W.O.A. 047

FILED
SID J. WHITE
JUL 17 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JAMES VON DECK,

Respondent.

Case No. 79,630
District Court of Appeal
5th District - No. 91-758

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF RESPONDENT

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SUMMARY OF RESPONSE TO RESPONDENTS INITIAL BRIEF

ARGUMENT #1: This Court should quash it's earlier order accepting jurisdiction in the instant case because there is no express and direct conflict between the instant case and Kimbrough v. State, 356 So.2d 1294 (Fla. 4th DCA 1978). Neither an announcement of conflicting rules of law or an application of the same rule of law to the same set of facts with a conflicting result has occurred between the two cases.

ARGUMENT #2: This Court should also quash it's earlier order accepting jurisdiction because the two cases are from the same county and judicial circuit and the decision of the Fifth District Court of Appeals in the instant case is merely a change in the law within that district and the area of the fifth district previously in the fourth district.

ARGUMENT #3: Petitioner claims that respondent has not preserved the issue of whether the lesser included offense of aggravated assault should have been presented to the jury. However, because petitioner failed to raise this issue in his brief to the Fifth District Court of Appeal, or at oral argument, petitioner is estopped from raising that issue in this Court.

ARGUMENT #4: Even if petitioner were entitled to raise it's claim that respondent has not preserved this issue, the trial record clearly shows that respondent specifically objected at trial to the reading "at all" of any jury instruction on aggravated assault and this issue is properly preserved for appellate review.

ARGUMENT #5: The defendant in the instant case was convicted of a crime he was never charged with. The information in the instant case did not allege any well-founded fear of the victim and therefore the charge of aggravated assault should not have been presented to the jury as a lesser included offense of attempted murder of a law enforcement officer.

ARGUMENT #6: The trial court erred in refusing to give the defendant's requested lesser included offenses which were more completely alleged in the charging document than the charge of aggravated assault.

ISSUE #1

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE INSTANT CASE AND KIMBROUGH V. STATE, 356 SO.2D 1294 (FLA. 4TH DCA 1978), AND THEREFORE THIS COURT SHOULD NOT DECIDE THIS APPEAL ON THE MERITS

This Court accepted jurisdiction in the instant case on June 4, 1992. However, this decision is not final and after additional consideration of the jurisdictional issue this Court can still rule that no express and direct conflict exists between the instant case and Kimbrough v. State, 356 So.2d 1294 (Fla. 4th DCA 1978). Lake v. Lake, 103 So.2d 639, 643 (Fla. 1958), Corn v. Department of Legal Affairs, 368 So.2d 591, 592 (Fla. 1979). Therefore, based on the following arguments, respondent asks this Court to rule that the prima facia showing of conflict by petitioner is not supported by the record; that express and direct conflict between the two cases does not exist; and that this Court does not have jurisdiction to consider the merits of petitioner's appeal.

In order to establish this Court's jurisdiction due to a conflict of appellate court decisions petitioner must establish that different appellate courts have done one of the following: announced conflicting rules of law; or, applied the same rule of law to the same set of facts with conflicting results. Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960). A comparison of the instant case and Kimbrough v. State, 356 So.2d 1294 (Fla. 4th DCA 1978), establishes that neither of these apply.

First, there is no conflicting rule of law announced in the two cases. The rule of law in Kimbrough is that when

the charging document sufficiently alleges the elements of a lesser included offense, whether the facts of the case also support that lesser included offense can be inferred. (Whether the victim was placed in a well-founded fear after being shot at can be inferred from his hearing the shots fired even though he never saw the gun.) The rule of law in Von Deck v. State, 593 So.2d 1129 (Fla. 5th DCA 1992), is that the charging document must allege all of the elements of a lesser included offense before that lesser included offense can be presented as an option to the jury. Thus, the rules of law between the two cases are not in conflict.

Likewise, the same rule of law has not been applied to two cases with similar facts and resulted in conflicting decisions. As stated above, the rules of law applied in the two cases are different. Furthermore, the facts in Kimbrough and Von Deck are clearly, obviously and easily distinguished.

