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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FSC CASE NO. 77,059
DCA CASE NO. 89-158

LESTER LEWIS GIBSON,

Respondent.

_______________________/

JURISDICTIONAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	
ISSUE I	
THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN SMITH V. STATE, 539 SO.2D 514 (FLA. 2D DCA 1989), REVIEW PENDING, CASE NO. 73,822, ON THE SAME QUESTION OF LAW.	4-5
ISSUE II	
THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN ROJAS V. STATE, 552 SO.2D 914 (FLA. 1989) ON THE SAME QUESTION OF LAW.	6-8
CONCLUSION	9
CERTIFICATE OF SERVICE	10
APPENDIX [copy of Gibson v. State, 15 F.L.W. D2539 (Fla. 1st DCA October 10, 1990)]	

TABLE OF CITATIONS

CASES	PAGE(S)
Rojas v. State, 552 So.2d 914 (Fla. 1989)	6-8
Smith v. State, 539 So.2d 514 (Fla. 2d DCA 1989), rev. pending, Case No. 73,822, (Fla. 1989)	4-5,7

FLORIDA CONSTITUTION	
Art. V, § 3(b)(3)	1

JURISDICTIONAL STATEMENT

Article V, section 3(b)(3) of the Florida Constitution states, in pertinent part, the following:

> The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

STATEMENT OF THE CASE AND FACTS[1]

This case involves an interpretation of the Florida Standard Jury Instructions on excusable homicide and the trial court's duty, if any, to use the long form standard jury instruction. The respondent, Lester Lewis Gibson, was convicted, inter alia, of second degree murder. The trial court instructed the jury on excusable homicide, using the short form Florida Standard Jury Instruction. No request was made to use the long form standard jury instruction on excusable homicide. On appeal, appellant argued that the trial court committed fundamental error by omitting the long form instruction. The First District Court of Appeal agreed. It reached two conclusions - first, that the short form standard jury instruction on excusable homicide was misleading and second, that the trial court had an affirmative duty, on its own motion, to instruct on excusable homicide using the long form standard jury instruction.

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[1] All facts are taken directly from the opinion of the First District Court of Appeal in this case, a copy of which is appended to this jurisdictional brief.

SUMMARY OF ARGUMENT

I. The decision of the First District Court of Appeal in the instant case directly and expressly conflicts with a decision of the Second District Court of Appeal on the same question of law. The First District held that it was fundamental error for the trial court to fail to use the long form standard jury instruction on excusable homicide. The Second District held to the contrary.

II. The decision of the First District in this case directly and expressly conflicts with a decision of this Court on the same question of law. This Court made it clear that the short form instruction on excusable homicide is sufficient for purposes of the manslaughter instruction. The First District held to the contrary.

ARGUMENT

ISSUE I

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN SMITH V. STATE, 539 SO.2D 514 (FLA. 2D DCA 1989), REVIEW PENDING, CASE NO. 73,822, ON THE SAME QUESTION OF LAW.

In Smith v. State, 539 So.2d 514 (Fla. 2d DCA 1989), the Second District Court of Appeal stated:

> [W]e hold that there was in this case no fundamental error from the failure to give the long form excusable homicide instruction even though the defendant had admittedly used a dangerous weapon thus calling into question the accuracy of the short form instruction as referred to above.

Id., at 516.

The Second District certified the following question 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?

Id., at 517-518. The Smith case is currently pending for review before this Court.

In the instant case, the First District answered the above question in the affirmative. In pertinent part, it stated:

> We find that the court's limited jury instruction on excusable homicide requires that appellant's murder conviction be reversed. ... In instructing the jury the

> court used only the short form Standard Jury Instruction as to excusable homicide .... The Standard Jury Instructions also contain a longer excusable homicide instruction .... But in the present case the court did not use this longer and more thorough instruction. Although appellant did not object to the use of the short form instruction, the homicide instructions included a manslaughter charge, and because this is a residual offense defined by "reference to what it is not," an accurate instruction as to excusable homicide is a "fundamental obligation" with regard to this charge. ... An improper excusable homicide instruction may thus be reviewed in this context even though no objection was interposed below. ... In the circumstances here presented the use of the short form excusable homicide instruction, without any clarification, requires the appellant's second degree murder conviction be reversed.

