047

IN THE SUPREME COURT OF FLORIDA

FILED
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APR 2 1991
CLERK, SUPREME COURT
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STATE OF FLORIDA

Petitioner,

vs. Docket No. 77,239

SINCLAIR JOHNSON,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, SINCLAIR JOHNSON, was the defendant in the Circuit Court and appellant in the First District Court of Appeal. Mr. Johnson will be referred to in this brief as Respondent or by his proper name. Petitioner, State of Florida, was the prosecutor in the circuit court and appellee in the appellate court. It will be referred to in this brief as Petitioner or as "the State."

JURISDICTION STATEMENT

The First District Court of Appeal issued an opinion and certified a question to be of great public importance. The State of Florida filed a Notice to invoke Discretionary Jurisdiction of the Supreme Court of Florida to review a Decision of the First District Court of Appeal. This Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(v), Fla.R.App.P., and Article V, Section 3(b)(4) of the Florida Constitution.

STATEMENT OF THE CASE AND FACTS

Respondent Sinclair Johnson was arrested and charged with Aggravated Battery, contrary to Section 784.045(1)(b), Florida Statutes. (R-1-2). An Information was later filed charging Sinclair Johnson with Attempted First Degree Murder, contrary to Section 782.04, 777.04, and 775.087, Florida Statutes; Possession of a Firearm By a Convicted Felon, contrary to Section 790.23, Florida Statutes; and Use of a Firearm During the Commission of a Felony, contrary to Section 790.07(2), Florida Statutes.

The State filed a Motion in Limine to prohibit argument and introduction into evidence of testimony: (1) that the victim was shot as a result of a drug transaction; and (2) that Sinclair Johnson was arrested for Aggravated Battery. (R-36,38). In return, Defense counsel filed a Motion in Limine to prohibit the State from introducing evidence relating to the arresting officer's opinions that the defendant intended to kill the alleged victim. (R-42). All Motions in Limine were granted. (R-44,45,46).

At trial, Miss E. Murray, age 16, testified that on the evening of January 31, 1989, she heard two men arguing outside her house. Miss Murray testified that she saw one man pull a gun and shoot the other man. (T-20,21). She also stated that the victim fell to the ground and started hollering when the assailant walked up and shot the victim two more times. (T-22). She testified that the victim said he wanted his money, and that Sinclair Johnson said, "You want your money, here you go", pulled a firearm and shot. (T-29). On cross-examination, Miss Murray testified that she knew the victim because he had dated her sister. (T-32).

Officer Larry F. Downey and Officer R.G. Fagan witnessed a shooting at 23rd Street and Myrtle Avenue. (T-43). Officer Downey observed a black man being pursued by another black man. The victim was shot, fell to the ground and was shot again. (T-45). He opined that the victim had been shot three times, once in the lower calf, once in the thigh and once in the buttocks. (T-53).

On cross-examination, defense counsel questioned Officer Downey as to the location and severity of the victim's wounds. The prosecutor's objection to defense counsel's questions, as to whether the victim's wounds were life-threatening, was sustained. (T-56). In light of the State's Motion in Limine, Officer Downey's testimony was proffered as to the basis for his arrest of Sinclair Johnson for aggravated battery as opposed to attempted first degree murder. Officer Downey admitted that the location of the wounds, as well as the nature and extent of the victim's injuries, lead him to charge Sinclair Johnson with aggravated battery.

James Todd, M.D., treated the victim identified in court as Robert Gooden. (T-97). Dr. Todd testified that Mr. Gooden was in no obvious distress, that vital signs were stable, and that there were injuries caused by bullets in his left leg, in the thigh, as well as in the buttocks. Dr. Todd stated over defense objection (T-100-102), that the wounds could be life threatening. (T-102).

On cross-examination, Dr. Todd testified that the injuries were only potentially life-threatening. (T-113). On redirect, Dr. Todd testified, over objection, that a layperson would know that shooting somebody three times could kill them. (T-119). On recross, Dr. Todd admitted that shooting someone in the buttocks

and calf would be the least likely place to shoot somebody in order to kill them. (T-120).

The State rested. In response, defense counsel moved for a judgment of acquittal on the grounds that the State had failed to establish a prima facie case of attempted first degree murder with premeditation with a firearm. Defense counsel also moved for a judgment of acquittal on Count Three, use of a firearm during the commission of a felony, in that the State had failed to establish a prima facie case that while attempting to commit attempted first degree murder, Sinclair Johnson did display or use a firearm. (T-131-134). The two Motions for Judgment of Acquittal were denied. (T-134,135).