In Kimbrough v. State, 356 So.2d 1294 (Fla. 4th DCA 1978), the appellate court was asked to decide whether the defendant's request for the lesser included offense of aggravated assault should have been granted over the state's objection. In reaching it's conclusion that the defendant was entitled to this lesser included offense the appellate court conducted an analysis of the two-prong test for permissive lesser included offenses which was announced by this Court in Brown v. State, 206 So.2d 377 (Fla. 1968). In conducting this analysis the Kimbroush court first stated that the charging document sufficiently alleged the elements of aggravated assault. However, nowhere does the appellate

court list the precise language of the information upon which it bases it's conclusion. In fact, it appears from the court's opinion that the appellee never argued that the charging document was insufficient to support the lesser included request because only in discussing the issue of whether the facts supported the lesser included request does the appellate court indicate that "the appellee argues." Kimbrough v. State, 356 So.2d 1294 (Fla. 4th DCA 1978). Thus, it appears that the court was not resolving an issue argued in the appeal but rather was merely proceeding in a logical progression through the Brown analysis.

Without knowing the precise language of the charging document in Kimbrough it is impossible to say that the charging document did not contain additional language which alleged more completely the element of fear of the victim than the charging document in the instant case. In it's opinion the Kimbrough court merely states that "Count I alleges that the defendant attempted to unlawfully kill a human being and did shoot him with a firearm." Kimbrough, at 1295. It is unknown whether the charging document additionally contained language such as - "by firing six shots at the victim." Had the information contained such language (as it very well may have) then the appellate court would have been ruling that this additional language, in addition to whatever else was contained in the information, was sufficient to meet the first prong of the Brown test.

The result of the Kimbrough court's cursory consideration of this first issue, however, is that this Court is being asked to resolve an alleged conflict between a rule of law as applied to a specific factual situation, and a discussion of an apparently unargued first prong of a rule of law as applied ta an unknown factual situation. Such cannot be said to create sufficient express and direct conflict to invoke the jurisdiction of this Court.

ISSUE #2

BECAUSE THE FIFTH DISTRICT HAD NOT BEEN CREATED AT THE TIME OF THE KIMBROUGH DECISION THE TWO CASES ARE NOT FROM DIFFERENT DISTRICT COURTS OF APPEAL

[NOTE: To ensure that this issue is not waived, petitioner includes the following argument previously made in it's brief on jurisdiction to this Court.]

The discretionary jurisdiction of this court is not applicable to the instant case because Rule 9.030(a)(2)(A)(iv), F.R.Cr.P. allows discretionary jurisdiction to be sought only when a decision of a district court "expressly and directly conflicts with a decision of another district court of appeal . . . on the same question of law." [emphasis added].

The instant case originated in Brevard County of the eighteenth judicial circuit which is now in the fifth appellate district. The decision in Kimbrough V. State, 356 So.2d 1294 (Fla. 4th DCA 1978), also originated in Brevard County of the eighteenth judicial circuit, however, at that time the fifth district had not yet been created and the district court of appeal for Brevard County was the fourth district. Thus, the fifth district court's decision in Von Deck could not be in conflict with "another district court" because at the time the Kimbrough opinion was issued there was no fifth district and the area of the fifth district from which Von Deck originated was then part of the fourth district. Although respondent has been unable to find any Florida decision which even discusses this issue it seems logical that when the fifth district was created the eighteenth judicial circuit was bound by the decisions of the fourth district court which originated in the area of the

fourth district which is now the fifth district. Furthermore, the fifth district would be bound by the previous decisions of the fourth district which originated in the area which is now the fifth district. Therefore, even if there was a conflict between the two decisions (which there is not) the fifth district court of appeals decision in Von Deck would be a change in the law within that district. Such a situation is not one in which the discretionary jurisdiction of this Court can be invoked.

ISSUE #3

PETITIONER IS ESTOPPED FROM RAISING THE ISSUE THAT RESPONDENT DID NOT OBJECT TO THE LESSER INCLUDED OFFENSE OF AGGRAVATED ASSAULT BECAUSE PETITIONER NEVER RAISED THIS ISSUE IN HIS BRIEF OR AT ORAL ARGUMENT IN THE INITIAL APPELLATE LEVEL AT THE FIFTH DISTRICT COURT OF APPEAL

Petitioner claims in it's initial brief that the "real issue is whether Respondent objected to the instruction on Aggravated Assault based upon the asserted deficiency in the charging document or whether he acquiesced in it." (Pet. Brief, P. 6). However, this "real issue" was of such minimal importance to petitioner at the initial appellate level that it chose not to raise this issue in it's brief or at oral argument.[1] Thus, the precise claim that petitioner now makes to this Court (that the defendant failed to preserve this issue for appeal) is exactly what petitioner is attempting to do in it's brief to this Court: raise an issue that was not raised by petitioner in it's brief to the Fifth District Court of Appeals. Because petitioner failed to raise this issue at the initial appellate level it is now estopped from raising it before this Court.

