ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STEVE LAMONT JOHNSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____ /

Case No. 96,234
DCA Case No. 1998-165

JURISDICTIONAL BRIEF OF ~~RESPONDENT~~ Petitioner

NANCY A. DANIELS
PUBLIC DEFENDER

GLENNA JOYCE REEVES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 0231061
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, Steve Lamont Johnson, was the defendant in the trial court and the appellant in the District Court of Appeal, First District. Respondent, the State of Florida, was the prosecuting authority in the trial court and appellee in the District Court. The parties will be referred to herein as they appear before this Court.

The opinion of the First District Court is reported in Johnson v. State, 24 Fla. L. Weekly D1138 (Fla. 1st DCA May 5, 1999), and is attached as an appendix. The appendix will be referred to as "A", followed by the appropriate page number, both in parentheses.

STATEMENT OF TYPE STYLE

This brief was typed in Courier New, 12 point.

STATEMENT OF THE CASE AND FACTS

Among other things, petitioner was charged with and convicted of causing bodily injury during the commission of a felony, to wit: burglary. (A-1). He contended on appeal that since the convenience store was open to the public at the time of the robbers' entry, the evidence failed to establish that a burglary[1] occurred. (A-2-3).

Acknowledging this Court's opinion in Miller v. State, 24 Fla. L. Weekly S155 (Fla. April 1, 1999)(A-16), the District Court noted that there is a complete defense to a burglary charge if the premises were open to the public. (A-3). The District Court affirmed the conviction, however, based upon the conclusion that the area "behind the cash-register counter" was not an area open to the public.[2]

In his motion for rehearing, petitioner argued that the court's rationale [that the check-out counter area within the open store was non-public] had been expressly rejected by this Court in State v. Butler, 24 Fla. L. Weekly S203 (Fla. April 29, 1999). (A-5, A-7). Without discussion, the District Court denied rehearing. (A-13).

Petitioner timely filed his Notice to Invoke. (A-14-15).

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[1] The commission of a burglary was an essential element of the crime of causing bodily injury the commission of a felony.

[2] According to the District Court, one of the store owners had instructed petitioner not to go behind the check-out counter. (A-2).

SUMMARY OF ARGUMENT

Petitioner's conviction for causing bodily injury during the commission of a felony, to wit: burglary, was affirmed although the undisputed evidence showed the premises allegedly burglarized -- the convenience store -- was open to the public at the time of the entry. The District Court's affirmance was based upon the rationale that the area by the cash register was not open to the public. Jurisdiction should be accepted since the District Court's opinion expressly and directly conflicts with State v. Butler, 24 Fla. L. Weekly S203 (Fla. April 29, 1999), and State v. Laster, 24 Fla. L. Weekly S203 (Fla. April 29, 1999), as well as Miller v. State, 24 Fla. L. Weekly S155 (Fla. April 1, 1999).

ISSUE PRESENTED

THE OPINION IN JOHNSON V. STATE, 24 Fla. L. Weekly D1138 (Fla. 1st DCA May 5, 1999), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN MILLER V. STATE, 24 Fla. L. Weekly S155 (Fla. April 1, 1999); STATE V. BUTLER, 24 Fla. L. Weekly S203 (Fla. April 29, 1999); AND STATE V. LASTER, 24 Fla. L. Weekly S203 (Fla. April 29, 1999).

In its opinion, the lower court affirmed petitioner's conviction for causing bodily injury during the commission of a felony, to wit: burglary, although the evidence was undisputed that the convenience store where the offense occurred was open to the public at the time of petitioner's entry into the store. (A-2-3). The lower court acknowledged this Court's holding in Miller v. State, 24 Fla. L. Weekly S155 (Fla. April 1, 1999)(A-16), that "if a defendant can establish that the premises were open to the public, then this is a complete defense" to a burglary charge. (A-3). The lower court sought to distinguish Miller, however, by concluding that the "check-out counter" or the "cash-register counter" was not an area open to the public. (A-2, A-3). By attempting to draw this distinction, the opinion below conflicts with State v. Butler, 24 Fla. L. Weekly S203 (Fla. April 29, 1999)(A-18), and State v. Laster, 24 Fla. L. Weekly S203 (Fla. April 29, 1999)(A-18), as well as Miller v. State, itself.

In Miller v. State, supra, this Court held that being "open to the public" is a complete defense to burglary. This Court held that "[t]he only relevant question is whether the premises were open to

the public at the time the defendant entered or remained with the intent to commit an offense therein." Miller v. State, supra at S516. The Court further noted that

> Whether or not consent may have been withdrawn, either by direct or circumstantial evidence, is not an issue.

(Emphasis supplied).

In the present case, the premises petitioner was alleged to have burglarized -- the convenience store -- was open to the public at the time petitioner entered with the intent to commit robbery. The lower court acknowledged this:

> [A]ppellant and his co-defendant ... entered a convenience store that was open for business.

(A-2).

> It is undisputed that in the instant case the store was open to the public when appellant entered.

(A-3). Under Miller, the complete defense was thus established. Whether consent to enter a portion of the store may have been withdrawn by the "other store owner's command" (A-2) is irrelevant.

In State v. Butler, supra, this Court affirmed the lower court's ruling that

> the trial judge should have granted his motion for judgment of acquittal on the burglary charge because the only evidence at trial concerning the convenience store at the time of his entry was that it was open to the public, and that one entering the premises under such circumstances cannot be convicted of burglary.

Butler v. State, 711 So.2d 1183 (Fla. 1st DCA 1998). Further, this Court specifically held:

> We do not find any merit to the state's argument in this case that the area behind the counter was not open to the public.

State v. Butler, supra. This Court held likewise in State v. Laster, supra. The decision of the lower court specifically conflicts with State v. Butler, supra, and State v. Laster, supra, in this regard.

As in Butler and Laster, the convenience store petitioner was alleged to have burglarized was open to the public at the time of his entry. The lower court cannot, consistent with Butler and Laster, characterize the check-out counter area as a non-public area within the otherwise "open to the public" store. Nor can the court define the check-out counter area as premises separate from the store itself.[3] To quote Miller v. State:

> [P]remises are either open to the public or they are not.

The premises petitioner was alleged to have burglarized -- the convenience store -- was open to the public at the time of his entry. Under Miller, Butler and Laster, these facts establish a complete defense to the burglary charge. The District Court's holding to the contrary must be reversed.