Sinclair Johnson testified in his own defense. (T-138). Sinclair Johnson stated that on January 31, 1989, he accompanied his two daughters to the Chinese Rice Bowl restaurant on 23rd Street and Myrtle Avenue. (T-138). Mr. Johnson saw Robert Gooden, a man that he had known since childhood, with two other men. (T-140). Mr. Johnson also stated that his daughter told him that Gooden and another man were selling drugs. (T-141,144). Sinclair Johnson told Gooden not to sell drugs around the kids. Mr. Gooden replied, "Nigger, you must be got a bullet-proof vest on." (T-141) [sic]. Johnson testified that Gooden then hit him and he Johnson walked away towards the restaurant. (T-142).

Sinclair Johnson testified that Gooden followed him and screamed that Johnson owed him money. Mr. Gooden had previously drawn a gun on Sinclair Johnson in order to collect a debt. That

debt had been paid by Johnson's family, in large part, on account of Gooden's violence. (T-146).

Sinclair Johnson testified that Gooden hollered at Johnson about the money he had lost but for Johnson breaking up the drug transaction. (T-146). Johnson stated that Gooden continued to "Goog" or harass him. (T-147). He had known Robert Gooden to carry a gun and that everyone knew Robert Gooden to carry a gun. (T-148-149). Sinclair Johnson also testified that when he saw Gooden that night reaching for what Johnson presumed to be a gun, he pulled a pistol out and shot Gooden. (T-148).

Sinclair Johnson testified under oath that he did not intend to kill Gooden. (T-149). Johnson considered Robert Gooden to be a "rattlesnake" or a violent person. He had previously witnessed Gooden shoot another man and knew of other circumstances where Gooden shot other people. (T-154). Finally, Johnson stated that Mr. Gooden had previously threatened to kill him. (T-155).

On cross-examination, Johnson admitted to having been convicted of five felonies. (T-155).

A second defense witness, George Moses, testified that he knew both Sinclair Johnson and Robert Gooden. Moses also testified, over objection, Gooden had previously shot him. (T-179). By means of a proffer, George Moses testified that Robert Gooden had on another occasion drawn both a knife and a gun. Moses stated that Gooden shot him in the buttocks and testicles. (T-276).

A third defense witness, Gregory Walton, testified that he knew both Robert Gooden and Sinclair Johnson (T-254-56). Mr. Walton stated that Robert Gooden had a reputation as a violent

person (T-255). On the night of the shooting, January 31, 1989, Mr. Walton observed Robert Gooden and Sinclair Johnson having a heated argument. (T-256-57). Walton stated that Gooden conducted a "pat down" search of Sinclair Johnson and that Gooden inquired whether Sinclair Johnson had a pistol. (T-257).

A fourth defense witness, Officer Robert V. Nelson, Jacksonville Sheriff's Office, admitted to knowing Robert Gooden for five years and having an opinion of Gooden's violent behavior. (T-263). Officer Nelson opined that Robert Gooden was a violent person. (T-265).

A fifth defense witness, Willie Hardeman, testified of knowing Robert Gooden and Sinclair Johnson (T-284). Hardeman told the jury that Sinclair Johnson observed Robert Gooden a/k/a "Stumpy" shoot Hardeman over a gambling debt of one dollar. (T-284).

In the charge conference, the prosecutors, defense counsel and the circuit court judge reviewed the pattern jury instructions. (T-299-303). Defense counsel stated that Sinclair Johnson would waive jury instructions of lesser included offenses. (T-302). The prosecutor requested the lesser included offenses. Circuit Judge Haddock replied, "Yes. Now you want it to be what you should have charged him with in the beginning." (T4-302). (emphasis supplied) Later, the prosecutor agreed that the crime of aggravated battery was supported by the evidence. (T4-309). Circuit Judge Haddock overruled the defense counsel's objection and instructed the jury on attempted first degree murder and the following lesser included offenses: murder with and without a firearm, attempted second with and without a firearm, aggravated battery with and without a

firearm, culpable negligence, and assault and battery. Although the State requested that the Court give instructions on lesser included offenses, it objected to the inclusion of culpable negligence and assault and battery. (T4-321). The objection was overruled.