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[1] Petitioner first raised this issue in it's Motion for Rehearing and Certification which was denied by the Fifth District Court of Appeal. However, arguments not made in a party's brief or at oral argument will not be entertained by the appellate court when first raised in a petition for rehearing. Cartee v. Florida Department of Health and Rehabilitative Services, 354 So.2d 81 (Fla. 1st DCA 1977). This is an additional example of case law which establishes that issues not raised at the appropriate time in an appeal are waived for future consideration.

The law in Florida is well established that when jurisdiction is accepted by this Court all issues which were properly preserved at the initial appellate level may be addressed. This Court made this principle clear in Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580, 585 (Fla. 1961), when it stated:

> "since we have concluded that . . . there can be no doubt about the question of direct conflict . . . it becomes our duty and responsibility to consider the case on its merits and decide the points sassed upon by the District Court which were raised by appropriate assignments of error as completely as though such case had come originally to this court on appeal." [emphasis added]

In footnote 7 of it's opinion in Tyus, at 585, this Court compares the above principle to Texas Supreme Court decisions in Holland v. Nimitz, 1922, 111 Tex. 419, 239 S.W. 185, and Ford v. Carpenter, 1949, 147 Tex. 447, 216 S.W.2d 558. A review of Holland further establishes that only properly preserved arguments are available for appellate court review.

In Holland v. Nimitz, 1922, 111 Tex. 419, 239 S.W. 185, the Texas Supreme Court accepted jurisdiction in a case where the Court of Civil Appeals had reversed the trial court's judgment and remanded the case for a new trial. After addressing the issue upon which the Court of Civil Appeals based its reversal the Supreme Court of Texas was faced with the question of whether it should continue on and address questions initially raised in the Court of Civil Appeals. In answering this question the Texas Supreme Court stated:

> "it seems to be the definitely settled rule that the party who prevailed in the Court of Civil Appeals is entitled to have his assignments, which were properly presented in that court, considered by the Supreme Court in so far as may be necessary to determine what judgment should have been rendered by the Court of Civil Appeals."[2] [emphasis added]

The principle of these cases is clear: the Supreme Court may decide issues other than that which is the basis of jurisdiction when a case comes before it, however, it will only rule on issues which have been properly preserved in the court below.

In the instant case at the initial appellate level the trial transcript was filed with the clerk of the Fifth District Court of Appeals on June 3, 1991. Petitioner's (appellee below) reply brief was not filed with the Fifth District Court of Appeal until September 9, 1991. Thus, petitioner had over three months to read the record, research the law, and develop his arguments. Petitioner chose not to argue in his brief or at oral argument that respondent had failed to object to and therefore failed to preserve his issue on appeal. Thus, petitioner has failed to preserve this issue and is estopped from raising it on appeal to this Court.

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[2] See also Savoie v. State, 422 So.2d 308, 310 (Fla. 1982), ["Once we accept jurisdiction over a cause in order to resolve a legal issue in conflict, we may, in our discretion, consider other issues properly raised and argued before this Court." (emphasis added)]

ISSUE #4

PETITIONER SUFFICIENTLY OBJECTED TO THE PROPOSED LESSER INCLUDED OFFENSE OF AGGRAVATED ASSAULT AND ITS ENHANCEMENTS TO PRESERVE THIS POINT FOR APPEAL

Even if petitioner were entitled to have this issue heard by this Court, the trial record, cases cited by petitioner and the cases cited by respondent establish that the defendant did sufficiently object to the proposed lesser included offense at trial to preserve the issue for appeal.

Petitioner cites Ray v. State, 403 So.2d 956 (Fla. 1981), as authority for it's claim that respondent did not preserve the issue of the propriety of presenting to the jury the lesser included offense of aggravated assault and its enhancements. However, the holding of Ray applies only to the situation when the defendant "had an opportunity to object to the charge and failed to do so." Id. at 961.