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[3] Dakes v. State, 545 So.2d 939 (Fla. 3d DCA 1989), can be readily distinguished since the storeroom within the store could be classified as a separate building.

CONCLUSION

Because the decision below expressly and directly conflicts with decisions of this Court, jurisdiction should be accepted and the decision in Johnson v. State should be quashed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to L. MICHAEL BILLMEIER, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL; and a copy has been mailed to appellant on this date, August 10, 1999.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

STEVE LAMONT JOHNSON,

Petitioner,

v. Case No.
DCA Case No. 1998-165

STATE OF FLORIDA,

Respondent.
_____/

APPENDIX TO JURISDICTIONAL BRIEF OF PETITIONER

PD

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

STEVE LAMONT JOHNSON,

Appellant,

v.

CASE NO. 98-165

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed May 5, 1999.

An appeal from the Circuit Court for Duval County.
William Wilkes, Judge.

Nancy A. Daniels, Public Defender; Glenna Joyce Reeves, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; L. Michael Billmeier, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Appellant raises three issues in the instant appeal. We affirm on all three issues raised, but we write to address only one.

Following trial by jury, appellant was convicted as charged of attempted armed robbery while wearing a mask, attempted second degree murder, and causing bodily injury during the commission of a felony, specifically burglary. Appellant contends that his

conviction for causing bodily injury during the commission of a felony cannot stand because the state did not establish an essential element of this crime, i.e., commission of the felony of burglary as charged. The state is correct that this specific claim was not preserved for appeal, but as appellant points out, a conviction is fundamentally erroneous when the facts affirmatively proven by the state do not constitute the charged offense as a matter of law. See Harris v. State, 647 So. 2d 206, 208 (Fla. 1st DCA 1994); K.A.N. v. State, 582 So. 2d 57, 59 (Fla. 1st DCA 1991) ("[A] conviction in the absence of a prima facie showing of the crime charged is fundamental error that may be addressed by the appellate court even though not urged below."). We therefore review the issue to determine whether fundamental error exists.

In the instant case, appellant argues that under the burglary statute, entry into premises open to the public is excluded from the definition of burglary. See § 810.02(1), Florida Statutes (1995). He thus claims that because the convenience store was open to the public when he entered, the state failed to establish that a burglary occurred. As the facts of this case demonstrate, however, appellant's claim fails.

In need of bail money for his girlfriend, appellant and his co-defendant, with masked faces and guns drawn, entered a convenience store that was open for business. While holding a gun on Mr. Goswami, one of the store owners, appellant followed him behind the check-out counter where the cash register was located, heedless of the other store owner's command that appellant was not

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permitted in that area. After appellant entered the prohibited area, he turned and fired twice at Mrs. Goswami, wounding her hand. Mr. Goswami immediately began to struggle with appellant's co-felon, and when appellant began striking her husband, Mrs. Goswami fought with appellant. During the fray, Mrs. Goswami obtained the gun she and her husband kept in their shop. Having armed herself, she held the gun on appellant, told the two perpetrators to leave her husband alone, and shot appellant's cohort.

We recognize that the supreme court has recently held that "if a defendant can establish that the premises were open to the public, then this is a *complete* defense" to a burglary charge. Miller v. State, 24 Fla. L. Weekly S155 (Fla. April 1, 1999). It is undisputed that in the instant case the store was open to the public when appellant entered. The area behind the cash-register counter was not, however, an area open to the public. This point was clearly made to appellant by an owner of the store before appellant forced the other owner to the cash register at gunpoint and followed him into the prohibited area. We thus affirm appellant's conviction for causing bodily injury during the commission of a burglary. See Dakes v. State, 545 So. 2d 939, 940 (Fla. 3d DCA 1989) ("We hold that although the store itself was open to the public, the closed storeroom to which access was clearly restricted was not part of the premises open to the public, within the scope of section 810.02."); Florida Standard Jury Instructions in Criminal Cases, *Burglary* § 810.02 (July 1997).

JOANOS, MINER and DAVIS, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

STEVE LAMONT JOHNSON,

Appellant,

v. CASE NO. **98-00165**

STATE OF FLORIDA,

Appellee.
_____/

MOTION FOR REHEARING

Appellant, **STEVE LAMONT JOHNSON,** by and through his undersigned attorney, files this Motion for Rehearing pursuant to Rule 9.330, Florida Rules of Appellate Procedure, and requests that the Court grant rehearing for the following reasons:

In his brief, appellant argued that his conviction for the offense of causing bodily injury in the course of committing a felony could not be sustained because the felony specifically alleged, burglary, had not been proven by the state since the undisputed evidence showed that the convenience store was open to the public at the time of the offense. In its opinion of May 5, 1999, this Court acknowledged the Supreme Court's recent holding in Miller v. State, 24 Fla. L. Weekly S155 (Fla. April 1, 1999), that "if a defendant can establish that the premises were open to the public, then this is a complete defense" to a burglary charge. This Court acknowledged that it was "undisputed that in the instance case the store was open to the public when appellant

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entered." (Slip opinion, p. 3). However, the Court upheld the conviction, distinguishing Miller, because "the area behind the cash-register counter was not, however, an area open to the public." In so finding, appellant submits the Court has overlooked or misapprehended the law as well as misapprehended the facts. These follow seriatim:

a. The distinction between public and nonpublic areas within an open store has been specifically rejected by the Supreme Court. In State v. Butler, 24 Fla. L. Weekly S203 (Fla. April 29, 1999), the Supreme Court affirmed this Court's decision in Butler v. State, 711 So.2d 1183 (Fla. 1st DCA 1998). In doing so, the Supreme Court specifically held:

> ***We do not find any merit to the state's argument in this case that the area behind the counter was not open to the public.***

Thus, it appears that the Supreme Court has expressly rejected attempts to draw specified areas as being outside the purview of the "open to the public" defense. Based upon Butler, appellant submits rehearing should be granted.

b. In finding that the cash register counter area was not open to the public, the Court relied upon Dakes v. State, 545 So.2d 939 (Fla. 3d DCA 1989). Dakes is both factually and, therefore, legally distinguishable from the present case. In Dakes, although the store itself was open to the public, the storeroom from which items were stolen was closed and access was clearly restricted from

that area. This area was described as a storeroom. The door leading to the room was unlocked but there were two signs on the door indicating "Authorized personnel only" and "Associates only". In affirming the conviction of burglary of a structure, the court indicated that the closed storeroom was not part of the premises open to the public.

