

IN THE SUPREME COURT OF FLORIDA

PAUL FOX,

Petitioner,

v.

CASE NO. 96,573

STATE OF FLORIDA,

Respondent.

\_\_\_\_\_ /

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

ROBERT FRIEDMAN  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NO. 500674  
LEON COUNTY COURTHOUSE  
SUITE 401  
301 SOUTH MONROE STREET  
TALLAHASSEE, FLORIDA 32301  
(850) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii-iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	
<u>ISSUE I</u>	
PETITIONER'S SENTENCE AS A VIOLENT CAREER CRIMINAL IS ILLEGAL WHERE THE VIOLENT CAREER CRIMINAL STATUTE WAS ENACTED IN VIOLATION OF THE SINGLE SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION.	6
<u>ISSUE II</u>	
THE TRIAL COURT ERRED IN DENYING PETITION- ER'S REQUEST FOR A JURY INSTRUCTION ON THE JUSTIFIABLE USE OF NON-DEADLY FORCE.	20
CONCLUSION	22
CERTIFICATE OF SERVICE	22
APPENDIX	

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE(S)</u>
<u>Albritton v. State</u> 89 So. 360 (Fla. 1921)	10,18
<u>Brown v. Firestone</u> 382 So.2d 654 (Fla. 1980)	9
<u>Bryant v. State</u> 412 So.2d 347 (Fla. 1982)	20
<u>Bunnell v. State</u> 453 So.2d 808 (Fla. 1984)	11,12,18
<u>Colonial Investments Co. v. Nolan</u> 131 So.2d 178 (Fla. 1930)	9
<u>Fox v. State</u> 24 Fla. L. Weekly D1998 (Fla. 1st DCA August 17, 1999)	2
<u>Holley v. State</u> 423 So.2d 562 (Fla. 1st DCA 1982)	20
<u>Kilgore v. State</u> 271 So.2d 148 (Fla. 2d DCA 1972)	20
<u>Motley v. State</u> 20 So.2d 798 (1945)	20
<u>Salters v. State</u> 24 Fla. L. Weekly D1116 (Fla. 4th DCA May 5, 1999)	8
<u>Santos v. State</u> 380 So.2d 1284 (Fla. 1980)	9
<u>State v. Johnson</u> 616 So.2d 1 (Fla. 1993)	6,11,12
<u>State v. Lee</u> 356 So.2d 276 (Fla. 1978)	9
<u>State v. Mancino</u> 714 So.2d 429 (Fla. 1998)	7

TABLE OF CITATIONS  
PAGE TWO

<u>Thompson v. State</u> 708 So.2d 315 (Fla. 2d DCA), <u>review granted</u> , 717 So.2d 538 (Fla. 1998)	2,7,8
<u>Trushin v. State</u> 425 So.2d 1126 (Fla. 1982)	6
<u>Vazquez v. State</u> 518 So.2d 1348 (Fla. 4th DCA 1987)	20
<u>Williams v. State</u> 459 So.2d 319 (Fla. 5th DCA 1984)	9,10,18,19

CONSTITUTIONS

Article III, Section 6, Florida Constitution	5,8,9
----------------------------------------------	-------

OTHER AUTHORITIES

Chapter 82-150, Laws of Florida	10
Chapter 89-280, Laws of Florida	11
Chapter 95-182, Laws of Florida	5,19
Chapter 96-388, Laws of Florida	5, <u>passim</u>
Florida Standard Jury Instruction (Crim.)3.04(e)	21

IN THE SUPREME COURT OF FLORIDA

PAUL FOX,

Petitioner,

v.

CASE NO. 96,573

STATE OF FLORIDA,

Respondent.

\_\_\_\_\_ /

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Pursuant to the Florida Supreme Court's Administrative Order dated July 13, 1998, this brief has been printed in Courier New (12 point) proportionately spaced.