In the instant case the defendant initially objected to the proposed instructions on aggravated assault when the prosecutor objected to the defendant's requested lesser included offense of discharge of a firearm. (R. 859). Later, the prosecutor himself specifically objected to the defendant's proposed jury instructions because all the elements were not contained in the charging document. (R. 878-879).

The defendant then made clear his objection as is evidenced by the following colloquy during the jury charge conference:

> THE COURT: Aggravated Assault, Law Enforcement Officer. . . .
>
> MR. CIENER: Judge, we are objecting to that being given.

THE COURT: Aggravated Assault?

MR. CIENER: Being given at all.

But, if you rule it is going to be given, we don't have any further objections to the definitions or the instruction as proposed. (R. 928-929). [emphasis added] . . .

THE COURT: I haven't heard anything on the Aggravated Assault.

MR. CIENER: Well, first I object to the Aggravated Assault being given at all, especially under Paragraph Four, the assault was made with a deadly weapon. (R. 931). [emphasis added]

It is hard to imagine a clearer objection being made to a **proposed** jury charge. The objection was timely and properly made and specifically addressed the reading of the instruction to the jury "at all," and was not, as claimed by petitioner in it's brief, merely an objection "to the placement of the Aggravated Assault instruction in the hierarchy of the lesser included offense instructions." (Pet. Brief P. 7).[3] It would indeed be a leap of logic

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[3] Petitioner also claims that when the trial judge went through the jury charges a final time, on the morning of March 8, 1991, defense counsel stated that the proposed instructions on aggravated assault were okay with the defense. (Pet. Brief P. 7). However, the trial record clearly shows that the lengthy jury charge conference was held during the afternoon of March 7, 1991, and that the defendant made his objections to the proposed lesser included offenses of aggravated assault at that time. (entire jury charge conference, R. 812-957, defendant's specific objections, R. 861, 929, 931). The next morning, after closing arguments ***were*** completed, the state attorney **was** to present the typed charges as ordered by the trial court. (R. 948). At that time both parties and the trial judge went through the instructions to determine if the state attorney had accurately typed the instructions as ruled applicable by the trial court. The issue that morning **was** the wording of the charges the state attorney had typed because as defense counsel stated "they have repeated a couple of mistakes [and] I think they can be quickly corrected." (R. 1085, 1088). The issue was merely the warding of the charges, and neither the state attorney or defense attorney were obligated, or did, restate the majority of the lengthy and numerous objections made at the jury charge conference.

to apply the holding of a case which is specifically limited to the factual situation where the defendant failed to object in any way, shape or form, to the instant case with its contemporaneous, clear and obvious objection. Petitioner has therefore failed to carry it's burden of showing that the Ray test conditions have been met.

The other cases cited by petitioner are all easily and obviously distinguished from the instant case. In Lee v. State, 526 So.2d 777 (Fla. 2nd DCA 1988), Castor v. State, 365 So.2d 701 (Fla. 1978), Blow v. State, 386 So.2d 872 (Fla. 1st DCA 1980), Carter v. State, 380 So.2d 541 (Fla. 5th DCA 1980), Alvarado v. State, 521 So.2d 180 (Fla. 3rd DCA 1988), and Odom v. State, 375 So.2d 1079 (Fla. 1st DCA 1979), the defendant failed to object to the instructions. In Lumia v. State, 372 So.2d 525 (Fla. 4th DCA 1979), the defendant actually requested the lesser included offense. In Courson v. State, 414 So.2d 207 (Fla. 3rd DCA 1982), the defense attorney made no objection to the specific lesser included offense and merely made a general objection to "all lesser included offenses." And in Henry v. State, 564 So.2d 212 (Fla. 1st DCA 1990), the defendant's attorney informed the court that his client wanted the lesser included offense. None of these cases do, and no case known to respondent does, stand for the proposition that the defendant's clear objection in the instant case is insufficient to preserve the issue for appellate review.

A case involving an objection to a lesser included offense which more closely approximates that of the defendant in the instant case is Moody v. State, 597 So.2d 839 (Fla.

5th DCA 1992). In Moody the following colloquy between the trial judge and defense counsel took place:

> THE COURT: Well, do you want the lesser of aggravated assault?
>
> MR. GUTIERREZ (defense counsel): No, I don't think so.

