IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

SINCLAIR JOHNSON,

Respondent.

_____/

1ST DCA CASE NO. 89-2191

FSC CASE NO. 77,239

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The pertinent facts were summarized by the Court below:

> In the case at hand, appellant, Sinclair Johnson, was charged by information with, among other offenses, the crime of attempted murder in the first degree with a firearm. Specifically, the information charged that appellant "did attempt to kill Robert Gooden . . . by shooting the same Robert Gooden, with a revolver, with a premediated design to effect the death of Robert Gooden...." At trial, a witness testified that she heard appellant and the victim having an argument outside her home. When she looked out her window, she saw appellant pull out a gun and shoot the victim in the kneecap. Appellant then approached the victim and shot him twice more. This account was corroborated by testimony from the arresting officers. Apparently, the arresting officers heard the initial shot and then witnessed appellant's subsequent shots. Appellant did not deny that he shot the victim, but argued that the shooting was in self-defense.
>
> At the jury charge conference at the end of the two-day trial, appellant's counsel announced that appellant did not want instructions on lesser included offenses. The state requested instructions on attempted second degree murder and aggravated battery. Despite appellant's argument that he had the right to present the jury with an "all or nothing" option, the trial court decided to give the instructions requested by the state. Faced with this prospect, appellant's counsel asked that instructions on <u>all</u> lesser included offenses be given if those requested by the state were going to be given. Thereafter, the trial court instructed on attempted second degree murder, aggravated battery, culpable negligence, battery and assault. From the appellant's convictions for aggravated battery with a firearm and another offense not pertinent to this analysis, he appeals.

SUMMARY OF ARGUMENT

Respondent was charged with attempted first degree murder. The allegations of the charging document and the proof adduced at trial were sufficient to support his conviction of aggravated battery. Under the presently existing law of this state, the State was entitled to a jury instruction on this Category 2 lesser included offense, even over the defendant's objection, just as it would be entitled to instruction on a Category 1 lesser included offense.

While Petitioner urges that this conviction be affirmed, it also urges this Court to review the concept of permissibly included lesser offenses in the light of the Legislature's 1988 amendment to sec. 775.021 Florida Statutes.

By that enactment the Legislature enumerated all the categories of crimes which could exist in Florida. This enumeration recognizes separate and necessarily included offenses, but leaves no room for a category of "permissibly" included offenses.

The courts are without authority to create such categories themselves. To do so would violate the separation of powers by invading the legislature's offense-defining prerogative as well as the executive branch's charging discretion. In addition it would violate a defendant's right to notice of all the charges against him.

Clarification of the law with respect to jury instruction, jury pardon, and inconsistent verdicts will be incidental but not insubstantial benefits of the abolition of Category 2 lesser included offenses.

ARGUMENT

ISSUE I

IS THE STATE ENTITLED TO HAVE JURY INSTRUCTIONS GIVEN ON CATEGORY 2 INCLUDED LESSER OFFENSES, IN ADDITION TO CATEGORY 1 NECESSARILY INCLUDED LESSER OFFENSES, IN A CASE WHERE THE DEFENDANT REQUESTS THAT NO SUCH INSTRUCTIONS BE GIVEN AND KNOWINGLY AND INTELLIGENTLY WAIVES HIS RIGHT TO SUCH INSTRUCTIONS?

The certified question must be answered in the affirmative.

The Rule involved here, Fla.R.Crim.P. 3.510(b) is not specific to either party, stating simply:

> Upon an indictment or information upon which the defendant is to be tried for any offense the jury may convict the defendant of:
>
> * * *
>
> (b) any offense which as a matter of law is a necessarily included offense or a lesser included offense of the offense charged in the indictment or information and is supported by the evidence. The judge shall not instruct on any lesser included offense as to which there is no evidence. (Emphasis supplied)

Case law has firmly established that a criminal defendant is entitled to instruction, on request, on both Category 1 and Category 2 included lesser offenses. Wilcott v. State, 509 So.2d 261 (Fla. 1987); State v. Wimberly, 498 So.2d 929 (Fla. 1986). It has also established that the State is entitled to instruction, even over a defendant's objection, on necessarily

included lesser offenses. Gallo v. State, 491 So.2d 541 (Fla. 1986); State v. Washington, 268 So.2d 901 (Fla. 1972). In addition to the Court below, one other district court has specifically held that the State has a right to instruction on Category 2 offenses even over a defendant's objection. Morrison v. State, 259 So.2d 502 (Fla. 3d DCA 1972). The case of Courson v. State, 414 So.2d 207 (Fla. 3d DCA 1982) is also instructive on this issue.