After deliberating for more than an hour, the jury requested that the court give again instructions on aggravated battery, culpable negligence, battery, and assault. (T-413). After conferring with counsel, the court gave such instructions plus the instruction for justifiable use of deadly force and battery. (T-414-421).

Some two hours later, at approximately 8:00 p.m., defense counsel requested the court give an Allen charge. (T-421). The state having no objection (T-422), the circuit judge gave an Allen charge. (T-423).

Subsequently, the jury returned a verdict. (T-427).

The jury returned a verdict of guilty as to Count One, the lesser included offense of Aggravated Battery with a Firearm, (R-52), and guilty as to Count Three, Use of a Firearm During the Commission of a Felony (R-53).

In due course, Sinclair Johnson was sentenced, after a hearing, as a habitual offender, to a term of fifteen (15) years in prison with a three (3) year minimum mandatory sentence. (T-456-57). Notice of appeal was timely filed (R-74).

On appeal, the First District Court of Appeals affirmed the judgment and sentence. It held that the state was entitled to the category 2 permissive lesser included instructions over the

defendant's objection. Judge Miner, for the Court, noted that category 2 lesser included offenses include offenses not contained in the information. However, he dismissed any prejudice in having category 2 lesser included instructions of other offenses presented to the jury because of the scope of discovery available to the defendant, relying on Morrison v. State, 259 So.2d 502 (Fla. 3d DCA 1972). Notwithstanding its holding, the appellate court certified the following question as being of great public importance:

> 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?

SUMMARY OF THE ARGUMENT

In its brief before the Supreme Court, the State makes two contradictory and conflicting arguments. On the one hand, it argues that the State is entitled to have the jury instructed on Category 2 lesser included offenses as well as Category 1 necessarily included lesser offenses. (See, Issue 1, pages 4-6, Petitioner's Brief on the Merits). On the other hand, the State argues that the 1988 legislative amendment to Section 775.021, Florida Statutes, abolishes category 2 lesser included offenses. (See, Issue II, pages 7-19, Petitioner's Brief on the Merits.) The two arguments are logically inconsistent together; the arguments also fail independently of one another.

Argument One:

> THE TRIAL COURT ERRED IN INSTRUCTING THE JURY OVER DEFENDANT'S OBJECTION AS TO LESSER INCLUDED OFFENSES.

In Harris v. State, 438 So.2d 787 (Fla. 1983), this Court held that the defendant could knowingly and intelligently waive instructions on necessarily lesser included offenses [category 1] to first degree murder. In Jones v. State, 484 So.2d 577 (Fla. 1986), this court held that defense counsel could waive the instructions on necessarily lesser included offenses [category 1] to noncapital offenses without a showing that the Defendant had knowingly and intelligently joined in the decision. In Gallo v. State, 491 So.2d 543 (1986), this court held that the state was entitled to jury instructions as to "necessarily included offenses," over the Defendant's knowing and intelligent waiver. However, the court did not provide any constitutional or statutory

authority for its position. The State has not provided any authority for such an entitlement at trial or on appeal.

In Gallo v. State, this court distinguished its prior holding in Harris v. State, 438 So.2d 787 (Fla. 1983) by finding that the State had to consent to the waiver, comparing it by analogy, to the waiver to a jury trial, and cited Rule 3.260, Florida Rules of Criminal Procedure. However, unlike Rule 3.260, there is no criminal rule requiring the state's consent to the defendant's waiver of his category 2 lesser included offenses. Interestingly, the Gallo court overlooked its earlier decision in Jones v. State, 488 So.2d 572 (Fla. 1986).

Reliance on Gallo is similarly suspect in light of its reliance on the pre-amendment statute Section 919.16, Florida Statutes. The decision is also distinguishable because the Court reiterated its view that the Gallo charging documents included all necessarily lesser-included offenses. It cannot be denied that the District Court below recognized the obvious, that category 2 permissible lesser included offenses, unlike category 1 necessary lesser included offenses, "are not contained in the information 'as a matter of law'." (Opinion of the First District Court of Appeal, at p. 4-5).

It is undisputed that the evidence addressed at trial did not sustain the information for attempted first degree murder. There is no question that the prosecutor overcharged the defendant in the information and, after hearing all the evidence, requested a lesser included instruction, category 2, aggravated battery.