In reversing the defendant's conviction for the uncharged crime of aggravated assault the Fifth District Court of Appeal stated that "it appears defense counsel did object to the instruction." Thus, the appellate court for the district in which the instant case originated has determined that an objection much less clear and precise than the defendant's objection in the instant case is sufficient to preserve the issue for appellate court review.

Additionally, contrary to petitioner's claims otherwise, respondent never acquiesced to a jury charge on the lesser included offense of aggravated assault and its enhancements by requesting the lesser included offense of assault after the trial court indicated it would give the aggravated assault on a law enforcement charge. A lawyer is not precluded from practicing damage control just because an incorrect ruling occurs at trial. To so rule would be tantamount to a ruling that any objected to error at trial would only be preserved for appellate review if the defense attorney ceased all further inquiry into that area on cross-examination, during his case in chief, or in closing argument. Such an argument by petitioner is without merit.

Finally, petitioner is incorrect in arguing that the defendant's defense was that he had committed an aggravated assault. Rather, the defendant's defense was that he was

either guilty of an attempted manslaughter or was not guilty. The defendant never argued to the jury that he was guilty of an aggravated assault. The following quotes from defense counsel's final argument make this clear:

> It is real serious still. But it is an Attempted Manslaughter. That is, if he did an act and by intent attempted to kill -- that is, slaughter a man -- he would be guilty of that. (R. 1025).
>
> Attempted Manslaughter or not proven, Not Guilty. That is the real decision. (R. 1077).
>
> Aggravated Assault is an intentional assaulting of the officer with a weapon.
> He did not do that. That is the conscious intent to do it.
> Attempted Manslaughter or not proven, not guilty. (R. 1080).
>
> Yes. He fired a gun. Yes. It was an impulsive act. Yes. It was dumb. But it is not this charge or Murder or Aggravated Assault of any Police Officer. (R. 1081).

The defendant in the instant case properly objected to the proposed jury instruction of aggravated assault and never waived this objection or acquiesced in it's being presented to the jury. Therefore, this issue was properly preserved for appeal.

ISSUE #5

THE CHARGING DOCUMENT IN THE INSTANT CASE DID NOT ALLEGE THE ELEMENT OF WELL-FOUNDED FEAR OF THE VICTIM AND THEREFORE THE CHARGE OF AGGRAVATED ASSAULT AND ITS ENHANCEMENTS SHOULD NOT HAVE BEEN PRESENTED TO THE JURY AS LESSER INCLUDED OFFENSE OPTIONS

Contrary to petitioner's claim otherwise, the "real issue" in this appeal is the issue this Court accepted conflict jurisdiction on: whether the charging document in Von Deck sufficiently alleged the element of a well-founded fear of the victim so that aggravated assault and its enhancements could be presented to the jury as lesser included offense options.

The law on lesser included offenses has been the subject of numerous decisions of this Court. Beginning with Brown v. State, 206 So.2d 377 (Fla. 1968), this Court established the requisite conditions to be met before a "necessarily included" lesser offense could be read to the jury. In Brown, this Court stated that there was a category of potential lesser included offenses:

> "which may or may not be included in the offense charged, depending upon, (a) the accusatory pleading, and (b) the evidence at the trial. In this category, the trial judge must examine the information to determine whether it alleges all of the elements of a lesser offense, albeit such lesser offense is not an essential ingredient of the major offense alleged. If the allegata and probata are present then there should be a charge on the lesser offense." Id. at 383.

The policy behind this requirement is that the defendant must be apprised by the accusatory pleading of all offenses of which he may be convicted. Id. at 383.

This Court has reiterated this principle in numerous cases since Brown. See State v. Smith, 240 So.2d 807 (Fla. 1970), ["the Brown case held that a lesser included offense

is one which may or may not be included in the offense charged depending on the accusatory pleading and the evidence"]; State v. Anderson, 270 So.2d 353, 355 (Fla. 1972), ["Brown v. State, supra, requires that the accusatory pleading allege all the essential elements of the lesser offense or at least spell it out in its pleading"]; State v. Wimberly, 498 So.2d 929, 930 (Fla. 1986), discussing category two lesser included offenses ["the second category . . . encompasses offenses which may or may not be included in the offense charged, depending on the accusatory pleadings and evidence"]; Wilcott v. State, 509 So.2d 261 (Fla. 1987); and State v. Daophin, 533 So.2d 761, 762 (Fla. 1988), the case relied upon by the Fifth District Court of Appeal in its decision in Von Deck, ["in order to be entitled to instructions on category two offenses, both the accusatory pleadings and the evidence must support the commission of the permissive lesser included offense."]

