district court has ignored the basic rule of statutory construction of *ejusdem generis*, the limitation of general words by specific words. Under this principle, when a statute contains an enumeration of specific things which are followed by a more general word or phrase, the general phrase must be construed to refer to things of the same kind or species as included within the preceeding limiting and more confining terms. 49 Fla.Jur.2d, Statutes §128; Soverino v. State, 356 So.2d 269 (Fla. 1978). The meaning of the general words are restricted by the specific words preceeding them and include only things or persons of the same kind, class, character, or nature as those specifically enumerated. 49 Fla.Jur.2d, Statutes §128. Otherwise, the use of general words would open the doors to items ever more remotely related to those enumerated.

An example of this principle of statutory construction can be found in Smith v. Nussman, 156 So.2d 680 (Fla. 3d DCA 1963).

In Smith, the defendant was charged with violation of §790.17, Fla. Stat. (1961), which made it a crime to sell to "any minor under sixteen years of age any pistol, dirk, or other arm or weapon, . . ." The appellant argued that a sling shot, which had been sold to a minor by the appellee, was an "other arm or weapon" within the meaning of §790.17. The district court stated that under the rule of *ejusdem generis*, "such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." Id., at 682. The court observed that a "weapon" was "an instrument of offensive or defensive combat" and then concluded that a sling shot was not an "other arm or weapon," stating that if the legislature had intended that sling shots be included, they would have said so and the court would not read into the statute something the legislature omitted. See also Jimenez v. Zayre Corp., 374 So.2d 28 (Fla. 3d DCA 1979) (BB gun was not an unspecified "other arm or weapon" within statute proscribing furnishing of weapons to minors). Thus, under *ejusdem generis*, a pistol and a dirk are clearly by nature and definition weapons, but sling shots and BB guns, although they may certainly be used as weapons, were not weapons by nature or definition and could not be included in the general catch-all provision.

Applying *ejusdem generis* to §776.08, we can see there is a common thread running through the twelve felonies defined by the legislature as forcible felonies. All twelve felonies have, as part of their very definition and elements, the use or threat of

physical force or violence. Robbery involves the taking of property with the use of force, violence, assault, or putting in fear (§812.13), aggravated battery requires great bodily harm or permanent disability (§784.045), aggravated assault requires a well-founded fear that violence is imminent (§784.021), kidnapping involves forcibly confining another against his will (§787.01), aircraft piracy requires the seizure of an aircraft by force or violence (§860.16), treason requires the levying of war or giving of aid to those warring against the state (§876.32), and so on. Even burglary involves a forceful invasion of the right of personal habitation which has always been considered an inherently dangerous forcible felony. LaFave and Scott, Criminal Law §96, p. 711 (1972 Ed.) Considering the personal violence necessarily attendant upon these twelve felonies, homicides that occur during their commission are usually directly related to the violent felonies themself and are a probable consequence of them. Thus, it is not unreasonable for the legislature to restrict the right of self defense for one who commits a homicide during his commission of these felonies.[5]

Drug trafficking is simply not the same type of felony. Even recognizing that drug trafficking may frequently be accompanied by violence, the fact is the crime itself does not

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[5] Indeed, it has long been the case that self defense may not be relied upon to excuse a homicide committed by an accused while engaged in these very violent felonies. 40 C.J.S., Homicide §119, p.991; 40 Am.Jur.2d, Homicide §§145-146, p.433-435; Bassett v. State, 44 Fla. 2, 33 So. 262 (1903); McCoy v. State, 175 So.2d 588 (Fla. 2d DCA 1965) (no error in court's refusal to give instruction on self defense where defendant killed gas station attendant after attendant fired upon defendant while defendant was attempting a robbery).