In Courson, the defendant in an attempted first degree murder case appealed the giving of instructions on the Category 2 lesser included offense of aggravated assault with a firearm; the offense of which he was ultimately convicted. The specific holding of the Third District was that Courson had failed to make an objection specific enough to preserve the issue for review, and that no fundamental error had occurred. In so ruling, the Court implicitly recognized the right of the State to instructions on properly alleged and proven lesser included offenses even where the defendant objects. Significantly, the Courson Court stated, citing Washington, supra, that "[w]hile Courson may have wanted the jury to decide the case by either convicting him of the charge contained in the information or nothing at all, that option is not his." Courson, supra, at 210.

In further support of its argument, Petitioner notes that both Washington and Gallo, as a factual matter, involved Category 2 included lesser offenses. Therefore this Court also has

implicitly recognized that instructions on such offenses may be given even over a defendant's objection.

It is undisputed in this case that the allegations of the information and the evidence adduced were sufficient to support a conviction of aggravated battery. Given the established precedent recited above, the State was entitled to an instruction on this permissibly included lesser offense notwithstanding the all-or-nothing desires of the defendant. The certified question must be answered in the affirmative.

ISSUE II

WHETHER SEC. 775.021(4) AS AMENDED BY CH. 88-131, LAWS OF FLORIDA, ABOLISHES CATEGORY 2 LESSER INCLUDED OFFENSES.

Although this case was correctly decided based on the currently prevailing case law, it is the position of the Petitioner that the recent amendment of sec. 775.021(4) Fla. Stat. effectively eliminates the classification of Category 2, or "permissibly" included lesser offenses.

In Chapter 88-131, Laws of Florida, the Florida Legislature made the following changes in sec. 775.021(4):[1]

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

[1] Underscored words are additions to the existing language.

1. Offenses which require identical elements of proof.

2. Offenses which are degrees of the same offense as provided by statute.

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

By this amendment, the legislature specifically enumerated the only categories of crime which exist under Florida law. Such action is exclusively within the legislature's constitutional domain. Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 68 L.Ed.2d 715 (1980).

The amended statute makes it clear that only one type of lesser included offense can exist, i.e., "lesser offenses the statutory elements of which are subsumed by the greater offense." This is the "necessarily" or "Category 1"[2] included lesser offense delineated by this Court in Brown v. State, 206 So.2d 377 (Fla. 1968). By virtue of omission, the legislature effectively abolished the previously established "permissibly" or "Category 2" included lesser offenses, and instruction on such offenses would be contrary to the plain terms of the statute.

This action was foreshadowed by the evolution of the statute.

Section 775.021(4) was enacted in 1976 and read:

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[2] In re Standard Jury Instructions, 431 So.2d 594 (Fla. 1981).

> Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

Sec. 775.021 (4) Fla.Stat. (1981).

The section was amended in 1983 to remove the exclusions for "lesser included offenses, committed during said criminal episode." The Legislature also added the statement "for the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial." Ch. 83-156, Laws of Florida. (emphasis supplied).

Justice Shaw, concurring in Green v. State, 475 So.2d 235, 238 (Fla. 1985) perceived the direction in which the Legislature was moving. Of the 1983 amendment, he observed:

> The effect of this deletion is patent. The statute now defines in clear and unambiguous terms a separate offense: explicitly, if two offenses, committed in the course of one criminal transaction or episode, each contain a statutory element not present in the other, they are separate offenses. Implicitly, if each does not contain a unique element, then one is a lesser included offense of the other. The effect of this deletion is to withdraw from the courts the authority to define lesser included offenses in a manner contrary to the statutory provisions of section

> 775.021(4). This has the practical impact of nullifying all the category two (permissive) lesser included offenses of the schedule. Under section 775.021(4) offenses are either separate or lesser included, *based on the statutory elements.* There can be no so-called permissive lesser included offenses based on the accusatory pleadings or proof adduced at trial.