Factually, the present case is distinguishable. As the Court noted, the record supports the inference that the store was co-owned by Mr. Goswami and his wife, Mrs. Goswami. While the Court's opinion points out that Mrs. Goswami had commanded that appellant not go into the cash-register counter area, the Court's opinion overlooks the contradictory commands of Mr. Goswami who stated:

> I told them I will give you the money, **you come with me,** I will give you the money. I was nearer to the cooler like this and I ran to the register if it is here.

(II-26). Further, from Mr. Goswami's testimony, it appears that the struggle took place prior to his arrival at the cash-register counter area. (II-27, 35). Thus, unlike the facts in Dakes, it is not clear that the area in question was a restricted one. Unlike Dakes, there was no evidence that appellant broke into a separate room that was not open to the public or that had been posted as a restricted area.

Dakes is legally distinguishable for another reason. Section 810.011, Fla. Stat., defines "structure" as a building of any kind, either temporary or permanent, which has a roof over it, together

with the curtilage thereof. The closed restricted storeroom in Dakes constituted a structure which could be burglarized. The undefined area in the present case can not be a structure capable of being burglarized since it does not meet the definition of structure by having walls around it. Small v. State, 710 So.2d 591 (Fla. 4th DCA 1998).

c. It is clear from both the state's closing arguments discussed extensively in appellant's reply brief as well as the jury instructions given in the case (IV-338-340) that the state was relying upon the theory rejected by Miller that consent to enter an open establishment was implicitly revoked when it became apparent that the intruders intended to rob the store. Under Miller and Butler, the present case should be reversed. Even if the Dakes rationale could be applied, appellant still would be entitled to a new trial since it would be a jury question to determine whether or not the area itself was open to the public or not after full and proper jury instructions. See, Cohen v. Katsaris, 530 F.Supp. 1092 (D.C. 1982).

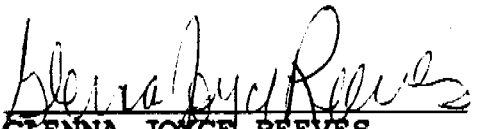
Wherefore, based upon the foregoing, appellant requests that rehearing be granted.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was furnished to **L. MICHAEL BILLMEIER,** by delivery to The Capitol, PL01, Tallahassee, FL 32399-1050, and by U.S. Mail to appellant, on this date, June 1, 1999.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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ATTORNEY FOR APPELLANT

Reeves

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

STEVE LAMONT JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 98-00165

REPLY TO MOTION FOR REHEARING

Pursuant to Florida Rule of Appellate Procedure 9.330(a), the Appellee, the State of Florida (hereinafter State), files this reply in opposition to Appellant's motion for rehearing, filed June 1, 1999, and in support of its opposition states:

1. This Court issued an opinion in this case on May 5, 1999. See Johnson v. State, 24 Fla. L. Weekly D1138 (Fla. 1st DCA May 5, 1999). Appellant filed his motion for rehearing on June 1, 1999. In the motion, he argues that State v. Butler, 24 Fla. L. Weekly S203 (Fla. April 29, 1999), "expressly rejected attempts to draw specified areas as being outside the purview of the 'open to the public' defense." Motion at 2. Appellant's claim should be rejected and rehearing should be denied.

2. In Johnson, this Court affirmed Appellant's conviction for causing bodily injury during the commission of a felony. This Court acknowledged that Miller v. State, 24 Fla. L. Weekly S155 (Fla. April 1, 1999), held that if a defendant can establish that the "premises were open to the public, then this is a complete

defense" to burglary but found that the area behind the "cash-register counter, was not, however, an area open to the public." Johnson, 24 Fla. L. Weekly at D1139. Butler does not conflict with this holding. Butler was expressly limited to the facts of that case:

> We do not find any merit to the State's argument **in this case** that the area behind the counter was not open to the public. Butler, 24 Fla. L. Weekly at S203. (emphasis added).

Butler does not hold that because part of the premises was open to the public, the entire premises is open to the public. Butler simply rejected the State's position in that case that the area behind the counter was open to the public. The Butler holding prevents the "absurd result" postulated by Ray v. State, 522 So. 2d 963, 967 n. 6 (Fla. 3d DCA), rev. denied, 531 So. 2d 168 (Fla.1988). Butler does not require a different result here.

3. Here, unlike Butler, this Court found that the area behind the counter was not open to the public because the owners expressly put Appellant on notice that the area was not open to the public:

> While holding a gun on Mr. Goswami, one of the store's owners, appellant followed him behind the check-out counter where the cash register was located, **heedless of the other store owner's command that appellant was not permitted in that area.** Johnson, 24 Fla. L. Weekly at D1139. (emphasis added).

Johnson continued:

> The area behind the cash-register counter was not, however, an area open to the public. This point was clearly made to appellant by an owner of the store before appellant forced the other owner to the cash register at gunpoint and followed him into the prohibited area. Id.

Despite these findings by this Court, Appellant claims that Mr. Goswami invited him behind the counter. Motion at 3.[1] Appellant's claim is improper reargument. See Fla.R.App.P. 9.330(a)(motion for rehearing shall not re-argue the merits of the court's order). It should be rejected.

4. This Court correctly found that the area behind the counter was not open to the public and properly affirmed Appellant's conviction. This is consistent with Dakes v. State, 545 So. 2d 939 (Fla. 3d DCA 1989), and Downer v. State, 375 So. 2d 840 (Fla. 1979)(a hospital can restrict the public's access to certain areas). Butler does not require a contrary result. This Court should deny Appellant's motion for rehearing.

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[1]Mr. Goswami testified that when Appellant and his co-defendant came into the store, they were armed. (II, 26). When he realized he was being robbed, he said "come with me, I will give you the money." (II, 26). The State submits that a previous restricted area of the premises is not rendered "open to the public" simply because criminals threaten the owner at gunpoint.

WHEREFORE, the State respectfully requests this Honorable Court to deny Appellant's motion for rehearing.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

L. MICHAEL BILLMEIER
Assistant Attorney General
Florida Bar No. 0983802

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The Capitol
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(850) 414-3300 Ext. 4595
COUNSEL FOR APPELLEE
[AGO #L98-1-1674]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply to Motion for Rehearing has been furnished by U.S. Mail to Glenna Joyce Reeves, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 11th day of June, 1999.