It is clear from this Court's holdings in these cases that both the charging document and the evidence adduced at trial must support a lesser included offense before that lesser included offense can be read to the jury at trial.

In the instant case the defendant was charged with attempted first degree murder of a law enforcement officer "by SHOOTING AT S. HUSS WITH A FIREARM, and said killing was perpetrated . . . from a premeditated design or intent to effect the death of said S. HUSS, [by] SHOOT[ing] AT S. HUSS WITH A FIREARM, TO WIT: PISTOL." (R. 1401-1402). According to this Court's holdings in the above cited cases, in order for aggravated assault to be a lesser included

offense of the charged crime, every element of the aggravated assault must have been alleged in the charging document.

An aggravated assault requires an act, "which creates a well-founded fear in [the] other person that . . . violence is imminent." Section 784.011 Fla. Stat. (1975). Nowhere in the charging document in the instant case is there any indication that any act of the defendant caused a well-founded fear in the alleged victim that any violence was imminent. In fact, the wording of the charging document could have supported a conviction for attempted murder in a factual situation where the victim had no idea a shot was being fired either before or after it occurred. Such a factual situation would clearly not support a lesser included offense of aggravated assault. Therefore, the lesser included offense of aggravated assault does not pass the first prong of the two part test enunciated by this Court in Brown. The charging document does not contain sufficient allegations to put the defendant on notice that an aggravated assault was contained within its four corners because the charging document fails to allege an essential element of aggravated assault (and its enhancements: upon a law enforcement officer, with a firearm, and upon a law enforcement officer with a firearm).

In fact, petitioner concedes that the charging document in Von Deck does not specifically allege the element of well-founded fear of the victim. In it's brief, petitioner states that "it could also be inferred that shooting at a police officer who is engaged in the performance of his duties would create in that officer a well-founded fear that violence was

imminent." [emphasis added] (Pet. Brief P. 5). However, such a claim is without merit because this Court has already established that no essential element in an information should be left to inference. State v. Dve, 346 So.2d 538, 541 (Fla. 1977).

Thus, due to the failure of the state attorney to include the element of well-founded fear of the victim in its charging document, or to charge aggravated assault as Count II in the charging document, the Fifth District Court of Appeal was correct in reversing the defendant's conviction of this crime he was never charged with.

ISSUE #6

IF THIS COURT FINDS THAT THE ELEMENTS OF AGGRAVATED ASSAULT WERE SUFFICIENTLY ALLEGED IN THE CHARGING DOCUMENT TO ALLOW A CHARGE OF AGGRAVATED ASSAULT AS A LESSER INCLUDED OFFENSE THEN THE TRIAL COURT ERRED IN DENYING DEFENDANT'S REQUESTED LESSER INCLUDED OFFENSES

If this court were to determine that even though the charging document in the instant case specifically omitted the essential element of well-founded fear of the victim, that the language in the charging document created a sufficient inference to support the aggravated assault lesser included offense jury instruction, then a relaxed standard from that seemingly mandated by this Court's language in Brown and its progeny must exist. However, under this relaxed standard the trial judge committed reversible error by refusing to give the defendant's requested instructions **on** lesser included offenses.

The defendant at trial requested two second degree felony and two first degree misdemeanor lesser included offenses. The first felony requested was defendant's proposed jury instructions #4-shooting or throwing missiles into vehicles, Section 790.19, Fla. Stat. (1974). (R. 878). Shooting or throwing missiles into vehicles is defined by Section 790.19, Fla. Stat. (1974), as "wantonly or maliciously shoot[ing] at . . . a vehicle of any kind which is being used or occupied **by any** person." Under the relaxed standard discussed above, the information in the instant case, alleging the premeditated attempt to kill S. Huss by shooting at *s*. Huss with a firearm, and the evidence at trial, that the defendant fired a gun towards the car occupied by *s*. Huss, clearly put the defendant on notice that

the crime of shooting or throwing missiles into vehicles would be a lesser included offense.

