FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

vs.

Case No. 87,633
5th DCA No. 95-0842

RICHARD ESPINOSA,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT

Assuming that resisting arrest without violence is a permissive lesser included offense of resisting arrest with violence, the Respondent should not be permitted to challenge on appeal the sufficiency of the former when he requested that the jury be instructed on it. Where the charging document encompasses the elements of a permissive lesser included offense and there is some evidence presented as to each element, the trial court can not refuse to instruct the jury on this offense. This rule is based on the recognition of the jury's inherent power to pardon a defendant by convicting him of a less serious offense than the one charged. By requesting the trial court instruct the jury on resisting arrest without violence, the Respondent was asking the jury to exercise its pardon power. Thus, he waived his right to later challenge a conviction for this offense based on the insufficiency of the evidence.

ARGUMENT

POINT I

RESPONDENT, BY REQUESTING THAT THE JURY BE INSTRUCTED ON A PERMISSIVE LESSER INCLUDED OFFENSE, ASKED THE JURY TO EXERCISE ITS PARDON POWER; THUS, HE HAS WAIVED IS RIGHT TO APPEAL THE SUFFICIENCY OF THE EVIDENCE OF A CONVICTION ON THE LESSER OFFENSE.

Assuming that resisting arrest without violence (section 843.01, Florida Statutes (1993) is a permissive lesser offense of resisting arrest with violence (section 843.02, Florida Statutes (1993), the Petitioner reasserts its position that Respondent waived his right to challenge on appeal the State's failure to prove all the elements of the former. A court must always instruct the jury on necessarily included lesser offenses. This requirement is grounded upon the recognition of the jury's right to exercise it "pardon power" by convicting the defendant of a less serious offense than the crime charged. State v Wimberly, 498 So. 2d 929 (Fla. 1986). Similarly, instruction on a permissive included lesser offense is precluded only where there is a total lack of evidence of the lesser offense. Amado v State, 595 So. 2d 282 (Fla. 1991); Jones v State, 655 So. 2d 960 (Fla. 3d DCA 1996). Whether a permissive lesser included offense is indeed a lesser offense of the crime charged depends on a) the

accusatory pleadings and b) the evidence at the trial. Brown v State, 206 So. 2d 377 (Fla. 1968). Brown outlines the procedure the trial court is to use in making this determination:

> [T]he trial judge must examine the information to determine whether it alleges all the elements of a lesser offense, albeit such lesser offense is not an essential ingredient of the major offense alleged. If the accusation is present, then the court must determine from the evidence whether it supports the allegation of the lesser included offense. If the allegata and probata are present then there should be a charge on the lesser offenses.

Id. at 383.

The defendant, upon requesting instruction upon the lesser offense and asking the jury to exercise its pardon power, cannot then be heard to complain that the State did not sufficiently prove all the elements of the lesser offense. Silvestri v State, 332 So. 2d 351 (Fla. 4th DCA 1976), aff'd 340 So. 2d 928 (Fla. 1976). In Silvestri, the defendant was charged with conspiracy to sell and possess cocaine, possession of cocaine, and making a false report of a crime, but was adjudicated guilty of the attempt of each of the crimes. Id. at 353. The Fourth District Court of Appeal noted that there was no evidence to support the

verdicts of attempt which the jury returned. Id. However, the fact that the defendant did not merely attempt to commit the crimes but actually completed them did not preclude affirmance of the judgments which reflect that she did. The logic behind this ruling is the recognition that a jury has the power to pardon for a more serious offense by convicting him only of a lesser one which does not even exist as a matter of fact:

> This conclusion requires, in turn, the holding that the jury cannot be faulted--and a defendant (who is this case did not object to the instruction on attempts) cannot be heard to complain--when the jury exercises it's power to pardon him or her through the conviction of a crime which he or she undoubtedly did not commit.

Id.; Bradford v State, 567 So. 2d 911 (Fla. 1st DCA 1990), rev. den. 577 So. 2d 1325 (Fla. 1991) and Kirby v State, 625 So. 2d 51 (Fla. 3d DCA 1993).

Thus, assuming the present information was broad enough to encompass resisting arrest without violence as a lesser included offense and some evidence was introduced regarding the legality of the arrest, the trial court had to instruct the jury on this offense regardless of the sufficiency of the evidence (which the Fifth District Court of Appeal found was insufficient). The

defendant, by requesting the instruction, has asked the jury to exercise its pardon power. He cannot now complain about the sufficiency of the evidence as to the lesser charge and has waived his right to challenge it on appeal. This is the same logic that led the Ray court to hold that a defendant's request for instruction on an erroneous charge amounts to a waiver of the defendant's right to challenge a conviction based on the erroneous charge. Ray v State, 403 So. 2d 956 (Fla. 1991).

The Respondent should not be permitted to seek reversal of a conviction of a lesser offense based on the State's failure of proof after requesting that the jury be instructed on that offense. Otherwise, a court would have to instruct the jury o the lesser offense knowing that the evidence will not support a conviction, and the defendant could seek reversal on this ground. Clearly, this result would cut the heart out of the "jury pardon" theory. Thus, this Court should hold that the Respondent waived his right to challenge the sufficiency of the State's evidence as to the legality of the arrest when he requested that the court instruct the jury on resisting arrest without violence as a lesser included offense of resisting arrest with violence.

CONCLUSION

Based on the arguments and the authorities presented herein, the Petitioner respectfully prays this Honorable Court answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply Brief of Petitioner has been hand delivered to the Public Defender's box at the Fifth District Court of Appeals on this 24th day of June, 1996.

Allison Leigh Morris
Of Counsel

FLORIDA SUPREME COURT

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RICHARD ESPINOSA,

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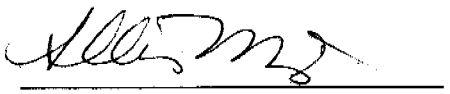
PETITIONER'S REQUEST FOR ORAL ARGUMENT

COMES NOW the Petitioner, and pursuant to Florida Rule of Appellate Procedure 9.320, requests oral argument in this matter.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Request for Oral Argument has been hand delivered to the Public Defender's box at the Fifth District Court of Appeals on this 21st day of June, 1996.

Allison Leigh Morris
Of Counsel