L. Michael Billmeier
Attorney for the State of Florida

[C:\USERS\CRIMINAL\PLEADING\98101674\JOHNSORO.WPD --- 6/11/99,8:11 am]

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DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

noted

July 30, 1999

CASE NO.: 1998-165
L.T. No. : 97-4378 CFA

Steve Lamont Johnson v. State Of Florida

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion filed June 1, 1999, for rehearing is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

JON S. WHEELER, CLERK

DISTRICT COURT OF APPEAL
SAT CITO SI IUSTE
FIRST DISTRICT
STATE OF FLORIDA

Served:

Glenna Joyce Reeves
L. Michael Billmeier, A.A.G.
[redacted]
James W. Rogers, A.A.G.
William J. Bakstran

jm

JUL 30 1999

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

STEVE LAMONT JOHNSON,

Petitioner,

v. CASE NO. 1998-165

STATE OF FLORIDA,

Respondent.
_____/

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

The Petitioner, STEVE LAMONT JOHNSON, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered July 30, 1999. The decision expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same grounds of law.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to L. Michael Billmeier, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL 32399-1050; and a copy has been mailed to appellant on this date, August 9, 1999.

Glenna Joyce Reeves

GLENNA JOYCE REEVES
Assistant Public Defender

Volume 24, Number 15
April 9, 1999

SUPREME COURT OF FLORIDA

Criminal law—Murder—Death penalty—Burglary—Affirmative defense of consent to entry—If defendant can establish that premises were open to public, then this is a complete defense to charge of burglary—Burglary conviction based on defendant's entering grocery store was improper where state conceded that store was open to the public—Reversal of burglary conviction invalidates aggravating circumstance that murder was committed during course of burglary—Under circumstances, reliance on improper aggravator not harmless—Defendant entitled to new penalty phase proceeding before a jury

WILLIE MILLER, Appellant, v. STATE OF FLORIDA, Appellee. Supreme Court of Florida. Case No. 85,744. April 1, 1999. An Appeal from the Circuit Court in and for Duval County, William A. Wilkes, Judge - Case No. 93-8494 CF. Counsel: Nancy Daniels, Public Defender, Second Judicial Circuit, Tallahassee, and Bill Salmon, Gainesville, for Appellant. Robert A. Butterworth, Attorney General, and Gypsy Bailey and Mark S. Dunn, Assistant Attorneys General, Tallahassee, for Appellee.

REVISED OPINION

[Original Opinion at 23 Fla. L. Weekly S389a]

The Motion for Rehearing filed by Appellee, the State of Florida, having been considered in light of the revised opinion, is hereby denied.

(PER CURIAM.) We have on appeal the judgment and sentence of the trial court imposing the death penalty upon Willie Miller. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Miller was found guilty of all five counts charged: first-degree murder (against victim James Wallace), attempted first-degree murder with use of a firearm (against victim James Jung), armed robbery with a firearm (against victim James Jung), burglary (including an assault while using a firearm), and robbery with a firearm (against James Wallace). On April 28, 1995, the judge sentenced Miller to death following a twelve-to-zero jury recommendation.

Miller (34 years old) and his nephew Samuel Fagin (16 years old) entered the Jung Lee grocery store at around 4:30 p.m. on July 5, 1993. Miller's brother had given them the idea to rob the store and had given Miller and Fagin a .22 caliber rifle. James Jung (who ran the store) testified that he, both his parents (who owned the store), the store's security guard (James Wallace), Mary McGriff, and two children were inside.

Fagin testified that after entering, Miller put the rifle up to Wallace's face, then Fagin took Wallace's .38 caliber gun. Fagin said he heard a gunshot, then saw blood coming from Wallace's face. Fagin then shot James Jung—he claimed accidentally—who was behind the counter. Miller took the money from the cash register. Miller and Fagin then left. Jung was hospitalized but ultimately recovered from the gunshot wound. Wallace developed other ailments during his hospitalization and died on January 1, 1994. His doctor testified that he died of pneumonia and respiratory failure; the medical examiner testified that the cause of death was a gunshot wound to the head.

Fagin testified that he and Miller split the money. Eric "Bobby" Harrison testified that he bought the .38 caliber gun from Fagin. Also testifying were: firearms experts, a fingerprint expert who testified that a print on the cash tray belonged to Miller, and several jailhouse informants who testified as to conversations with Miller where he said he had shot Wallace. Sheila Rose testified that she was across the street from the grocery when her grandmother Mary McGriff ran over and told her Wallace had been shot. Rose said that through the window she saw a man jump across the counter and that then she saw two men exit the store. She described both men. The defense did not call any witnesses, and Miller did not testify in his own defense. The jury deliberated for approximately two hours before returning the guilty verdicts.

At the penalty phase, the State called court operations supervisor Hanzelon to testify as to Miller's prior armed robbery conviction. The State called Fertgus, who testified that the fingerprints affixed to the prior judgment matched the prints he took from Miller in 1995, and Detective Goodbred, who recounted the details of the 1984 offense. The defense called no witnesses. The jury deliberated for half an hour before returning its twelve-to-zero vote.

After submitting sentencing memoranda, the defense submitted a copy of Miller's school records at the sentencing hearing and noted that Miller had been examined by Dr. Krop and Dr. Miller. At sentencing, the defense introduced a letter from Miller's G.E.D. instructor. The court sentenced Miller to death on the first-degree murder count, finding three aggravators: prior violent felony conviction, felony murder, and pecuniary gain. The court found no statutory mitigation, but considered nonstatutory mitigation presented in the P.S.I. and defense memorandum: family background and abuse as a child. The court found that the aggravation outweighed the mitigation.

The court also sentenced Miller to sentences of life imprisonment for the attempted murder of Jung, the two counts of armed robbery, and the armed burglary, with a three-year mandatory minimum on the attempted murder charge based on use of a firearm. The trial court departed from the guidelines, listing as reasons the unscored capital conviction, the excessive physical trauma to the victims, and the force used in committing the robbery.