By its 1988 amendment to 775.021(4) the Legislature made plain that which it had previously implied: that there are separate offenses, and there are lesser offenses whose elements are subsumed by the elements of the greater, and that is all.

In light of the amendment, constitutional principles now require amendment of both Fla.R.Crim.P. 3.510 and the schedule of Category 2 offenses.

First, given the Legislature's unambiguous enumeration of the only categories of offenses, it is clear that establishment by the courts of other categories would constitute a usurpation of the separation of powers required by article II, section 3, of the Florida Constitution. In his dissent in Wilcott v. State, 509 So.2d 261,264 (Fla. 1987), Justice Shaw noted:

> The plenary power to define offenses and prescribe their punishment rests exclusively with the legislative branch. *Whalen v. United States,* 445 U.S. 684, 689, 100 S.Ct. 1432, 1436, 68 L.Ed.2d 715 (1980), and cases cited therein; *Bradley v. State,* 79 Fla. 651, 84 So. 677 (1920); *Hutchinson v. State,* 315 So.2d 546 (Fla. 2d DCA 1975). It is not the prerogative of the courts, based on the accusatory pleadings or the proof adduced at trial, to instruct juries that they may

> treat statutorily defined separate offenses as lesser included offenses. Thus, the entire concept of permissive lesser included offenses is a violation of the separation of powers doctrine, article II, section 3 of the Florida Constitution.

Second, since permissive lesser includeds are nothing more than separate crimes under the amended statute, an instruction on such crimes would violate art. II, section 3 by infringing into the domain of the executive branch. The Florida Constitution gives the state attorney complete discretion in deciding whether to prosecute. Cleveland v. State, 417 So.2d 653 (Fla. 1982); State v. Cain, 381 So.2d 1361 (Fla. 1980); Johnson v. State, 314 So.2d 573 (Fla. 1985). See also, Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984) (No double jeopardy violation in prosecuting charges to which a judge had accepted guilty pleas over the state's objection.).

Finally, the due process notice rights of criminal defendants will be violated if the statutory equivalent of new charges are permitted to be added at the point of jury instruction through the mechanism of permissibly included lessers.[3] See, Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948); Penny v. State, 140 Fla. 155, 162, 191

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[3] No violation exists where the instruction is on "necessarily" lesser included offense. Since it is impossible, as a matter of law, to commit the greater offense without committing the lesser, the notice of the greater charge amounts to notice of the lesser. In addition, no notice problem exists with respect to this case, both because of the allegations of the information, and because the initial arrest was for aggravated battery. (R 1-3, 6-7).

So. 190, 193 (Fla. 1939); Ray v. State, 403 So.2d 956 (Fla. 1981). It would therefore appear that withdrawal of Category 2 lesser included offenses from the standard jury instructions will be necessary to preserve defendant's rights.

A number of policy benefits will flow from the revision of Fla.R.Crim.P. 3.510 and withdrawal of the schedule of Category 2 lesser included offenses. Not the least of these would be the pure clarification of the law.

The state of confusion of the Florida courts on this issue is immediately apparent from the opinion below and especially Judge Ervin's concurrence. In Gallo v. State, 491 So.2d 541 (Fla. 1986) this Court held that the state was entitled to a jury instruction on a necessarily lesser included offense although the facts of the case indicated that the Court was actually dealing with a "permissible" lesser included offense. The Second District, in Gould v. State, 558 So.2d 481 (Fla. 2d DCA 1990) jurisdiction accepted, 564 So.2d 487 (Fla. 1990) exacerbated the problem by interpreting Gallo to mean that "[a] category two lesser offense ... can constitute a 'necessarily included lesser offense.'" Id. at 485.

The necessity for reconciling these cases disappears in light of the statutory amendment.

In addition, the change effectively resolves certain thorny issues relating to the concepts of jury pardons and inconsistent verdicts.

Petitioner acknowledges the suggestion that instructions on permissibly lesser included offenses rest on a defendant's right to the jury's exercise of its pardon power. Wilcott, supra. On closer review, however, it becomes apparent that this suggestion somewhat overstates the extent of the defendant's entitlement.