Petitioner was the defendant in the criminal division of the circuit court of the Eighth Judicial Circuit in and for Bradford County, Florida, and the appellant in the First District Court of Appeal. Respondent was the prosecution and appellee below.

In the brief, the parties will be referred to as they appear before this Honorable Court. The following symbols will be used: references to the record on appeal shall be by the letter "R" followed by the page number. References to the trial transcript shall be by the letter "T" followed by the page number.

STATEMENT OF THE CASE

Petitioner, Paul Fox, was charged by information with aggravated battery in Count I and possession of a weapon by a state prisoner in Count II. The date of the offense was May 15, 1997. (R 1-2)

Petitioner proceeded to a jury trial. During the charge conference, Petitioner requested a jury instruction on the justifiable use of non-deadly force which was denied by the trial court. (T 118-119)

The jury returned a verdict of guilty as charged in the information. (R 49) Appellant was adjudicated guilty and sentenced to 35 years in the Department of Corrections as a violent career criminal in Count I and to a concurrent term of 15 years in Count II. (R 99-105)

On direct appeal to the First District Court of Appeal, Petitioner's conviction and sentence were affirmed. The First District Court of Appeal certified conflict with Thompson v. State, 708 So.2d 315 (Fla. 2d DCA), review granted, 717 So.2d 538 (Fla. 1998). Fox v. State, 24 Fla. L. Weekly D1998 (Fla. 1st DCA August 17, 1999).

Notice of intent to seek discretionary review was filed by Petitioner on September 21, 1999. On September 24, 1999, this Court issued an order postponing decision on jurisdiction and briefing schedule. This merits brief follows.

STATEMENT OF THE FACTS

William Cortez testified that on May 15, 1997, he was incarcerated at Florida State Prison. While in the recreation yard, as he hung his t-shirt on the chain link fence, someone hollered to him in Spanish to move because there was a fight going on. Cortez backed up and Petitioner came up from behind, grabbed him, and cut his throat. (T 25-27) Petitioner had a razor blade and blood on his hand. Cortez testified that he asked Petitioner why and Petitioner said, you know why. Cortez then ran to the gate and told the officer to let him go to the clinic. (T 28-29) On cross-examination, Cortez testified that as Petitioner tried to cut him, he may have thrown a punch at him. (T 41)

Luther Davis, a Florida State Prison correctional officer, testified that on May 15, 1997, he was in charge of the gated area of the yard. He observed Petitioner strike at the facial area of Cortez. According to Davis, Cortez was holding his neck and his other arm was used to deflect blows. He did not see Cortez strike at Petitioner. According to Davis, Cortez was coming towards the gate. He told Petitioner to stop hitting Cortez. He also advised the control room and requested assistance. (T 46-48)

The parties stipulated that Petitioner is an inmate in the Florida corrections system and that he has been lawfully confined. (T 58)

Gerald Caddell, Jr., an officer at Florida State Prison testified that on May 15, 1997, he received a call for assistance in the yard in reference to a fight. Upon his arrival, Petitioner was being taken into custody. He observed blood on Petitioner's hand. Caddell told Petitioner to go to the handcuff procedure and Petitioner had his fists clenched. He told Petitioner to release his fists. Petitioner had a razor blade in his hand. Caddell retrieved it from Petitioner and turned it over to Investigator Ruiz. (T 59-61)

David Ellis, an inspector at Florida State Prison, testified that he responded to the yard, took pictures, and interviewed Petitioner and Cortez. Petitioner was Mirandized and the interview with Petitioner was taped. Ellis also testified that two razor blades were recovered. However, the razor blades in this case were destroyed. Without objection, a replica blade was introduced into evidence. (T 74-78, 82)

In his statement, Petitioner stated that he was in the yard with Cortez and he cut him across the throat with a razor with his right hand. Cortez had previously run his mouth at Petitioner so Petitioner decided he would cut him. This was decided a few days before. It was sexually oriented. (T 86-88) Petitioner's frame of mind was to kill him. (T 91)

#### SUMMARY OF THE ARGUMENT

Issue I: The violent career criminal provisions under



which Petitioner was sentenced are invalid because the session law that created them violates the state constitutional single subject requirement. Chapter 95-182, Laws of Florida addresses two distinct and unrelated subjects: career criminal sentencing and civil remedies for the protection of victims of domestic violence. Since these two subjects are not reasonably related, Chapter 95-182 addresses more than one subject and thus is invalid.