15 F.L.W. D2539 (See Appendix.)

To summarize, the decision of the Second District and the First District directly and expressly conflict on the same question of law. The First District held that it was fundamental error not to use the long form standard jury instruction on excusable homicide, and the Second District held to the contrary.

ISSUE II

> THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN ROJAS V. STATE, 552 SO.2D 914 (FLA. 1989) ON THE SAME QUESTION OF LAW.

The issue in Rojas v. State, 552 So.2d 914 (Fla. 1989) was whether the jury instruction on manslaughter was legally adequate, and the supreme court answered this question negatively, stating, "As in Spaziano and Ortagus, the total omission of any reference to justifiable or excusable homicide in the definition of manslaughter was fatal." Id., at 916. The supreme court went on to state, however:

> The fact that the judge defined excusable and justifiable homicide in the beginning of the homicide instructions did not suffice to make the manslaughter instruction legally adequate. Recognizing the need to refer to justifiable and excusable homicide in the context of defining manslaughter, this Court in 1985 approved a recommendation of the Standard Jury Instructions Committee to add after the definition of the elements of manslaughter the following language:
>
> > However, the defendant cannot be guilty of manslaughter if the killing is either justifiable or excusable homicide as I have previously explained those terms.
>
> [Footnote 2] **In view of the fact that the standard jury instructions already provide for the definitions of justifiable and excusable homicide to be given during the trial judge's introductory remarks, the current standard jury instruction on manslaughter adequately reminds the jury that justifiable and excusable homicide are not contained within the definition of the crime.** However, because reinstructions [presumably at the jury's request] often occur several hours later, a note was added which advised

> the judge that in the event of any reinstruction on manslaughter, the original instructions on justifiable and excusable homicide should be given at the same time.
>
> [Footnote 3] This opinion is directed only to the failure to instruct on justifiable and excusable homicide as it relates to the definition of manslaughter. In those cases in which there is evidence to support the defenses of justifiable or excusable homicide, the standard jury instructions _provide for_ longer and more explicit instructions to be given on these defenses.

_Id._, at 916, footnotes 2 and 3) (e. s.).

Rojas disposes of the second question that was certified in _Smith v. State_, _supra_, which states:

> 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?

_Id._, at 520. _Smith_ is pending for review before this Court.

Rojas makes it clear that the 1985 amended jury instruction defining manslaughter is legally adequate. Therefore, there is no requirement that the long form excusable homicide instruction be given as part of the manslaughter instruction itself.

In the instant case, the District Court stated, in pertinent part:

> We find that the court's limited jury instruction on excusable homicide requires that appellant's murder conviction be reversed. ... In instructing the jury the

court used only the short form Standard Jury Instruction as to excusable homicide, which has been criticized in various cases as misleading. This short form instruction describes a killing as excusable if:

> ... committed by accident and misfortune during any lawful act ..., or by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon any sudden combat, without any dangerous weapon being used ....

The cited cases note that this instruction might improperly suggest to the jury that a killing cannot be excusable if committed with a dangerous weapon. The Standard Jury Instructions also contain a longer excusable homicide instruction which more thoroughly explicates the short form instruction and divides it into three categories, so that it is clear that the "dangerous weapon" exclusion relates only to the "sudden combat" category. But in the present case the court did not use this longer and more thorough instruction. Although appellant did not object to the use of the short form instruction, the homicide instructions included a manslaughter charge, and because this is a residual offense defined by "reference to what it is not," an accurate instruction as to excusable homicide is a "fundamental obligation" with regard to this charge. An improper excusable homicide instruction may thus be reviewed in this context even though no objection was interposed below. ... In the circumstances here presented the use of the short form excusable homicide instruction, without any clarification, requires that appellant's second degree murder conviction be reversed. [citations omitted]