Miller raises no guilt phase issues and six penalty phase issues. He argues: (1) there was improper weighing and evaluation of mitigating evidence in that the mitigation outweighed the aggravation; (2) the prosecutor's "mercy is inappropriate" comment was a misstatement of the law; (3) the victim impact evidence did not comply with section 921.141(7), Florida Statutes (1995), and should have been prohibited under *Booth v. Maryland*, 482 U.S. 496 (1987); (4) the death sentence is disproportionate; (5) the sentencing order failed to expressly weigh and evaluate each mitigating circumstance; and (6) there was ineffective assistance of counsel because of failure to adequately investigate and present additional mitigation, including mental retardation, which was readily available information.

Although Miller raises no guilt phase issues, we have conducted an independent review of the entire record and find competent and substantial evidence to support the convictions of murder, attempted murder, armed robbery, and robbery. We reverse the conviction for burglary, for the reasons expressed below. We vacate the death sentence and remand for a new sentencing proceeding.

First, we address Miller's burglary conviction. Section 810.02(1), Florida Statutes (1993), defines burglary:

> Burglary means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

This Court has construed the consent clause of the statute (beginning with "unless") to be an affirmative defense. *See State v. Hicks*, 421 So. 2d 510, 511 (Fla. 1982). Thus, the burden is on the defendant to establish there was consent.

In *Ray v. State*, 522 So. 2d 963 (Fla. 3d DCA 1988), the Third District Court of Appeal formulated the proposition that once consent is established, the State can demonstrate that consent had been withdrawn. There has been some confusion regarding the application of *Ray* to cases involving the "open to the public" affirmative defense.[1] To resolve this conflict, we hold that if a defendant can establish that the premises were open to the public, then this is a *complete* defense. *See Collett v. State*, 676 So. 2d 1046, 1047 (Fla. 1st DCA 1996) ("But premises are either open to the public or they are not, and the fact that persons with criminal intent have not been given permission to enter has no effect on whether premises are open to the public. Otherwise, every time a person entered a structure that was open to the public with the intent to

commit a crime, the person would have committed a burglary—a result directly in conflict with the express language of section 810.02(1)."); *Ray*, 522 So. 2d at 967 n.6 ("That the premises are open to the public is a complete defense to a burglary charge . . . ."). Whether or not consent may have been withdrawn, either by direct or circumstantial evidence, is not an issue. The only relevant question is whether the premises were open to the public at the time the defendant entered or remained with the intent to commit an offense therein.

By applying this rule to the present case, we determine that Miller's burglary conviction was improper. The State conceded that the grocery store was open to the public. Hence, Miller met his burden of establishing the affirmative defense of consent. Accordingly, we reverse Miller's burglary conviction.

Because we reverse the burglary conviction, the "committed during the course of a burglary" aggravator is invalid. On the basis of this record, we cannot find this improper aggravator to be harmless and therefore a complete new penalty phase proceeding before a jury is required.

From our review of the record, it appears that Miller should be provided with different counsel for the new penalty phase proceeding. New counsel should be appointed within thirty days of this opinion becoming final. New counsel should be allowed reasonable opportunity to develop mitigating evidence prior to the new penalty phase proceeding.

It is so ordered. (HARDING, C.J., and OVERTON, SHAW and WELLS, JJ., concur. ANSTEAD, J., concurs with an opinion.)

[1]Because this case involves the "open to the public" affirmative defense, we do not address either the licensee or invitee affirmative defenses.

(ANSTEAD, J., concurring.) I concur in the affirmance of appellant's murder conviction and write separately to note that it is apparent from the face of the record that the penalty phase proceedings before the jury were fundamentally flawed.

We can have no confidence in the outcome of this sentencing proceeding because the defendant did not receive the competent assistance of counsel. The State candidly acknowledges in its brief that defendant's counsel called no witnesses during the penalty phase proceedings before the jury, although the record reflects the existence of extensive evidence of compelling mitigation:

> The presentence investigation report reflects that Miller completed the 5th grade; that Miller never knew his father; that he was raised primarily by an aunt; that he developed behavioral problems when he lived with his mother after age 11; that Miller constantly ran away from home and became involved with "less than desirable individuals"; that Miller's mother beat Miller's twin to death in Miller's presence; that Miller entered a juvenile delinquency facility at age 13; that Miller has many brothers and sisters; that Miller claims no physical or emotional problems; that Miller changed residences many times after age 11; that Miller reported that he drinks alcoholic beverages whenever they are available; that he tried marijuana first at the age of 10; that he first used powder cocaine at the age of 20 and is addicted; and that Miller has never tried crack cocaine or drug treatment.
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> Dr. Miller's 1993 report opined that Miller was competent to proceed with trial and was not insane at the time of the offenses. Dr Miller concluded:
>
> > Mr. Miller will provide a challenge for his attorney. The patient does not have a mental disorder per se, b[u]t a personality at this point in time will serve him in the use of passive aggressive mechanisms. His negativism and his refusal to cooperate are the only means which he has available to him at the present time to remind him that he has any control whatsoever over his destiny. Though this, indeed, is self-defeating behavior, it does not originate on the basis of a mental disease or disorder but of a characterologic problem which in many ways is even more of an obstacle to successful adaptation than the former. No treatment is indicated, but a great deal of time and patience will be required.
>
> Dr. Krop's 1994 evaluation revealed conflicts between Miller and defense counsel and inappropriate courtroom behavior. Despite Miller's complaints of depression, auditory and visual hallucinations, and suicidal ideation, Dr. Krop found Miller resistant to completing psychological tests, deliberate in answering questions incorrectly, and generally coherent, logical, and goal directed in thinking. Additionally, "[a] test utilized to rule out malingering was administered and the Defendant's responses to this assessment procedure strongly suggested that he was attempting to exaggerate symptomatology and give an appearance of limited intellectual ability." *See also id.* ("Mr. Miller is malingering in order to avoid responsibility."). Dr. Krop concluded that Miller was legally competent to proceed, but offered no opinion as to sanity based on Miller's refusal to discuss his involvement in the instant offenses.
>
> . . . .
>
> Miller also claims that his dull intelligence, substance abuse, low IQ, and mental retardation all point to statutory mitigation. This argument, however, assumes Miller has no responsibility for presenting mitigation. Case law from this Court holds to the contrary. *Lucas*, 613 So. 2d at 410; *Mikenas v. State*, 367 So. 2d 606, 610 (Fla. 1978) ("It is not the function of this Court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not . . . ."). Had Miller considered these mitigating factors so noteworthy during the penalty phase, he had every opportunity to present additional evidence in support of them. In any event, to the extent that these factors existed, the trial court considered them via the school records, the PSI, and the medical reports.
>
> Regarding retardation, intelligence, and low IQ, it is important to recognize that, while the school records refer to retardation, they didn't say that [Miller] was quote retarded or that he had any kind of organic disfunction or his brain didn't work, just rather that he was functioning in that retarded intellectual level and where they get that from is the plain fact he just . . . couldn't do the work because he never tried to do the work. He never applied himself. *Compare Martin v. State*, 515 So. 2d 189 (Fla. 1987); *Martin v. State*, 455 So. 2d 370 (Fla. 1984). The school records also show that Miller did not accept responsibility for his actions, was mean, could not get along with others, and was a bully. These records, prepared in 1977 when Miller was 17 years old, also conflict with the more recent reports provided by Drs. Miller and Krop, who found no evidence of retardation or any mental impairment.
>
> Regarding substance abuse, the school records mentioned only that Miller, on the day of testing, "smelled rather strongly of alcohol and his eyes were somewhat bloodshot." They do not refer to a longstanding problem. Miller, however, told the PSI preparer that he drinks alcoholic beverages when they are available, began using marijuana when he was 10 years old, began using powdered cocaine when he was 20, and was addicted to powdered cocaine. Critically, there is no report that he was drunk or high at the time of the instant offenses. *See Cook v. State*, 542 So. 2d 964, 971 (Fla. 1989). Under such circumstances, the trial court committed no error in considering, but not finding, this mitigating circumstance. *See Duncan v. State*, 619 So. 2d 279, 283-84 (Fla. 1993); *Mason v. State*, 438 So. 2d 374, 379 (Fla. 1983).