The enactment of Chapter 96-388, Laws of Florida did not affect the window period for challenging Chapter 95-182 because Chapter 96-388 did not reenact Chapter 95-182 and Chapter 96-388 also violates Article III, Section 6 of the Florida Constitution.

Issue II:

A defendant is entitled to a jury instruction on his theory of the case if there is any evidence to support it no matter how flimsy, weak, or improbable that evidence might be. In the instant case, it was reversible error for the trial court to deny Petitioner's requested jury instruction on the justifiable use of non-deadly force.

## ARGUMENT

### ISSUE I

PETITIONER'S SENTENCE AS A VIOLENT CAREER CRIMINAL IS ILLEGAL WHERE THE VIOLENT CAREER CRIMINAL STATUTE WAS ENACTED IN VIOLATION OF THE SINGLE SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION.

Petitioner was sentenced to 35 years in the Department of Corrections as a violent career criminal upon his conviction for aggravated battery in Count I of the information. The date of the offense was May 15, 1997. (R 1-2, 99-102, 185-189) Petitioner's sentence as a violent career criminal is unconstitutional.

Preliminarily, this Court may reach the merits of Petitioner's claim despite the lack of an objection below. Petitioner challenges the facial constitutionality of the statute. A challenge to the facial constitutionality of a statute which results in fundamental error may be raised for the first time on appeal. Trushin v. State, 425 So.2d 1126 (Fla. 1982). In State v. Johnson, 616 So.2d 1 (Fla. 1993), this Court determined as a matter of fundamental error that the amendments to the Habitual Offender Act violated the single subject rule. The statute resulted in a far longer sentence than the defendant would have otherwise had to serve under the guidelines. This Court held that the provision involved the defendant's "fundamental liberty due process interests." 616 So.2d at 3. See also, State v. Mancino, 714 So.2d 429 (Fla.

1998) (a sentence that patently fails to comport with statutory or constitutional limitations is by definition illegal). The violent career criminal provision, like the habitual offender provision, affects Petitioner's fundamental liberty due process interests. Thus, the facial constitutionality of the violent career criminal statute is reviewable by this Court as a matter of fundamental error.

As to the merits, this Court should set aside Petitioner's violent career criminal sentence.

In Thompson, the Second District Court of Appeal examined the bill and reviewed the legislative history which culminated in enactment of the violent career criminal provision as part of Chapter 95-182, Laws of Florida. A combination of criminal and civil subjects were contained within the law. The Thompson court correctly concluded that the law violates the single subject rule because it joins unrelated criminal and civil provisions. The Second District concluded:

Harsh sentencing for violent career criminals and providing remedies for victims of domestic violence, however laudable, are nonetheless two distinct subjects. The joinder of these two subjects in one act violate Article III, Section 6 of the Florida Constitution; thus, we hold that Chapter 95-182, Laws of Florida is unconstitutional. 708 So.2d at 317.

The Thompson court determined that the window period to challenge the constitutionality of the statute began on October

1, 1995, the effective date of Chapter 95-182 and closed on May 24, 1997, the date of the reenactment of the 1995 amendments as part of the biennial adoption of the Florida Statutes. 708 So.2d 317 note 1. In Salters v. State, 24 Fla. L. Weekly D1116 (Fla. 4th DCA May 5, 1999), the Fourth District Court of Appeal disagreed with the Thompson court as to the parameters of the window period. The Fourth District incorrectly concluded that the window closed on October 1, 1996, the effective date of Chapter 96-388, Laws of Florida.