15 F.L.W. D2539 (See Appendix.)

To summarize, the decision of this Court in Rojas and the decision of the First District in this case directly and expressly conflict on the same question of law. Rojas makes it

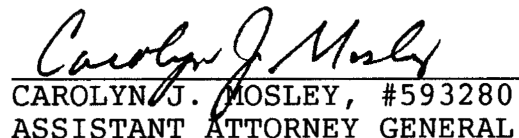
clear that the short form instruction on excusable homicide is sufficient for purposes of the manslaughter instruction. By contrast, the First District in the instant case disagrees.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the petitioner's argument.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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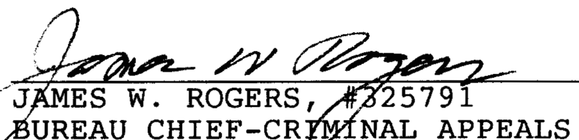

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional brief has been furnished by U.S. Mail to Nancy A. Daniels, Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 12th day of December, 1990.

Carolyn J. Mosley
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v. DCA CASE NO. 89-158

LESTER LEWIS GIBSON,

Respondent.

_________________________/

APPENDIX

Copy of Gibson v. State, 15 F.L.W. D2539
(Fla. 1st DCA October 10, 1990)

Criminal law—Competency hearing not procedurally deficient—Second-degree murder—Limited jury instruction on excusable homicide misleading—Error in giving of limited instruction preserved for appellate review without necessity of objection where homicide charge included a manslaughter charge—Conviction and sentence for use of firearm during offense improper where murder conviction is enhanced as to degree and sentence due to use of firearm—Excessive sentence imposed for first degree misdemeanor of improper exhibition of firearm—Error to fail to give written reasons for departure from sentencing guidelines

LESTER LEWIS GIBSON, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 89-158. Opinion filed October 10, 1990. Appeal from the Circuit Court for Leon County, William L. Gary, Judge. Nancy A. Daniels, Special Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General; Carolyn J. Mosely, Assistant Attorney General, for appellee.

(WENTWORTH, J.) Appellant seeks review of judgments of conviction and sentences imposed for second degree murder, shooting within a building, using a firearm in the commission of a felony, improper exhibition of a firearm, and grand theft of a motor vehicle. We find that the court's limited jury instruction on excusable homicide requires that appellant's murder conviction be reversed. We find no error with regard to appellant's other convictions, but certain sentencing improprieties require that the sentences be vacated and the cause remanded for resentencing.

Before appellant proceeded to trial three different defense attorneys were either dismissed or withdrew from the case. One of these attorneys had secured the appointment of a defense expert to examine appellant's mental state, and another had sought to have appellant declared incompetent to stand trial. Two additional experts were appointed to examine appellant for this purpose. Various medical reports were submitted to the court, and a hearing was held at which appellant protested any inquiry into his competence. Appellant thereafter obtained other counsel and further experts were appointed for an examination and evaluation as to appellant's competence. Another hearing was held, and appellant's new counsel maintained that appellant was competent to proceed to trial, in accordance with appellant's wishes. The two prior attorneys who had initiated the inquiry into appellant's mental state testified, as did a private investigator and appellant's mother. Appellant's new counsel, the prosecutor, and the court all participated in the questioning of these witnesses. Several of the appointed experts also testified, and the court ultimately found appellant to be competent to stand trial.

Appellant now contends on appeal that the competency hearing was procedurally deficient. In this regard appellant cites *Bundy v. Wainwright*, 808 F.2d 1410 (11th Cir. 1987), which states that the matter should be "adequately developed in an adversary manner." However, this statement in *Bundy* was made in the context of a hearing at which the defendant's prior counsel was not called to testify and thus was precluded from expressing any opinion as to the defendant's competence. In the present case appellant's prior attorneys were called as witnesses and testified as to this matter. Several experts also testified and were questioned by the court, as well as by appellant's new counsel and the prosecutor, in a manner which adequately developed the issue. Although no independent counsel was appointed to argue on behalf of appellant's incompetence, *Bundy's* description of an "adversary" process does not require such a convoluted procedure. The hearing was conducted in accordance with the Florida Rules of Criminal Procedure and was adequate to satisfy appellant's due process concerns as delineated in *Drope v. Missouri*, 420 U.S. 162 (1975), and *Pate v. Robinson*, 383 U.S. 375 (1966).