(Answer Brief of Appellee at 14-19) (citations to record omitted) (footnote omitted). This discussion by the State clearly demonstrates the existence of extensive mitigation that was *not* presented to the sentencing jury. As the State argues, "[h]ad Miller considered these mitigating factors [of dull intelligence, substance abuse, low IQ, and mental retardation] so noteworthy during the penalty phase", he should have presented them to the jury. Of course, that is the essential point: competent counsel for Miller should have and would have exhaustively investigated, and then presented the extensive evidence of mitigation that we all know exists.

Our reversal and remand hopefully will result in a fair proceeding where the jury and judge are presented with all of the available evidence of mitigation and *both sides* receive vigorous and professional representation.

* * *

Criminal law—Warrantless arrest for misdemeanor offense of loitering and prowling—Jurisdiction declined for absence of express and direct conflict

JOSE MANUEL CORTEZ and ALEXIS RODRIGUEZ, Petitioners, v. STATE OF FLORIDA, Respondent. Supreme Court of Florida. Case No. 92,458. April 1, 1999. Application for Review of the Decision of the District Court of Appeal, Direct Conflict. Third District - Case No. 97-1369 (Dade County). Counsel:

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judgment must be fair to society, it must be fair to the attorney, and it must be severe enough to deter other attorneys from similar misconduct." *Florida Bar v. Lawless*, 640 So. 2d 1098, 1100 (Fla.1994). Considering all of the circumstances here, we hold that a three-year suspension is appropriate. *See, e.g., Florida Bar v. Beach*, 699 So. 2d 657 (Fla. 1997) (suspending attorney for three years for committing acts contrary to honesty and justice by his reckless disregard for the truth where the attorney had a history of serious ethical misconduct and a selfish motive); *Florida Bar v. King*, 664 So. 2d 925 (Fla. 1995) (suspending attorney for three years for multiple ethical violations involving his representation of clients where attorney had disciplinary history and was on probation at the time for, among other things, misrepresentations); *Florida Bar v. Robbins*, 528 So. 2d 900 (Fla. 1988) (suspending attorney for three years for, among other things, conduct involving dishonesty, knowingly making a false statement in representation of a client, incompetence, charging an excessive fee, and several trust account violations). We are especially concerned that Nunes has patently ignored the seriousness of his misconduct and has failed to accept responsibility for his actions, while lashing out at everyone else involved in the proceedings. By his actions, Nunes has placed his legal career in serious jeopardy.

Accordingly, David Smith Nunes is hereby suspended from the practice of law in Florida for three years (and for an indefinite period thereafter until he has shown proof of rehabilitation and has paid the costs of the proceedings), with a requirement that he pay for and complete twenty-five hours of continuing legal education in ethics during his suspension. Contrary to the referee's recommendation, Nunes's suspension shall *not* be followed by a period of probation. Nunes's suspension will be effective thirty days from the filing of this opinion so that Nunes can close out his practice and protect the interests of existing clients. If Nunes notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Nunes shall accept no new business from the date this opinion is filed until the suspension is completed. Judgment for costs in the amount of $1,609.53 is hereby entered in favor of The Florida Bar against Nunes, for which sum let execution issue.

It is so ordered. (HARDING, C.J., and SHAW, WELLS, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.)

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[1]Accordingly, as to count one in case number 91,148, the Bar charged Nunes with violating rules 3-4.3 ("The commission by a lawyer of any act that is unlawful or contrary to honesty and justice . . . may constitute a cause for discipline"); 4-3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous"); 4-4.4 ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person"); and 4-8.4(d) ("A lawyer shall not . . . engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against . . . court personnel, or other lawyers on any basis") of the Rules Regulating the Florida Bar.

[2]Accordingly, as to count two in case number 91,148, the Bar charged Nunes with violating rules 4-8.4(d) ("A lawyer shall not . . . engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against . . . court personnel, or other lawyers on any basis"); and 4-8.2(a)("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge").