Section 44 of Chapter 96-388 contains an amended version of the career criminal statute. It is not a biennial adoption of the Florida Statutes. For the reasons that follow, like Chapter 95-182, Laws of Florida, Chapter 96-388 violates the single subject rule as set forth in Article III, Section 6, of the Florida Constitution.

Article III, Section 6, of the Florida Constitution includes a limitation on a passage of new legislation in Florida which is commonly called "the one subject rule": Laws - Every law shall embrace the one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title...

"The purpose of the requirement that each law embrace only one subject and matter properly connected with it is to prevent subterfuge, surprise, hodgepodge and log-rolling in legislation." Santos v. State, 380 So.2d 1284 (Fla. 1980); see

also, Brown v. Firestone, 382 So.2d 654, 663 (Fla. 1980); State v. Lee, 356 So.2d 276, 282 (Fla. 1978); Williams v. State, 459 So.2d 319 (Fla. 5th DCA 1984). Where legislation fails the Article III, Section 6 one subject rule the courts must strike it down.

In the analysis of what constitutes one subject, this Court has held that "Wide latitude must be afforded the Legislature in the enactment of laws, and this Court will strike down a statute only when there is a plain violation of the constitutional requirement that each enactment be limited to a single subject which is briefly expressed in the title." State v. Lee, 356 So.2d at 282. A bill's subject may be broad as long as there is a "natural, logical connection" among the matters contained within. Id.

But the "wide latitude" standard does not place legislation beyond review. Courts must balance a deference due to legislative branch with the duty to protect the state constitution and proper governmental process. There are, therefore, definite limits to how broad a scenario the legislature may envision when passing multiple matters and subjects under the title and vote of one bill. For example, in Colonial Investments Co. v. Nolan, 131 So.2d 178 (Fla. 1930), provisions requiring a sworn tax return and a provision prohibiting deed recorded without the stating of the grantor's address were held to be independent and unrelated to satisfy

the constitutional requirement. Similarly, the prohibition of the manufacture and trafficking of liquor and a provision criminalizing voluntary intoxication failed the one subject rule. Albritton v. State, 89 So. 360 (Fla. 1921).

Chapter 82-150, Laws of Florida, is another example of a law which violated the single subject rule. It contained four subsections, which can be summarized as follows:

1. Created the new crime of "prohibiting the obstruction of justice by false information."
2. Challenge membership rules for the Florida Council on Criminal Justice.
3. Repealed certain sections of the Florida Council on Criminal Justice.
4. Provide an effective date for the bill.

This legislation was found violative of the one subject rule. The Fifth District in Williams v. State, 459 So.2d 319 (Fla. 5th DCA 1984) explained:

The bill in question in this case is not a comprehensive law or code type of statute. It is very simply a law that contains two different subjects or matters. One section creates a new crime and the other section amends the operation and membership of the Florida Criminal Justice Council. The general object of both may be to improve the criminal justice system, but that does not make them both related to the same subject matter.

459 So.2d at 320.

In Bunnell v. State, 453 So.2d 808 (Fla. 1984), this Court agreed:

We recognize the applicability of the rule that legislative acts are presumed to be constitutional and that courts should resolve every reasonable doubt in favor of constitutionality. Nevertheless, it is our view that the subject of Section 1 has no cogent relationship with the subject of Sections 2 and 3 and that the object of Section 1 is separate and disassociated from the object of Sections 2 and 3. We hold that Section 1 of 82-150 was enacted in violation of the one subject provision of Article III, Section 6, Florida Constitution. [Citations omitted].