In instructing the jury the court used only the short form Standard Jury Instruction as to excusable homicide, which has been criticized in various cases as misleading. *See e.g., Smith v. State*, 539 So.2d 514 (Fla. 2d DCA 1989), *rev. pending*, Case No. 73,822; *Blitch v. State*, 427 So.2d 785 (Fla. 2d DCA 1983); *see also, Kingery v. State*, 523 So.2d 1199 (Fla. 1st DCA 1988). This short form instruction describes a killing as excusable if:

> . . . committed by accident and misfortune during any lawful act . . ., or by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon any sudden combat, without any dangerous weapon being used . . . .

The cited cases note that this instruction might improperly suggest to the jury that a killing cannot be excusable if committed with a dangerous weapon. The Standard Jury Instructions also contain a longer excusable homicide instruction which more thoroughly explicates the short form instruction and divides it into three categories, so that it is clear that the "dangerous weapon" exclusion relates only to the "sudden combat" category. But in the present case the court did not use this longer and more thorough instruction. Although appellant did not object to the use of the short form instruction, the homicide instructions included a manslaughter charge, and because this is a residual offense defined by "reference to what it is not," an accurate instruction as to excusable homicide is a "fundamental obligation" with regard to this charge. *See Ortagus v. State*, 500 So.2d 1367 (Fla. 1st DCA 1987), approved in *Rojas v. State*, 552 So.2d 914 (Fla. 1989). An improper excusable homicide instruction may thus be reviewed in this context even though no objection was interposed below. *See Schuck v. State*, 556 So.2d 1163 (Fla. 4th DCA 1990); *Smith, supra*. While appellant was not convicted of manslaughter, he was convicted of second degree murder, and since manslaughter is the next lesser instructed offense the improper instruction may not be deemed harmless as it might have impacted the jury's decision regarding the exercise of its inherent pardon power. *See Smith*, fn. 2. In the circumstances here presented the use of the short form excusable homicide instruction, without any clarification, requires that appellant's second degree murder conviction be reversed.

In the event that appellant is retried and again convicted of this offense, we note that appellant's conviction and sentence for using a firearm during the offense is not permitted if, as in the present case, the murder conviction is enhanced as to degree and sentence due to the use of a firearm. *See Hammonds v. State*, 548 So.2d 909 (Fla. 1st DCA 1989), *rev. denied* 558 So.2d 18 (Fla. 1990); *Grantham v. State*, 545 So.2d 945 (Fla. 1st DCA 1989), *rev. denied* 553 So.2d 1166 (Fla. 1989). Appellant was also impermissibly sentenced to a term of imprisonment in excess of the one year statutory maximum under section 775.082(4)(a), Florida Statutes, for the first degree misdemeanor of improper exhibition of a firearm as described in section 790.10, Florida Statutes. On remand appellant should be resentenced for this offense. The court also failed to provide any written reasons for its departure from the recommended guidelines sentence. The sentence must thus be vacated and appellant should be resentenced within the guidelines. *See Pope v. State*, 561 So.2d 554 (Fla. 1990).

Appellant's conviction of second degree murder is reversed. The other convictions are affirmed, but the sentences imposed are vacated and the cause remanded for resentencing. (ERVIN and MINER, JJ., CONCUR.)

* * *

Civil procedure—Hearing on motion to compel appearance for deposition—Notice of hearing not served reasonable time before hearing—One day notice not reasonable, particularly where recipient of notice is in city other than city in which hearing is to be held

THOMAS C. TURNER and TURNER, FORD & BUCKINGHAM, P.A., Petitioners, v. GREYHOUND FINANCIAL CORPORATION, formerly known as GREYHOUND LEASING & FINANCIAL CORPORATION, a Delaware