[3]Specifically, in *Florida Bar v. Nunes*, 679 So. 2d 744, 746 (Fla. 1996), the referee recommended that, in connection with his representation of several immigration clients, Nunes be found guilty of failing to provide competent representation (two counts), failing to adequately explain a matter to a client, and charging a clearly excessive fee. In approving the referee's findings of fact and conclusions of guilt, this Court held that "[c]ompetent substantial evidence in the record . . . supports the referee's findings that Nunes's actions were incompetent and futile." *Id.* As to discipline, the referee recommended that Nunes be suspended for ninety days (and for an indefinite period thereafter until Nunes paid the costs of the disciplinary proceedings and made restitution to certain of his clients), followed by one year of probation with the requirement that Nunes complete a total of twenty-five hours of continuing legal education in the areas of immigration law and ethics. *Id.* In likewise approving this recommended discipline and imposing same, this Court noted that Nunes's representation was "clearly incompetent," that his clients "were prejudiced by Nunes's actions," and that "the clients were exploited--whether deliberately or not--by Nunes for his own financial gain." *Id.* at 747. This Court also took into account Nunes's prior disciplinary record. *Id.* at "Nunes was given a private reprimand in 1986 and a public reprimand and 10-day suspension in 1995 for sending to opposing counsel's client a letter criticizing opposing counsel's handling of the case"). Later, this Court publicly reprimanded Nunes for failing to comply with its disciplinary order by failing to notify his clients of his suspension and provide an affidavit to that effect. *See Florida Bar v. Nunes*, 687 So. 2d 1307 (Fla. 1996).

[4]Accordingly, as to count one in case number 91,281, the Bar charged Nunes with violating rule 4-3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous").

[5]Accordingly, as to count two in case number 91,281, the Bar charged Nunes with violating rule 4-1.16(a)(3) ("a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the lawyer is discharged").

[6]Accordingly, as to count three in case number 91,281, the Bar charged Nunes with violating rules 3-4.3 ("The commission by a lawyer of any act that is unlawful or contrary to honesty and justice . . . may constitute a cause for discipline"); 4-3.3(a)(1) ("A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal"); 4-8.4(c) ("A lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation"); and 4-8.4(d) ("A lawyer shall not . . . engage in conduct in connection with the practice of law that is prejudicial to the administration of justice").

[7]We reject without discussion Nunes's unsubstantiated arguments that the referee failed to consider other mitigating factors. We further note that even the mitigation as to remorse is weak. The referee himself found in his report that, while Nunes admitted that he was guilty of most of the "mistakes" with which he was charged, he only did so "with some hesitation," and that Nunes "admit[ted] that he was wrong to file the various lawsuits [at issue] but did so out of anger and for retaliation." Such anger and retaliation continued to be evident when Nunes himself (i.e., not his attorney) subsequently filed in this Court a racially and ethnically charged motion to set aside the referee's report, in which Nunes asserted that he was the victim of a "Jewish conspiracy against him," made disparaging remarks about Bar counsel and others, and questioned the fairness and validity of his prior and current disciplinary actions.

* * *

Criminal law—Burglary—If defendant can establish that premises were open to public, this is complete defense to charge of burglary

STATE OF FLORIDA, Petitioner, vs. JEREMIAH BUTLER, Respondent. Supreme Court of Florida. Case No. 93,499. April 29, 1999. Application for Review of the Decision of the District Court of Appeal Direct Conflict. 1st District - Case No. 96-4871 (Duval County). Counsel: Robert A. Butterworth, Attorney General, James W. Rogers, Tallahassee Bureau Chief, Criminal Appeals, and L. Michael Billmeier, Assistant Attorney General, Tallahassee, for Petitioner. Nancy A. Daniels, Public Defender, and Phil Patterson, Assistant Public Defender, Second Judicial Circuit, Tallahassee, for Respondent.

(PER CURIAM.) We have for review *Butler v. State*, 711 So. 2d 1183 (Fla. 1st DCA 1998), which expressly and directly conflicts with the opinion in *Garvin v. State*, 685 So. 2d 17 (Fla. 3d DCA 1996), regarding whether the "open to the public" defense is a complete defense to the charge of burglary. *See* § 810.02(1), Fla. Stat. (1995). We have jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution.

This case is controlled by our recent decision in *Miller v. State*, 24 Fla. L. Weekly S155 (Fla. July 16, 1998). In *Miller*, we held that if a defendant can establish that the premises were open to the public, then this is a complete defense to the charge of burglary. We do not find any merit to the State's argument in this case that the area behind the counter was not open to the public. Accordingly, we approve the decision of the First District Court of Appeal. We disapprove *Garvin* to the extent that it is inconsistent with our decision in *Miller*.

It is so ordered. (HARDING, C.J., and SHAW, WELLS, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.)

* * *

Criminal law—Burglary—If defendant can establish that premises were open to public, this is complete defense to charge of burglary

STATE OF FLORIDA, Petitioner, vs. ROBERT LASTER, Respondent. Supreme Court of Florida. Case No. 92,864. April 29, 1999. Application for Review of the Decision of the District Court of Appeal—Certified Direct Conflict of Decisions. 1st District - Case No. 96-4580 (Duval County). Counsel: Robert A. Butterworth, Attorney General, James W. Rogers, Tallahassee Bureau Chief, Criminal Appeals, and L. Michael Billmeier, Assistant Attorney General, Tallahassee, for Petitioner. Glen P. Gifford, Assistant Public Defender, Second Judicial Circuit, Tallahassee, for Respondent.

(PER CURIAM.) We have for review *Laster v. State*, 23 Fla. L. Weekly D790 (Fla. 1st DCA 1998), in which the district court certified conflict with the opinion in *Garvin v. State*, 685 So. 2d 17 (Fla. 3d DCA 1996), regarding whether the "open to the public"

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810.02(1), Fla. Stat. (1995). We have jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution.

This case is controlled by our recent decision in *Miller v. State*, 24 Fla. L. Weekly S155 (Fla. July 16, 1998). In *Miller*, we held that if a defendant can establish that the premises were open to the public, then this is a complete defense to the charge of burglary. We do not find any merit to the State's argument in this case that the area behind the counter was not open to the public. Accordingly, we approve the decision of the First District Court of Appeal. We disapprove *Garvin* to the extent that it is inconsistent with our decision in *Miller*.

It is so ordered. (HARDING, C.J., and SHAW, WELLS, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.)

* * *

Insurance—Personal injury protection—Coverage—Injuries arising out of ownership, maintenance, or use of motor vehicle—Where insured's vehicle had blowout, and insured was attacked by unknown assailants while he was changing tire, injuries inflicted by assailants were sufficiently connected to maintenance and use of vehicle to justify PIP coverage—When construing statutory phrase "arising out of," courts should ask whether the injury is a reasonably foreseeable consequence of the use, ownership, or maintenance of the vehicle

KARL BLISH, Petitioner, v. ATLANTA CASUALTY COMPANY, Respondent. Supreme Court of Florida. Case No. 92,984. May 6, 1999. Application for Review of the Decision of the District Court of Appeal, Direct Conflict. Fifth District - Case No. 97-3189 (Brevard County). Counsel: Michael L. Reda of Cianfrogna, Telfer, Reda, Faherty & Anderson, P.A., Titusville, for Petitioner. Wendy D. Jensen of Rogers, Dowling, Fleming & Coleman, P.A., for Respondent.