453 So.2d at 809.

In State v. Johnson, 616 So.2d 1, 4 (1993), this Court held that Chapter 89-280, Laws of Florida, violated the single subject requirement because it addressed two unrelated subjects: "The habitual offender statute, and ...the licensing of private investigators and their authority to repossess personal property." This Court adopted the District Court's analysis of Chapter 89-280:

The title of the active issue designates it an act relating to criminal law and procedure. The first three sections of the Act amend Section 775.084, Florida Statutes, pertaining to habitual felony offenders; Section 775.0842, Florida Statutes, pertaining to policies for career criminal cases. Sections 4 through 11 of the Act pertain to the Chapter 493 provisions governing private investigation and patrol services, specifically, repossession of motor vehicles and motor boats. Id.

This Court also agreed with the District Court that "it is difficult to discern a logical or natural connection between career criminal sentencing and repossession of motor vehicle by

private investigators." Id. (Citation in internal quotes omitted). This Court found these to be "two very separate and distinct subjects" which have "absolutely no cogent connection and were not reasonably related to any crisis the Legislature intended to address." Id. The Court rejected the state's contention that these two subjects relate to the single subject of controlling crime.

Johnson, like Bunnell, was a unanimous decision. As Justice Grimes noted in his concurring opinion:

In Jamison v. State, 583 So.2d 413 (Fla. 4th DCA), review denied, 591 So.2d 182 (Fla. 1991), and McCall v. State, 583 So.2d 411 (Fla. 4th DCA 1991), the court relied upon this Court's decision in Burch (citation omitted), in concluding that Chapter 89-280 did not violate the single subject rule. As the author of the Burch opinion, I find that case to be substantially different. The Burch legislation was upheld because it was a comprehensive law in which all of the parts were at least arguable related to its overall objective of crime control. Here, however, Chapter 89-280 is directed only to two subjects - habitual offenders and repossession of motor vehicles and motor boats - which have no relationship to each other whatsoever. Thus, I conclude that this case is controlled by the principal of Bunnell (citation omitted) rather than Burch. 616 So.2d at 5 (Grimes, J., concurring).

These cases establish the following principals: provisions in the statute will be considered as covering a single subject if they have a cogent, logical, or natural connection or relation to each other. The legislature will be given some



latitude to enact a broad statute, provided that statute is intended to be a comprehensive approach to a complex and difficult problem that is currently troubling a large portion of the citizenry. However, separate subjects cannot be artificially connected by the use of broad labels like "the criminal justice system" or "crime control."

Based upon these principles, Chapter 96-388, Laws of Florida, is unconstitutional. It is loosely titled, "Public Safety." Its seventy four sections run the gamut from implementing a continuous revision cycle for the criminal code, coordinating information systems resources, enacting the "Street Gang Prevention Act of 1996," enacting the "Jimmy Ryce Act," relating to sexual predators as well as redefining various crimes and attendant punishments. The seventy four sections of Chapter 96-388 may be briefly summarized as follows:

Section 1 -- creates a new Section 775.0121, which requires the legislature to revise and update the Florida criminal statutes on a regular basis.

Section 2 -- amends Section 187.201, which deals with the "State Comprehensive Plan" for the criminal justice system.

Section 3 -- amends Section 943.06 regarding the membership of the "Criminal and Juvenile Justice Information Systems Council."

Sections 4-16 -- amends and creates several statutes dealing with the membership and the duties of the "Criminal and Juvenile Justice Information Systems Council" and

its relation to other government organizations.

Section 17-21 -- amends several statutes regarding juvenile criminal history records.

Section 22 -- amends the statutory provisions regarding the preparation of sentencing guidelines scoresheets.

Section 23 -- repeals Section 6 of Chapter 94-209, Laws of Florida, which had imposed duties on the Juvenile Justice Advisory Board.

Section 24 -- requires the "Justice Administrative Commission [to] report to the Legislature no later than January 1, 1997, itemizing and explaining each of its duties and functions."

Section 25 -- amends Section 27.34(4) by eliminating the provision that allowed the Insurance Commissioner to contract with the "Justice Administrative Commission for the prosecution of criminal violations of the Workers' Compensation Law ...."

Section 26 -- repeals Section 27.37, which had created the "Council on Organized Crime" and detailed its membership and duties.