The concept of instructing juries on lesser included offenses developed at the common law as an aid to prosecutors whose evidence "failed to establish some element of the crime originally charged...." Keeble v. U.S., 412 U.S. 205, 208, 93 S.Ct. 1993, 36 L.Ed.2d 844, 847 (1973). Over time it came to be acknowledged that the defendant as well as the prosecution, was entitled to the instruction. Id. The entitlement was based on the need to allow the jury to return a true verdict:

> True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

Keeble, supra, at 212-13.

The right to such instruction was by no means absolute, however. To the contrary, the instruction was only proper

> where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.

Sansone v. U.S., 380 U.S. 343, 350, 855 S.Ct. 1004, 13 L.Ed. 882, 888 (1965) (emphasis supplied). Thus, the United States Supreme Court mandated that two requisites be met before either the prosecutor or the defendant was entitled to an instruction on a lesser included offense: 1) the elements of the greater offense must include all the elements of the lesser (i.e., it must be a "necessarily" lesser included offense); and, 2) the element or elements which distinguish the greater from the lesser must be in dispute. The entitlement to instruction on necessarily lesser included offenses recognized by the Supreme Court was emphatically not grounded on the jury's "pardon power." Indeed, in U.S. v. Johnson, 637 F.2d 1224, 1233 (9th Cir. 1980), the Court noted:

> This is not at all to say that the defendant's procedural right to an included offense instruction is based on some supposed notion of the jury's compassion or leniency. In this connection, we accept the statement that "[a]n element of the mercy-dispensing power is doubtless inherent in the jury system, and may well be a reason why a defendant seeks a lesser included offense instruction, but it is not by itself a permissible basis to justify such an instruction." *Kelly v. United States,* 370 F.2d 227, 229 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 913, 87 S.Ct. 2127, 18 L.Ed.2d 1355 (1967). Rather, "[a] lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not

> required for conviction of the lesser-included offense," *Sansone,* 380 U.S. at 350, 85 S.Ct. at 1009, and "the evidence would permit [the] jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater." *Keeble,* 412 U.S. at 208, 93 S.Ct. at 1995.

Petitioner respectfully submits that any other reading of the entitlement to instruction on lesser included offenses is too expansive, as any suggestion that criminal defendants have a right to instructions which allow juries to convict them of uncharged crimes simply because they carry less severe punishments would render the allegations and proof adduced at trial largely irrelevant.

As Justice Shaw suggested in Wimberly, the "jury pardon" has become synonymous with permitting the jury to select from a "smorgasbord" of lesser offenses. In Jess v. State, 523 So.2d 1268 (Fla. 5th DCA 1988) the Fifth District was faced with virtually the same scenario presented in Wilcott, supra. Jess, an incarcerated prisoner, was charged with introducing into or possessing marijuana on the grounds of a correctional facility, and the trial court refused to instruct on simple possession. Reluctantly reversing on authority of Wilcott, the Court said:

> We feel constrained, however to urge the supreme court to reexamine its position with regard to permissive lesser included offenses and "jury pardons" and to adopt the views expressed in Justice Shaw's dissent in *Wilcott,* which we believe deserves support.

> Originally the term "jury pardon" was an oblique and cynical reference to the fact that since the jury's secret heart and motive for a particular verdict was not subject to legal scrutiny, the jury had the bare power to disregard the evidence, disregard their own lack of reasonable doubt as to the defendant's guilt, disregard the law, and disregard their oath and find a guilty defendant not guilty and that, occasionally, the jury did this and thereby "pardoned" the defendant of his crime. Unfortunately, the colorful name for this abuse of the jury system has been extended, dignified, elevated, and incorporated into the law as a respectable doctrine and good law has even been abandoned or distorted in order to legitimize the doctrine. The result, as in this case, certainly justifies public dissatisfaction: a criminal conviction based upon a jury verdict finding guilt beyond every reasonable doubt is, on appeal, set aside based on the dubious presumption that the jury found the defendant guilty as charged not because he was guilty and proven so beyond a reasonable doubt, but because the jury was not given the opportunity to find him guilty of some other crime of lesser degree or punishment!
>
> In the interest of justice and the law, the Florida Supreme Court should turn its face from the pernicious notion that a criminal defendant has some kind of right to have the jury given a verdict alternative so that it can compromise its oath and return a verdict of guilt as to some lesser included offense. A defendant has no right to be charged or tried as to any particular crime -- the right to charge or not charge a defendant with a particular crime (the charging discretion) belongs to the State's attorney.