The defendant was entitled to waive his right to the category 2 lesser included offense. There is no constitutional or statutory authority requiring the state's consent for the defendant to waive a category 2 lesser included offense. In the absence of constitutional or statutory authority, the state was not entitled to the instruction. The certified question should be answered in the negative.

Argument Two:

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

A. This court should not address this issue as not properly preserved nor presented in the circuit or district court of appeal.

This issue has not been properly preserved nor properly presented. The issue is not the legal ground for the decision below. It is raised for the first time on appeal in the Supreme Court by the petitioner. The court should not review the case under such circumstances.

B. The legislative amendment did not abolish category 2 instructions.

The 1988 amendments to Section 775.021(4), Florida Statutes, abolished the single transaction rule. It did not abolish category 2 instructions. Section 775.021(4)(b)(3) provides that lesser offenses, the statutory elements of which are subsumed by the greater offense, are exempt from the single criminal act.

A trial court may give a permissive jury instruction based upon a recognition of the jury's right to exercise its "pardon power". See, State v. Baker, 456 So.2d 419 (Fla. 1984). To

adopt the state's argument on appeal would eliminate any need to distinguish between necessary lesser included offenses (category 1) and lesser included offenses (category 2). This is contrary to the amended statute and to the constitutional right to a jury trial.

ARGUMENT ONE

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY OVER DEFENDANT'S OBJECTION AS TO LESSER INCLUDED OFFENSES.

In Harris v. State, 438 So.2d 787 (Fla. 1983), this Court held that the defendant could knowingly and intelligently waive instructions on necessarily lesser included offenses [category 1] to first degree murder. In Jones v. State, 484 So.2d 577 (Fla. 1986), this court held that defense counsel could waive the instructions on necessarily lesser included offenses [category 1] to noncapital offenses without a showing that the Defendant had knowingly and intelligently joined in the decision. In Gallo v. State, 491 So.2d 543 (1986), this court held that the state was entitled to jury instructions as to "necessarily included offenses," over the Defendant's knowing and intelligent waiver.

From Harris, Jones, and Gallo, the issue before the Court is whether the State is entitled to have category 2 lesser included offenses instructions read to the jury over the Defendant's knowing and intelligent waiver.

In the trial below, Sinclair Johnson was arrested for aggravated battery. Subsequently, an information was filed and he was tried for the crime of attempted first degree murder. The sole defense issue was self-defense. Defense counsel for Sinclair Johnson at first requested that the circuit court judge not instruct the jury with lesser included offenses. In response, the prosecutor requested that the court instruct the jury of a single lesser included offense, aggravated battery. (T-302-303). The circuit court judge overruled the defendant's objection and

instructed the jury on all lesser included offenses, to wit, aggravated battery, culpable negligence and assault and battery. The jury returned a verdict of guilty to the lesser included offense of aggravated battery. Neither at trial nor on appeal has the State provided any constitutional or statutory authority that is has any right to have a jury instructed as to lesser included offenses over the defendant's knowing and intelligent waiver.

In the First District Court of Appeals, the appellate court rejected the argument that the defendant had the option to have the jury instructed as to Category 2, lesser included offenses, citing Courson v. State, 414 So.2d 207 (Fla. 3rd DCA 1982); Gallo v. State, 491 So.2d 541 (Fla. 1986); and State v. Washington, 268 So.2d 901 (Fla. 1972). The appellate court's reliance on these cases is unsound in light of their foundation in Section 919.16, Florida Statutes, its repeal and the amendment of the criminal rule.

The Courson court primarily addressed the statutory requirement that an issue be preserved for appellate review. Only as a second thought did the Courson court review the instructions of lesser-included offenses to find that the defendant was not entitled to decide whether to give any or all lesser-included offenses. "While 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. State v. Washington, 268 So.2d 901 (Fla. 1972)." Reliance on Washington is equally unsound because it was based upon Section 919.16, Florida Statutes, which was subsequently amended in Florida Legislature.

In Gallo v. State, 491 So.2d 543 (Fla. 1986), this court distinguished its prior holding in Harris v. State, 438 So.2d 787 (Fla. 1983) by finding that the State had to consent to the waiver as in the waiver to a jury trial, citing Rule 3.260, Florida Rules of Criminal Procedure. However, unlike Rule 3.260, there is no criminal rule, requiring the state's consent to the defendant's waiver of his category 2 lesser included offenses. Interestingly, the Gallo court overlooked its earlier decision in Jones v. State, 488 So.2d 572 (Fla. 1986).