Section 27 -- repeals Sections 282.501 and .502, which had directed the Department of Education to establish the "Risk Assessment Coordinating Council", which was to "develop a population-at-risk profile for purposes of identifying at an early age, and tracking for statistical purposes, persons who are probable candidates for entering into the criminal justice system so as to develop education and human resources to direct such persons away from criminal activities", and providing for membership and duties of this council.

Section 28 -- repeals Sections 648.25(2), .265, and .266, which had established the

"Bail Bond Advisory Council", which was to monitor and make recommendations regarding pre-trial release procedures.

Section 29 -- amends Sections 648.26(1) and (4) to eliminate the Bail Bond Advisory Council from the regulatory process over bail bond agents.

Section 30 -- repeals the "Florida Drug Punishment Act of 1990", which had attempted to identify offenders whose criminal activity was the result of drug problems and divert those offenders into treatment programs.

Section 31 -- repeals Section 827.05, which had created the offense of "negligent treatment of children."

Section 32 -- repeals Section 943.031(6), which had provided for automatic repeal of Section 943.031, which in turn created, provided for membership, and imposed duties upon, the "Florida Violent Crime Council."

Sections 33-43 -- amends Sections 39.053, 893.138, 895.02, and Chapter 874 regarding the prosecution of offenders who are members of a "Criminal Street Gang", including new definitions, the creation of new offenses, and provisions for punishment and forfeiture.

Sections 44-46 -- amends the habitualization sentencing statutes in minor ways.

Sections 47-48 -- amends the definitions of burglary and trespass.

Section 49 -- amends the definition of theft.

Sections 50-53 -- amends the sentencing guidelines in minor ways.

Section 54 -- significantly amends Section 893.135(1), regarding the offense of trafficking in controlled substances.

Sections 55-59 -- amends various statutes regarding enhanced offenses and a defendant's eligibility for gain-time or early release.

Sections 60-67 -- creates the "Jimmy Ryce Act", which significantly amends the Florida Sexual Predators Act and establishes provisions regarding the release of public records regarding missing children.

Section 68 -- creates Section 943.15(3), which requires "the Florida Sheriffs Association and the Florida Police Chiefs Association [to] develop protocols establishing when injured apprehendees will be placed under arrest and how security will be provided during any hospitalization [and] address[ing] the cost to hospitals of providing unreimbursed medical services.. .."

Section 69 -- amends Section 16.56 to give the statewide prosecutor jurisdiction over violations of "s. 847.0135, relating to computer pornography and child exploitation prevention ....."

Sections 70-71 -- amends definitions and creates new offenses regarding computer pornography.

Section 72 -- amends Section 776.085 regarding the provision of a civil damages action against perpetrators of forcible felonies.

Sections 73-74 -- provides for an effective date.

Chapter 96-388 thus encompasses a multitude of unrelated subjects that have separate and disassociated objectives. It is the variegated nature of the subject matters of the Act which preclude the title from complying with the constitutional mandate that its subject be briefly expressed in the title.

The proof of constitutional violation in Chapter 96-388 is clear. The only arguable connection among all sections of the bill is "public safety." But Florida courts have ruled such a broad, general area may not be considered a single subject or the constitutional mandate would become meaningless. For example, both Bunnell and Williams rejected the contention that many separate matters may be included together in one bill if all relate somehow to a broad general subject area, such as criminal justice or crime prevention and control, as contended by the state in those cases. The Fifth District in Williams highlighted the fallacy of such a position:

The Bunnell court (referring to the Second District decision) reasoned that although not expressed in the title, it could infer from the provisions of the bill, a general subject, the criminal justice system, which was germane to both sections. Even if that subject was expressed, for example, in a title reading "Bill to Improve Criminal Justice in Florida," we think this is the object and not the subject of the provisions. Further, approving such a general subject for a non-comprehensive law would write completely out of the Constitution the anti log-rolling provision of Article III, Section 6.