Id. at 1269 (footnote omitted).

It bears observation here that the combination of the jury pardon/lesser included offense concept with the law relating to

inconsistent verdicts has compounded geometrically the difficulties associated with both.

In Mahaun v. State, 377 So.2d 1158 (Fla. 1979) the defendant was charged with third degree felony murder and aggravated child abuse. The jury convicted him of third degree felony murder and the lesser included offense of culpable negligence. Since culpable negligence was not a felony, the felony murder verdict could not stand.[4] If this was an exercise of mercy on one count, it resulted in a windfall to the defendant of which the jury was totally unaware. See also Damon v. State, 397 So.2d 1224, 1229 (Fla. 3rd DCA 1981) expressing concern that "the boon granted [to the defendants] through confusion or pity by their acquittal of the higher murder offenses, of which they were plainly guilty, would result in their exoneration, directly contrary to the jury's findings, of another serious offense which they also committed." (emphasis added).

Clearly, the mercy dispensing power could also be purposely misused by a jury to "pardon" an individual when the victim was an unsympathetic one. In speaking to the "jury pardon" concept, the Jess Court noted, "[i]n bygone years, this was most frequently done when the jury applied the 'unwritten law' and

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[4] Petitioner recognizes that the lesser included offenses instructed on in Mahaun were "necessarily" included offenses. The same analysis applies, however, whether the lessers involved are Category 1 or 2.

'pardoned' a cuckolded husband who, in hot or cold blood, killed his wife's paramour." Jess, supra, at 1269, fn 1.

In addition it must be recognized that even if the mercy dispensing power of the jury is accepted as a reason for instructing on permissible lesser included offenses, it is of severely limited value. When the defendant gambles that the jurors will disregard their oaths and the evidence to show "mercy", he also gambles that the prosecutor will receive "half-a-loaf" rather than none. If the goal of the practice is to allow the jury to control the severity of the sentence[5] it is poorly served.

The speculative nature of this practice is well illustrated by this case. The respondent was willing to bet that given a choice between guilty as charged and innocent, the jury would find him innocent. The prosecutor evidently believed it advantageous to "hedge" by requesting instruction on some of the "permissible" lesser included offenses.[6] Equally often, the positions will be reversed. See Wilcott, supra. While the freedom to gamble in this manner applies to both parties equally,

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[5] A goal which in itself violates Florida Law, under which sentencing is the exclusive domain of the trial judge.

[6] Significantly once this motion was granted the respondent countered by requesting that instruction on all lesser includeds be given.

(Morrison v. State, 259 So.2d 502 (Fla. 3d DCA 1972)) the administration of justice should not be a game of chance.

Section 775.021(4) as amended in 1988, requires that the practice of instruction on permissibly included lesser offenses be discontinued. If, in fact, the accusatory pleadings and proof adduced at trial support an instruction on the "permissive" lesser offense, by the plain terms of section 775.021(4) conviction and punishment of the lesser offense must be in addition to, not in lieu of, the greater charged offense. Such action will resolve constitutional concerns and effect a tremendous clarification and streamlining of the law to the benefit of all involved, while the efficiency of the system and the ability of the jury to return a true verdict will be preserved through instruction on necessarily included lesser offenses. See, Wimberly, Sansone, supra. Petitioner urges this Court to clarify Fla.R.Crim.P. 3.510 to speak only to necessarily included lesser offenses and to withdraw the schedule of Category 2 lesser included offenses from the standard jury instructions. Petitioner submits that, in advancement of the orderly administration of justice, the Court's decision on this issue be made prospective from the date of the opinion. Witt v. State. 387 So.2d 922 (Fla. 1980).

CONCLUSION

Wherefore, in view of the foregoing argument and citation to authority, appellee respectfully asks this Honorable Court to affirm the judgment and sentence appealed here from.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded via U. S. Mail to Clyde M. Collins, Jr., Esquire, 24 North Market Street, Suite 303, Jacksonville, Florida 32202, this 25th day of January, 1991.

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