Reliance on Gallo is similarly suspect in light of its reliance on the pre-amendment statute Section 919.16, Florida Statutes. The decision is also distinguishable because the Court reiterated its view that the Gallo charging documents included all necessarily lesser-included offenses. The lower appellate court correctly noted that in contrast to Category 1 necessary lesser included offenses, Category 2 permissible lesser included offenses "are not contained in the information 'as a matter of law." (Opinion of the First District Court of Appeal, at p.4-5.

A review of Florida law indicates no authority for the State to instruct the jury over the defendant's waiver. A trial judge is required to instruct the jury as to a necessarily lesser included offense upon request. Brown v. State, 206 So.2d 377 (Fla. 1968). The Brown decision was based on the statutory requirement of Section 919.16 Florida Statutes (1967). The Supreme Court later adopted Rule 3.510, Fla.R.Cr.P., which provided the substance of Section 919.16, Florida Statutes, as a rule:

> . . . the jury . . . may convict [the defendant] of any offense which is necessarily included in the offense charged. The Court shall charge the jury in this regard.

Section 919.16, Florida Statutes was repealed in 1970. In September 1981, Rule 3.510(b), Florida Rules of Criminal Procedure, was amended to provide:

> 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).

In State v. Wimberly, 498 So.2d 929 (Fla. 1986), this Court held that category 1 lesser crimes must be given upon request, however, category 2, permissive lesser included offenses, required the trial judge to analyze the information or indictment to determine if elements of category 2 crimes have been alleged and proved. The trial judge must instruct the jury on category 2 permissible lesser included offenses upon request only when the (i) pleadings allege and (ii) evidence proved that a lesser offense was included in offense charged. The Wimberly Court based its requirement of instructing on lesser included offenses despite the absence of proof on the recognition of the jury's right to exercise "its pardon power." citing, State v. Baker, 456 So.2d 419 (1984).

In Wilcott v. State, 509 So.2d 261 (Fla. 1987), this Court confirmed its holding in Wimberly, that category 2 permissive lesser included offenses must be instructed upon request when the

pleadings and evidence demonstrate that a lesser offense was included in the offense charged. The Supreme Court also held that the defendant charged with introduction possession of contraband upon grounds of state correctional facility was entitled upon request to instruction on the lesser included offense of misdemeanor possession of marijuana.

It is undisputed that the evidence addressed at trial did not sustain the information for attempted first degree murder. There is no question that the prosecutor overcharged the defendant in the information and, after hearing all the evidence, requested a lesser included instruction, category 2, aggravated battery.

The defendant was entitled to waive his right to the category 2 lesser included offense. There is no constitutional or statutory authority requiring the state's consent for the defendant to waive a category 2 lesser included offense. In the absence of constitutional or statutory authority, the state was not entitled to the instruction. The certified question should be answered in the negative.

ARGUMENT TWO

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

Respondent Sinclair Johnson submits that the defendant has the right or option to choose whether the jury should be instructed with category 2 lesser included offenses. In light of the arguments presented in the first argument, as well as the failure of the trial court or appellate court to consider this second issue, Respondent submits that this court should decline to exercise its right of review of this second issue: whether Section 775.021(4) as amended by Chapter 88-131, Laws of Florida, abolishes Category 2 lesser included offenses.

A. THIS COURT SHOULD NOT ADDRESS THIS ISSUE AS NOT PROPERLY PRESERVED NOR PROPERLY PRESENTED IN THE CIRCUIT OR DISTRICT COURT OF APPEAL

The First District certified a specific question weighing the right of the State to have the jury instructed on Category 2 Included Necessary Offenses with the defendant's right to waive such instructions. In the Petitioner's Brief, for the first time, the State submits a second and additional issue: whether Category 2 lesser included offenses have been abolished by the legislature. Respondent submits that this Court should decline its right of review.

Although this Court's review is not limited to the certified question, Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1984), this Court should not address issues not raised nor properly presented below. In Tillman v. State, 471 So.2d 32 (Fla. 1985),

this Court reviewed the State's argument that the review proceeding should be dismissed, in part, because the issue was raised but not addressed by the District Court of Appeal in its opinion. The appellate court certified the case without setting forth the question. The Supreme Court rejected the State's position to find "once the case has been accepted for review here, the Supreme Court may review any issue arising in the case that has been properly preserved and properly presented." Id., at 34. (citation omitted). (emphasis supplied).

