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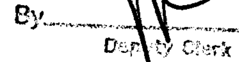
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,990

MARCUS PERKINS and,
RODNEY GUY,

Petitioners,

-vs-

THE STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW, CERTIFIED QUESTION
FROM THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT

REPLY BRIEF OF PETITIONERS

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ARGUMENT

THE DISTRICT COURT INCORRECTLY HELD THAT DRUG TRAFFICKING IS A FORCIBLE FELONY WHERE THE CRIME DOES NOT HAVE THE USE OR THREAT OF PHYSICAL FORCE OR VIOLENCE AS PART OF ITS VERY DEFINITION AND ELEMENTS AND THUS, UNDER *EJUSDEM GENERIS*, DRUG TRAFFICKING MAY NOT BE INCLUDED AS A FORCIBLE FELONY UNDER §776.08 FORECLOSING THE PETITIONERS FROM RAISING THEIR RIGHT OF SELF DEFENSE.

In its answer brief, the state makes only two points pertaining to the petitioners' argument.

First, the state claims that Bowes v. State, 500 So.2d 290 (Fla. 3d DCA 1986), is inapposite to the instant case. Petitioners have never claimed that Bowes directly disposes of this case. However, as pointed out in our initial brief, Bowes is an important case for several reasons. Bowes involves the crime of third degree felony murder committed while the accused and victim were engaged in the crime of sale of marijuana. In Bowes, the defendant met with the victim to engage in a drug transaction in which the defendant was to sell the victim some marijuana. The defendant and the victim walked together to the back of the van allegedly containing the marijuana. When the victim found the van empty, the victim pulled a gun on the defendant. The defendant swatted the gun away and was shot in the thumb. The defendant then pulled out his own gun and shot the victim to death. At trial, the defendant claimed the death was the result of sudden provocation under the excusable homicide statute, §782.03, and requested an amended jury instruction in court on excusable homicide. The court gave the complete

instruction instead and the defendant was convicted. On appeal, the district court held that the giving of the complete instruction was error on grounds unrelated to the issue in this case.

However, on appeal the state had also argued that excusable homicide was not even a defense to a third degree felony murder. The district court disagreed and stated that excusable homicide was a defense to the nonforcible felony murder. Thus, the district court found the crime of sale or delivery of drugs to be a nonforcible felony and petitioners submit the same should be true of the sale of large quantities of drugs in drug trafficking. Moreover, it is important that the district court found that excusable homicide was a defense to third degree felony murder. It is true that Bowes involved excusable homicide and the instant case involves justifiable homicide. However, any technical distinction that may exist between justifiable use of deadly force and excusable homicide is immaterial for purposes here. In both situations, the defendant has the legal right to kill in defense of himself and is entitled to a full acquittal. For purposes of the felony murder situation, both defendants have the legal right to kill when confronted with another attempting to shoot them during the commission of the drug transaction.[1]

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[1] Law commentators have said that although there may be "a semantic difference" between justifiable homicide and excusable homicide and that historically, they were not synonymous terms, they are now used synonymously and on principle there should be no difference in the consequences in the felony murder situation, in other words, the distinction is no longer a matter of any practical importance as the defendant is entitled to a full acquittal where the homicide is either justifiable or excusable. LaFave and Scott, Criminal Law §72, n.41, pg.552 (Cont'd)

Consequently, while Bowes does not directly dispose of the issue in the instant case, it is instructive.

As its second point in its answer brief, the state claims that under the principle of *ejusdem generis*, drug trafficking should be included in the catch-all "any other felony which involves the use or threat of physical force or violence against any individual" of §776.08, Florida Statutes (1987). The state argues that "drug trafficking presents no less of a threat of violence" than the enumerated felonies of treason and burglary, which the state claims "do not necessarily involve violence against an individual." (Appellee's brief, pg. 5) Contrary to the state's position, both treason and burglary involve the use or threat of physical force or violence, unlike drug trafficking, and are properly considered forcible felonies.

The crime of treason expressly requires the use of physical force or violence as it consists of "levying war against" the state, or "adhering to the enemies thereof, or giving them aid and comfort." §876.32, Fla. Stat. (1987).[2] Thus, treason does not involve the mere selling of Florida "secrets" to the State of Georgia; treason involves the levying of war - which clearly

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(1972 Ed.); 19 Rutgers Law Journal 451, 473, 481, "Felony Murder Liability." In many states, the distinctions have been abolished and the defense is simply called justifiable self defense. 40 C.J.S., Homicide §99, pg.960; 40 Am.Jur.2d, Homicide §110, pg.405.

[2] 876.32 TREASON. - Treason against the state shall consist only in levying war against the same, or in adhering to the enemies thereof, or giving them aid and comfort. Whoever commits treason against this state shall be guilty of a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

requires the use of physical force or violence - against Florida or the joining, aiding or comforting those who are levying war against the state. And the crime of burglary involves a forceful invasion of the right of personal habitation which has always been considered an inherently dangerous forcible felony because of the personal violence so ineluctably attendant upon it. LaFave and Scott, Criminal Law §96, p.711 (1972 Ed.).

As pointed out in the petitioners' initial brief, drug trafficking is simply not the same type of felony. Even recognizing that drug trafficking may often be accompanied by violence, the fact remains that the crime itself does not 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 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. There is nothing "forcible" about the crime.

And finally, the state in its answer brief suggests that petitioners "are unable to propose another felony that would be contemplated by the catch-all provision." (Appellee's brief, pg. 5) To the contrary, several other felonies immediately come to mind as likely to be found encompassed by the catch-all provision of §776.08, such as aggravated child abuse (§827.03), resisting an officer with violence (§843.01), subversive activities

(§876.23), combination to usurp government (§876.34), and combination against part of the people of the state (§876.35). The list of catch-all felonies is likely to be relatively short because the general phrase must be construed under *ejusdem generis* to refer only to crimes of the same kind or nature as those specifically enumerated. An expansive use of the general catch-all would open the doors to crimes ever more remotely "forcible" to those enumerated. The principle of *ejusdem generis* is especially important here because obviously, most crimes have the very real potential for becoming violent and forcible.

In sum, drug trafficking cannot be fit into the catch-all provision as a forcible felony under §776.08. The petitioners have retained thier basic inherent and statutory right to assert the defense of self defense in this case. The trial court's order holding the petitioners had the right of self defense 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 that this Court quash the decision of the Third District Court of Appeal in this case and 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 13th day of August, 1990.

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