involve the use or threat of physical force or violence. Drug trafficking is set forth by the legislature in §893.135 as a crime requiring a specified mandatory minimum sentence for dealing in quantities of narcotics over specified amounts, in contrast to the regular narcotics laws of §893.13 which involve no mandatory minimum sentences for the dealing in drugs of unspecified amounts. The crime of trafficking does not by definition, and need not and frequently does not in practice, involve violence. In fact, the crime of trafficking does not even require knowledge by the participants of the weight or quantity of the drugs. Way v. State, 475 So.2d 239 (Fla. 1985). It would be illogical to call the sale of 28 grams of cocaine, which is trafficking, a forcible felony and thereby deny the accused his right of self defense, and yet call the sale of 27 grams of cocaine, which is a mere cocaine sale, a nonforcible felony with the right to raise self defense.[6]

Moreover, to include drug trafficking in the catch-all provision would permit the inclusion of other crimes that by definition are not violent but which may frequently become violent in practice, such as bookmaking (§849.25), racketeering (§895.03), dealing in stolen property (§812.019), larceny by trick (§812.014), uttering forged bills and worthless checks (§831.09, §832.05), fraudulently obtaining of property by gaming (§817.28), and the keeping of gambling houses (§849.01). The

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[6] Indeed, the Third District has already described the crime of sale or delivery of drugs a nonforcible felony for which the defense of self defense or excusable homicide would be applicable. Bowes v. State, 500 So.2d 290 (Fla. 3d DCA 1986).

catch-all provision would thus swallow any crime that has a potential for violence, which obviously would include most crimes.

Thus, it is evident that drug trafficking cannot be fit into the catch-all provision as a forcible felony under §776.08. The petitioners have retained their basic inherent and statutory right to assert the defense of self defense in this case. The most the state can argue is that it is simply unclear or ambiguous whether drug trafficking is included in §776.08. However, it is well established that penal statutes and statutes in derogation of personal rights, such as the fundamental right to self defense, must be strictly construed in favor of the individual and against the state. State v. Jackson, 526 So.2d 58 (Fla. 1988); Ferguson v. State, 377 So.2d 709 (Fla. 1979); 49 Fla.Jur.2d, Statutes §191, 195; 40 Am.Jur.2d, Homicide §140, p.430. Consequently, this statute must be construed in a manner that does not restrict the petitioners' fundamental and statutory right of self defense. The trial court's order holding the petitioners had the right of self defense in this case was correct and the trial court properly granted the petitioners' sworn motions to dismiss. The decision of the Third District Court of Appeal reversing the trial court's order should be quashed.

CONCLUSION

Based upon the foregoing, the petitioners request this Court to quash the decision of the Third District Court of Appeal in this case and to remand the case with directions to discharge the petitioners forthwith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was hand delivered to Richard Shiffrin, Assistant State Attorney, 1351 NW 12 Street, Miami, Florida 33125, this 21st day of June 1990.

By: Marti Rothenberg
MARTI ROTHENBERG #320285
Assistant Public Defender

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1990

THE STATE OF FLORIDA, **

Appellant, **

vs. ** CASE NO. 89-221

MARCUS PERKINS and RODNEY GUY, **

Appellees. **

Opinion filed April 3, 1990.

An Appeal from the Circuit Court for Dade County, Allen Kornblum, Judge.

Robert A. Butterworth, Attorney General; Janet Reno, State Attorney, and Richard L. Shiffrin, Assistant State Attorney, for appellant.

Mark King Leban; Mechanic & Goldstein, for appellees.

Before BARKDULL, NESBITT, and JORGENSON, JJ.

On Motion for Rehearing and
Motion to Certify Question of Great Public Importance

NESBITT, J.

We deny the motion for rehearing but grant the motion to certify a question of great public importance. This opinion is substituted for that released on November 7, 1989.

The state appeals the dismissal of first-degree murder charges against the defendants in a cocaine trafficking case. We reverse.

APPENDIX: 1

The state alleged that the defendants met with the victim to buy a trafficking amount of cocaine from him. The victim pulled a gun on the defendants and attempted to rob them of the $11,000 which they had brought to purchase the drugs. In the ensuing struggle, one defendant, himself shot by the victim, fatally shot the victim with the victim's own gun.