In Tait v. State, 387 So.2d 338 (Fla. 1980), the District Court of Appeal addressed two issues: right of the defendant to act as co-counsel and the requirement of a hearing to determine competency to stand trial. This court first addressed the certified question, then reviewed the second issue in the case: "we should not limit ourselves to consideration of the certified question only, but should also review this other ground for the decision below." Id., at 340. (citation omitted). (emphasis supplied). Both issues independently required Tait's judgment and sentence be reversed and remanded for new trial.

In the instant case, the State has raised the issue of legislative interpretation. The impact of the 88--131 Laws of Florida on Rule 3.510 F.R.Cr.P. was not an issue raised and addressed in the trial or appellate court. This is not the legal foundation or ground for the decision below. It is raised for the first time on appeal in the Supreme Court by the Petitioner. The Court should not review the case under such circumstances.

B. LEGISLATIVE AMENDMENTS DID NOT ABOLISH CATEGORY 2 INSTRUCTIONS

Although Section 775.021(4), Florida Statutes abolished the "single transaction rule," it did not abolish the concept of permissive lesser included offense (category 2 lesser included offenses). The statute did not address the practice of charging substantively and legally different offenses in one count of a charging document, thereby forcing the jury to acquit the defendant of all such "permissive lesser included offenses" charged except one. To the contrary, Section 775.021(4)(b)(3) provides for lesser included offenses.

In the 1988 amendment to Florida Statute Section 775.021(4) the Legislature made three changes. First, the legislature eradicated the Carawan v. State, 515 So.2d 161 (Fla. 1987) distinction between a criminal act and a criminal transaction. New section 775.021(4)(a) tightens the reins on the court's interpretive power and ensures that in determining whether one criminal transaction or episode violated separate criminal offenses. Separate sentences may be imposed when "in the course of one criminal transaction or episode. . ." a person "commits an act or acts which constitute one or more separate criminal offenses. . ." Section 775.021(4)(a).

The second modification curtailed the lenity principle: "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. . . to determine legislative intent." 775.021(4).

The third and most important for purposes of this appeal, was the introduction of a trio of exceptions. Section 775.021(4)(b) provides:

> The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction. . .
>
> Exceptions to this rule of construction are:
> 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.

[emphasis supplied]

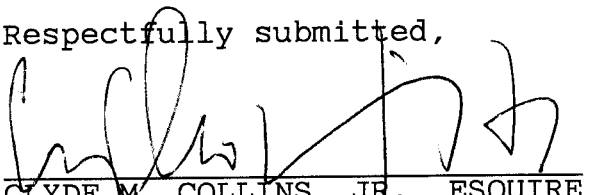
In State v.Wimberly, 498 So.2d 929 (Fla. 1986), this Court held that the trial court upon request may instruct the jury as to category 1 necessary lesser included offenses notwithstanding and regardless of the degree of proof. This requirement was bottomed upon a recognition of the jury's right to exercise its "pardon power," citing to, State v. Baker, 456 So.2d 419 (1984). In the instant case, the right of the defendant to choose to have the jury instructed on category 2 permissive lesser included instructions is similarly situated on the jury's pardon power.

Moreover, to adopt the state's argument on appeal would eliminate any need to distinguish between necessary lesser included offenses (category 1) and permissive lesser included offenses (category 2). This is contrary to the amended statute and to the constitutional right to a jury trial.

CONCLUSION

For the foregoing reasons, the judgment and sentence must be reversed and remanded for new trial.

Respectfully submitted,



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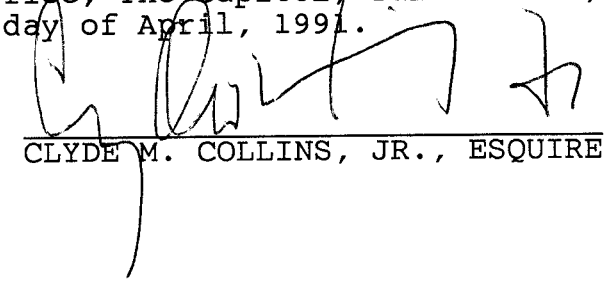
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Attorney General's Office, The Capitol, Tallahassee, Florida 32301, by mail, this 1st day of April, 1991.



CLYDE M. COLLINS, JR., ESQUIRE

JOHNSON.BRF