459 So.2d at 321. (Footnote omitted).

Since the Act clearly includes a great many more than one subject, Chapter 96-388 violates Article III, Section 6 of the Florida Constitution and must be invalidated. As the career criminal statute was unconstitutionally enacted by both Chapters 95-182 and 96-388, the window period to challenge the

constitutionality of the statute remained open until May 24, 1997, the date of the biennial adoption of the amendments to the Florida Statutes. Because the instant offense arose on May 15, 1997, Petitioner is entitled to relief.

## ISSUE II

### THE TRIAL COURT ERRED IN DENYING PETITIONER'S REQUEST FOR A JURY INSTRUCTION ON THE JUSTIFIABLE USE OF NON-DEADLY FORCE.

During a preliminary charge conference and without objection from the state, Petitioner requested a self-defense jury instruction. (T 109-110) Petitioner subsequently narrowed his request to that of a jury instruction on justifiable use of non-deadly force. Again, the state did not object to Petitioner's request. The trial court, however, denied Petitioner's request for a jury instruction on justifiable use of non-deadly force. (T 118-119) This was reversible error.

It is well-settled that where there is any evidence introduced at trial which supports the theory of defense, a defendant is entitled to have the jury instructed on the law applicable to his theory of defense when he so requests. Bryant v. State, 412 So.2d 347, 350 (Fla. 1982); Motley v. State, 20 So.2d 798 (1945). A defendant is entitled to an instruction on his theory of defense however flimsy the evidence is which supports that theory or however weak or improbable the evidence may have been. Vazquez v. State, 518 So.2d 1348, 1350 (Fla. 4th

DCA 1987); Holley v. State, 423 So.2d 562, 564 (Fla. 1st DCA 1982). It is for the jury, not the trial court, to determine what weight to give the defendant's evidence. Vazquez, supra. As the second district stated in Kilgore v. State, 271 So.2d 148, 152 (Fla. 2d DCA 1972):

It is not the quantum or the quality of the proof as to self-defense that determines the requirement for giving the charge. If any evidence of a substantial character is adduced, either upon cross-examination of state witnesses or upon direct examination of the Defendant and/or his witnesses, the element of self-defense becomes an issue, and the jury, as the trier of the facts, should be duly charged as to the law thereon, because it is the jury's function to determine that issue.

In the instant case, there was sufficient evidence introduced from Petitioner's statement to support the instruction on the justifiable use of non-deadly force. In Petitioner's taped statement, he indicated that what occurred between him and Mr. Cortez was the result of Mr. Cortez having previously run his mouth at Petitioner. According to Petitioner, there was a sexual orientation conflict between the two. (T 87) An instruction on the justifiable use of non-deadly force was therefore warranted. See, Florida Standard Jury Instruction (Crim.)3.04(e).

The question of whether Petitioner's act of cutting Cortez across the throat with a razor to avoid a sexual confrontation constituted non-deadly force should have been a question for the jury. Although the jury may have been unable to conclude

that the use of deadly force, for example, in response to a sexual advance was justifiable, they may have reached a different result if they had the opportunity to find that Petitioner's use of the razor was non-deadly force.

Accordingly, this cause must be reversed and remanded for a new trial.



CONCLUSION

Based on the foregoing argument and authorities cited therein, Petitioner respectfully requests this Court to quash the opinion of the First District Court of Appeal and reverse this cause.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by delivery to the Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this \_\_\_\_\_ day of October, 1999.

Respectfully submitted,

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

---

ROBERT FRIEDMAN  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NO. 500674  
LEON COUNTY COURTHOUSE  
SUITE 401  
301 SOUTH MONROE STREET  
TALLAHASSEE, FLORIDA 32301  
(850) 488-2458

COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

PAUL FOX,

Petitioner,

v.

CASE NO. 96,573

STATE OF FLORIDA,

Respondent.

\_\_\_\_\_ /

APPENDIX