The defendants were charged with attempted cocaine trafficking, § 893.135, Fla. Stat. (1987), and first-degree felony murder, § 782.04, Fla. Stat. (1987). The trial court granted defendants' pretrial motion in limine, ruling that the defense of self-defense was available. The defendants then filed a motion to dismiss the murder charges; the state demurred, asserting that the defense of self-defense is not available when felony murder is charged. The trial court granted dismissal of the murder charges, and the state appeals.

We first briefly address defendants' claim that the state is foreclosed from pursuing this appeal of the trial court's final order dismissing the felony murder charges since the state failed to appeal the trial court's initial ruling on defendants' pretrial motion in limine to the effect that self-defense was an available defense. Defendants claim that since the state knew at that time that, based on the facts of this case, allowing a defense of self-defense would effectively foreclose the possibility of a guilty verdict on the murder charges, the state was required to seek review of that ruling at that time. We disagree with the defendants and hold that pursuant to Florida Rule of Appellate Procedure 9.140(c)(1)(A), the state could file

APPENDIX: 2

this appeal based on the trial court's final order dismissing the felony murder charges.

Defendants acknowledge that pursuant to section 782.04, a person may be charged with felony murder if that person, while "engaged in the perpetration of, or in the attempt to perpetrate" cocaine trafficking, kills another human being. However, they contend that they are entitled to raise the defense of self-defense, § 776.012, Fla. Stat. (1987), to the felony murder charges because the victim was shot only to prevent him from killing them. While recognizing that, pursuant to section 77.041, Fla. Stat. (1987), a self-defense claim is not available to a person who "[i]s attempting to commit . . . a forcible felony," the defendants contend that a claim of self-defense is not foreclosed to them since cocaine trafficking is not a forcible felony.

Section 776.08, Fla. Stat. (1987), defines "forcible felony." It states:

> "Forcible felony" means treason; murder; manslaughter; sexual battery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and <u>any other felony which involves the use or threat of physical force or violence against any individual</u>.

(emphasis added). While it is true, as defendants claim, that section 776.08 does not specifically list drug trafficking as a forcible felony in the way that section 782.04 lists trafficking as an underlying felony upon which a first-degree murder charge can be based, the crime of drug trafficking is clearly embraced within the scope of the definition of forcible felony since the

APPENDIX: B

crime is the sort of felony which involves "the use or threat of physical force or violence against an[] individual" as set forth in section 776.08.

Numerous cases attest to the propensity for violence inherent in narcotics trafficking. See e.g., State v. Sayers, 459 So.2d 352, 353 (Fla. 3d DCA 1984) (In a drug "transaction prospectively involving a large quantity of narcotics and large sums of money [a participant] is likely to be armed to protect the drugs, the money, or himself."), review denied sub nom. Zzie v. State, 471 So.2d 44 (Fla. 1985); State v. Amaro, 436 So.2d 1056, 1061 (Fla. 2d DCA 1983) ("Recent history has shown that the potential for violence in a drug related felony, particularly in Florida, is high and cannot be discounted."); Martinez v. State, 413 So.2d 429 (Fla. 3d DCA 1982) (robbery and kidnapping foreseeable consequences of a conspiracy to participate in a large drug transaction).

Accordingly, because drug trafficking is a forcible felony as defined in section 776.041, we hold that the defense of self-defense is not available to these defendants.[1] Recognizing that

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[1] We discern no conflict with our decision here and that of Bowes v. State, 500 So.2d 290 (Fla. 3d DCA 1986), review denied, 506 So.2d 1043 (Fla. 1987) for two reasons. First, Bowes, convicted of marijuana trafficking, pleaded the defense of excusable homicide, § 782.03, Fla. Stat. (1985). Second, and more importantly, in 1987 after this court rendered the Bowes decision, the legislature amended the felony murder statute, § 782.04, specifically to include drug trafficking in the list of those heinous crimes which can underlie a charge of felony murder. The clear implication of that change was to place drug trafficking within the definition of forcible felony, i.e., "any other felony which involves the use or threat of physical force or violence against any individual." § 776.08.

APPENDIX: 4

this cases addresses an issue of great public importance, we certify to the Supreme Court of Florida the issue addressed here.

The trial court order dismissing the felony murder charges is hereby

Reversed.

APPENDIX: 5