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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CLERK, SUPREME COURT

By [Signature]
Chief Deputy Clerk

WILLIAM J. O'ROURKE,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO.: 84,934

SUPPLEMENTAL POINT OF PETITIONER'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

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SUMMARY OF ARGUMENT

The trial court erred in failing to give the standard jury instruction on justifiable and excusable homicide contained in the Introduction to Homicide. Without this standard instruction being given as part of the trial court's definition of the charged offense of attempted premeditated murder, fundamental error occurred since the jury was not fully instructed as to what constitutes lawful versus unlawful acts. Moreover, the lack of any objection by defense counsel to the trial court's failure to give the aforementioned mandatory standard jury instruction on excusable or justifiable homicide has recently been held by the Fifth District Court of Appeals to constitute fundamental error, absent a specific waiver on the record by defense counsel. Therefore, a new trial is required for the charge of attempted premeditated murder due to such fundamental error appearing on the face of the instant record.

SUPPLEMENTAL POINT

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR
IN FAILING TO GIVE THE STANDARD JURY
INSTRUCTION ON JUSTIFIABLE AND EXCUSABLE
HOMICIDE CONTAINED IN THE INTRODUCTION TO
HOMICIDE WHICH IS REQUIRED TO BE GIVEN IN ALL
MURDER CASES.

In the case at bar, the State filed an information charging the Petitioner, in count one, with attempted premeditated murder and kidnapping. (R 1) The trial court instructed the jury on attempted first degree premeditated murder, as well as on the lesser-included offenses of aggravated battery and battery, but failed to read to the jurors the required instructions pertaining to justifiable and excusable homicide contained in the "Introduction to Homicide" of the Standard Jury Instructions. (T 589-590) Even though the instructions on justifiable and excusable homicide were never asked for by defense counsel, fundamental error resulted when the trial court failed to include the introductory definitions of justifiable and excusable homicide as part of the court's instructions to the jury concerning the offense of attempted premeditated murder.

This Court has held that the definitions of both justifiable and excusable homicide contained in the "Introduction to Homicide" of the Standard Jury Instructions are to be read in all murder and manslaughter cases. State v. Smith, 573 So.2d 306, 309-310 (Fla. 1990). See also Stallings v. State, 634 So.2d 784 (Fla. 5th DCA 1994). In Stallings, the Fifth District Court of Appeal held, as well, that it was fundamental error for the trial court to fail to give the mandatory standard instruction

contained in the Introduction to Homicide which provides the definitions for justifiable and excusable homicide. The district court further found that because defense counsel did not specifically request to either limit or eliminate the standard definitions of excusable and justifiable homicide from the initial homicide instructions, the absence of an objection did not waive any error. The logic behind this rule is clear. For jurors to be properly instructed on what constitutes, for example, first degree premeditated murder, the trial court must make sure they are aware of what does not constitute first degree murder. This is done by the trial court including in every murder or manslaughter case the definition of justifiable and excusable homicide contained in the "Introduction to Homicide" as part of the trial court's instructions to the jury. See Rojas v. State, 552 So.2d 914 (Fla. 1989).

One of the elements of first degree premeditated murder is that the death was caused by a criminal act or agency of the accused. Jurors need to know just what is a "criminal act." They need to know that a certain act may not be criminal if it is an act that falls under either justifiable or excusable homicide. Otherwise, a non-criminal act may be mistakenly thought by the jury to be criminal.

More recently, the Fifth District Court of Appeal in Blandon v. State, 20 Fla. L. Weekly D1421 (Fla. 5th DCA June 16, 1995), found fundamental error due to the trial court's failure to give the definitions of justifiable and excusable homicide

contained in the "Introduction to Homicide" of the Standard Jury Instructions when instructing the jury on the offense of attempted murder of a police officer. Nor was such error found to be dissipated by the fact that defense counsel did not request either definition to be read to the jury, or by the fact that he did not object when the trial court failed to give the aforementioned standard instruction. Similarly, then, in the case sub judice, although defense counsel did not object when the trial court failed to include, as part of the trial court's instructions to the jury, any definition of excusable or justifiable homicide, this did not obviate the mandatory requirement that both definitions be read to the jury, absent a specific waiver on the record by defense counsel. Id.; Armstrong v. State, 579 So.2d 734 (Fla. 1991); Smith, supra; and Stallings, supra.

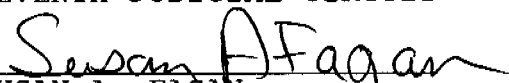
Finally, numerous cases have further held that such fundamental error may be addressed at any time by a reviewing court even if it has not previously been raised below at the trial level or argued as an error on appeal. State v. Davis, 290 So.2d 30 (Fla. 1974); Castor v. State, 365 So.2d 701 (Fla. 1978); Rojas, supra; Travers v. State, 578 So.2d 793 (Fla. 1st DCA 1991); and Dydek v. State, 400 So.2d 1255 (Fla. 2d DCA 1981). Accordingly, Petitioner respectfully requests that this Honorable Court remand for a new trial as to the attempted premeditated murder charge based on the fundamentally erroneous jury instruction given by the trial court as to that charge.

CONCLUSION

BASED UPON the foregoing cases, authorities and policies, the Petitioner respectfully requests this Honorable Court remand for a new trial as to the attempted premeditated murder charge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32114, in his basket, at the Fifth District Court of Appeal, and mailed to: William J. O'Rourke, No. A 016652, Liberty C.I., P. O. Box 999, Bristol, FL 32321-0099 on this 29th day of June, 1995.


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