Similarly, the crime of discharging a firearm from a vehicle is more logically encompassed within the charging document and the evidence at trial than the charge of aggravated assault. Section 790.15, Fla. Stat. (1989), defines this crime as an "occupant of any vehicle who knowingly and willfully discharges any firearm from the vehicle within 1,000 feet of any person." Again, the charging document in the instant case states that the defendant, with premeditated intent, shot at s. Huss with a firearm. (R 1401-1402). And, the facts adduced at trial indicate the defendant fired a handgun from the vehicle he was driving and that S. Huss was within 1000 feet of the defendant when the shot was fired. (R. 566, 696).

The two misdemeanor lesser included offenses requested by the defendant were defendant's proposed jury instructions #3-discharging a firearm, Section 790.15(1), Fla. Stat. (1989), and defendant's proposed jury instructions #2-improper exhibition of firearm, section 790.10, Fla. Stat. (1976). (R. 859, 952). These charges are defined as knowingly discharging a firearm and exhibiting it in a threatening manner. These charges are also sufficiently encompassed within the charging document and supported by the evidence at trial to require their being read to the jury.

After determining that the lesser included instructions requested by the defendant should have been read to the jury the question then becomes whether the failure to read any of these four instructions is reversible error. The policy

behind requiring "necessary lesser included offenses" (as defined in Brown to include all offenses which may or may not be read depending on the charging document and the facts adduced at trial) is to allow the jury to exercise its inherent pardon power. State v. Abreau, 363 So.2d 1063 (Fla. 1978), State v. Bruns, 429 So.2d 307 (Fla. 1983). If the jury is not allowed a verdict option one-step below the charge they returned with a verdict on, and that option should have been presented to the jury, then the failure to give the instruction is reversible error. Butler v. State, 379 So.2d 715 (Fla. 5th DCA 1980), Hunter v. State, 389 So. 2d 661 (Fla. 4th DCA 1980), Marshall v. State, 529 So.2d 797 (Fla. 3rd DCA 1988). Such is precisely the situation in the instant case.

At trial the jury was read the following 12 jury instructions.

1. Attempted Murder of a Law Enforcement Officer
2. Attempted First Degree Murder with a firearm
3. Attempted First Degree Murder
4. Attempted Second Degree Murder with a firearm
5. Attempted Second Degree murder
6. Attempted Manslaughter with a firearm
7. Attempted Manslaughter
8. Aggravated Assault Upon a Law Enforcement Officer with a firearm
9. Aggravated Assault Upon A Law Enforcement Officer
10. Aggravated Assault With a Firearm
11. Aggravated Assault
12. Assault on a Law Enforcement Officer (R. 1129).

The first four instructions need not be considered by this Court because they are of a degree higher than what the defendant was found guilty of. Furthermore, all instructions which allowed the jury to find the defendant guilty of an offense without a firearm or not upon a law enforcement officer should also not be considered by this Court. The

testimony was uncontroverted that S. Huss was indeed a police officer and that the alleged crime was committed with a firearm, and the defendant never denied either of these facts. (R. 560, 561, 566, 696). (The court even instructed the jury that Steven Huss is a law enforcement officer.) (R. 1135). Because the evidence was such that the jury could only conclude that a firearm was used and that the alleged crime occurred against a police officer, the jury was not given an honest option to exercise its pardon power.

The Third District Court of Appeals addressed precisely this situation in Fernandez v. State, 570 So.2d 1008 (Fla. 2d DCA 1990). In Fernandez, the evidence clearly showed that the defendant had used a firearm. The jury was read jury instructions on both aggravated assault with a firearm and aggravated assault with a deadly weapon, but the defendant's requested jury instruction on public discharge of a weapon was not read (the same instruction requested by the defendant in the instant case). The jury returned with a verdict of guilty to the charge of aggravated assault with a firearm.

In reversing the defendant's conviction the appellate court addressed the appellee's argument that the jury could have exercised its pardon power by finding the defendant guilty of aggravated assault with a deadly weapon. The court stated that:

> "Under the evidence in this case, the jury could only conclude that the deadly weapon was a firearm. No reasonable jury could have found that the defendant used a weapon other than a firearm. Thus, the lesser-included offense of aggravated assault with a deadly weapon other than a firearm did not give the jury an honest option to "pardon" the defendant." Id. at 1011

Similarly, in the instant case no reasonable jury could have found that the offense was committed without a firearm or on anyone other than a law enforcement officer. The evidence was clear and unequivocal that S. Huss was a police officer and that a firearm was used. Therefore, instructions 5, 7, 9, 10, and 11 were not reasonable pardoning offenses for the jury to consider. Thus, the following options were the only reasonable options remaining for the jury to consider:

6. Attempted Manslaughter with a Firearm.
8. Aggravated Assault Upon a Law Enforcement Officer With a Firearm.
12. Assault on a Law Enforcement Officer.