(SHAW, J.) We have for review *Atlanta Casualty Co. v. Blish*, 707 So. 2d 1178 (Fla. 5th DCA 1998), based on conflict with *Hernandez v. Protective Casualty Insurance Co.*, 473 So. 2d 1241 (Fla. 1985), and *Government Employees Insurance Co. v. Novak*, 453 So. 2d 1116 (Fla. 1984). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We quash *Blish*.

Karl Blish left work on January 6, 1995, drove a coworker home, spent a few minutes at the coworker's house, and then headed home himself. Blish's pickup truck had a blowout on U.S. 1 in Brevard County and he pulled over to change the tire. He jacked up the truck and was loosening the lug nuts when he was attacked from behind by several assailants. The men choked and beat him (he testified that he "might have went unconscious") and stole between eighty and a hundred dollars from his pocket. After the attack, Blish recovered his glasses, did his best to finish changing the tire, and drove home ("I just barely got the tire on and I drove home."). He did not go to the hospital or call police because he did not think that he had been hurt badly enough ("I was just going to write it off as a loss, I guess."). A week later, he experienced severe abdominal pain, was rushed to the hospital in an ambulance, and was diagnosed as suffering from a ruptured spleen, which doctors removed.

Blish filed a claim for benefits under the PIP portion of his auto insurance policy with Atlanta Casualty Company ("Atlanta"). Atlanta denied the claim, and Blish filed suit. The county court granted summary judgment in favor of Atlanta, and the circuit court sitting in its appellate capacity reversed, ruling that Blish had established a sufficient nexus between his use of the truck and his injuries. The district court reversed, concluding that the attackers had made no effort to possess or use Blish's truck:

> In our case, there is nothing in the record to suggest that the assailant wanted anything other than the victim's money. No effort was made to possess or use the automobile. The fact that the victim was changing his tire when he was robbed does not make the robbery "arise from the maintenance or use" of his vehicle.

Blish, 707 So. 2d at 1179. This Court granted review based on conflict with *Hernandez v. Protective Casualty Insurance Co.*, 473 So. 2d 1241 (Fla. 1985) (finding PIP coverage where the insured was stopped by police for a traffic infraction and was injured during the ensuing arrest), and *Government Employees Insurance Co. v. Novak*, 453 So. 2d 1116 (Fla. 1984) (finding PIP coverage where the insured was shot in the face by a stranger and pulled from her car, which the stranger then stole).

Blish claims that the district court erred in reasoning that "possess or use" the vehicle. He contends that under the facts of this case there was a sufficient connection between the maintenance and use of the vehicle and the resulting injury to justify PIP coverage. We agree.

The controlling statute, section 627.736, Florida Statutes (1995), requires that motor vehicle insurance policies issued in Florida provide personal injury protection (PIP) benefits for bodily injury "arising out of the ownership, maintenance, or use of a motor vehicle":

> 627.736 Required personal injury protection benefits . . . .
>
> (1) REQUIRED BENEFITS.—Every insurance policy complying with the security requirements of s. 627.733 shall provide personal injury protection to the named insured . . . to a limit of $10,000 for loss sustained by any such person as a result of bodily injury, sickness, disease, or death *arising out of the ownership, maintenance, or use of a motor vehicle* . . . .

§ 627.736, Fla. Stat. (1995) (emphasis added).[1]

This Court in *Government Employees Insurance Co. v. Novak*, 453 So. 2d 1116 (Fla. 1984), explained that the phrase "arising out of" in the above statute means that there must be "some nexus" between the motor vehicle and the injury:

> Construction of the clause "arising out of the use of a motor vehicle" is an [easy] matter. It is well settled that "arising out of" does not mean "proximately caused by," but has a much broader meaning. *All that is required is some nexus between the motor vehicle and the injury.*

Novak, 453 So. 2d at 1119 (emphasis added). The Court went on to explain that the phrase "some nexus" should be given a liberal construction in order to effectuate legislative intent to extend coverage broadly:

> The clause, "arising out of the use of a motor vehicle," is framed in such general, comprehensive terms in order to express the [legislative] intent to effect broad coverage. Such terms should be construed liberally because their function is to extend coverage broadly.

Id. (citation omitted).

The Court subsequently circumscribed the parameters of the "some nexus" standard in *Hernandez v. Protective Casualty Insurance Co.*, 473 So. 2d 1241 (Fla. 1985), by pointing out that PIP coverage is not applicable where the motor vehicle, through pure happenstance, is the situs of an unrelated injury-causing event:

> [I]t is not enough that an automobile be the physical situs of an injury or that the injury occur incidentally to the use of an automobile, but that there must be a causal connection or relation between the two for liability to exist.

Id. at 1243 (quoting *Reynolds v. Allstate Insurance Co.*, 400 So. 2d 496, 497 (Fla. 5th DCA 1981)).

Both this Court and the district courts have applied the above rules to deny coverage where the motor vehicle was the mere situs of an unrelated injury-causing event,[2] and to find coverage where there was "some nexus," i.e., some "causal connection or relation," between the vehicle and the injury.[3] The results under these standards, however, have not been consistent.[4] In an effort to resolve these inconsistencies, we now set forth the following guidelines.

First, legislative intent—as always—is the polestar that guides an inquiry under section 627.736(1). Thus, as noted above, the language of the statute must be liberally construed in order to effect the legislative purpose of providing broad PIP coverage for Florida motorists. *Novak*. Second, a key issue in deciding coverage is whether the type of injury sustained by the insured was reasonably in the minds of the contracting parties. Accordingly, when construing the phrase "arising out of" noted above, courts should ask: Is the injury a reasonably foreseeable consequence of the use (or the ownership, or the maintenance) of the vehicle?

In the present case, Blish's injuries were an unfortunate but eminently foreseeable consequence of the use and maintenance of the pickup truck: Blish was using the truck for routine transportation purposes after dark when the truck sustained a mechanical failure, i.e., a blowout; he responded in a normal and foreseeable fashion, i.e., he attempted to change the tire on it with the [illegible]

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