Aggravated assault upon a law enforcement officer with a firearm is a second degree felony with a three year minimum mandatory prison sentence. Attempted manslaughter with a firearm is a second degree felony. Therefore, for the purposes of the jury exercising its pardon power, attempted manslaughter with a firearm would be a less severe offense than aggravated assault upon a law enforcement officer with a firearm. Equally less severe offenses would be the two charges the defendant requested but which were denied by the trial judge; shooting or throwing missiles into vehicles, Section 790.19 Fla. Stat. (1974), and discharging firearm from vehicle, Section 790.15(2) Fla. Stat. (1989). The failure to give an instruction which the defendant requests and which is one step removed from the offense the defendant is convicted of is reversible error regardless of whether another "equal" instruction was given. Reddick v. State, 394 So.2d 417 (Fla. 1981), Piantadosi v. State, 399 So.2d 382

(Fla. 3rd DCA 1981), Marshall v. State, 529 So.2d 797 (Fla. 3rd DCA 1988). Therefore, the failure of the trial court to instruct the jury on the defendant's requested jury instructions is reversible error.

A case involving a factual situation strikingly similar to the instant case is Fernandez v. State, 570 So. 2d 1008 (Fla. 2nd DCA 1990) (discussed supra). In Fernandez, the alleged victim accused the defendant of producing a firearm from behind his back, pointing the gun directly at the alleged victim, and firing one shot. The defendant, however, testified that he produced a handgun from his glove compartment and fired a warning shot over the alleged victim's head. The defendant was charged with aggravated assault with a firearm, and requested the lesser included offense of discharge of firearm in public (the same request the defendant made in the instant case). The Second District Court of Appeal, in reversing the defendant's conviction of aggravated assault with a firearm, held that it was harmful error to omit the defendant's requested jury instruction.

Similarly, in the instant case Steven Huss testified that the defendant had aimed his gun in his direction and fired a shot. The defendant, however, in a sworn statement to the police which was introduced and played at trial, stated that he only fired the shot over the police cruiser and that he did not want to hit the police car or the officer. (R. 696-700). The defendant requested jury instructions on discharging a firearm, shooting or throwing missiles into vehicles, discharging firearm from vehicle, and improper exhibition of firearm. The failure to give

these instructions is, as in Fernandez, reversible error.

The prosecutor at the trial level in the instant case tried to have the best of two worlds. He filed the most serious charge available, yet knowing that the jury was unlikely to return with a guilty verdict he desired the three year minimum mandatory aggravated assault with a firearm charge as a lesser included offense. Unfortunately for the prosecutor, his information failed to allege the elements of aggravated assault and did not put the defendant on notice of this charge as a potential lesser offense. The prosecutor then compounded the problem by objecting to the defendant's proposed jury instructions which were more logically encompassed within the charging document and supported by the evidence than the charge of aggravated assault. The result was that the defendant was either convicted of a charge which should never have been presented to the jury, or the jury was not allowed to properly exercise its inherent pardon power. Under either situation the defendant's conviction was properly reversed by the Fifth District Court of Appeals.

CONCLUSION

Based on the arguments presented in this answer brief, respondent respectfully asks this Honorable Court to quash it's order accepting jurisdiction in the instant case because there is no express and direct conflict between the instant case and Kimbrough v. State, 356 So. 2d 1294 (Fla. 4th DCA 1978). In the alternative, respondent asks this Honorable Court to affirm the Fifth District Court of Appeals decision reversing the defendant's conviction.

CERTIFICATE OF SERVICE

I, as counsel for the Respondent, respectfully submit this "REPLY BRIEF OF RESPONDENT" to this Honorable Court, and I HEREBY CERTIFY that a true and correct hereof has been furnished, by MAIL delivery, to the Honorable Robert Butterworth, Attorney General, **210** N. Palmetto Avenue, Suite **447**, Daytona Beach, Florida 32014, this 16th day of July, 1992.

By: _____

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