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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DAMANI SPENCER,

Respondent.

Case No.: SC16-54

L.T. No. 1D14-5663

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

ANSWER BRIEF ON THE MERITS

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Statement of the Case and Facts

Mr. Spencer accepts the State's statement of the facts.

Summary of the Argument

It is well-established that manslaughter is a residual offense that is defined by what it is not. The failure to define justifiable and excusable homicide when instructing the jury on manslaughter results in an incomplete and misleading instruction that fails to draw a distinction between what is criminal and what is lawful. This constitutes fundamental, per se reversible error if the defendant is convicted of manslaughter or an offense one step removed from manslaughter.

The court should affirm decades of precedent holding that a defendant is not required to present evidence supporting a defense of justifiable or excusable homicide before he is entitled to a jury instruction properly defining manslaughter, and that the failure to give a proper instruction is not subject to harmless error analysis by looking to the particular facts of the case.

Argument

I. WHETHER THE FAILURE TO DEFINE JUSTIFIABLE AND EXCUSABLE HOMICIDE IN A JURY INSTRUCTION FOR MANSLAUGHTER CONSTITUTES FUNDAMENTAL ERROR REGARDLESS OF THE EVIDENCE PRESENTED [RESTATED]

The First District Court of Appeal has certified the following question as one of great public importance:

> [Is] the failure to instruct on justifiable or excusable homicide fundamental error[1] even when the record reflects there was no dispute as to this issue and there was no evidence presented from which the jury could find justifiable or excusable homicide?

Spencer v. State, 2015 WL 9287020 (Fla. 1st DCA 2015). This is a legal question subject to de novo review. *See e.g. Gridine v. State,* 175 So. 3d 672 (Fla. 2015).

The State seeks to merge two distinct universes of case law into one homogenized, one-size-fits-all standard for jury instruction error. On one hand, the failure to properly instruct the jury on an essential element of a criminal offense constitutes fundamental error only if that element is in dispute or the State relies on the incorrect instruction. *Reed v. State,* 837 So. 2d 366 (Fla. 2002)*; State v. Delva*, 575 So. 2d 643 (Fla. 1991). On the other hand, the failure to define justifiable and excusable homicide when instructing the jury on manslaughter constitutes

[1] Generally, fundamental error refers to error that does not have to be preserved for appeal, and per se reversible error refers to error that is not subject to harmless error analysis. *Johnson v. State,* 53 So. 3d 1003, 1007 n.5 (Fla. 2010). The error in this case is both fundamental and per se reversible.

fundamental error in any case where the defendant is convicted of manslaughter or a greater offense not more than one step removed, regardless of the evidence or the particular facts of the case. *State v. Lucas,* 645 So. 2d 425 (Fla. 1994). The only exception is where the defense affirmatively requests or agrees to an incomplete instruction. *See Armstrong v. State,* 579 So. 2d 734 (Fla. 1991).

The State now wants the Court to overturn *Lucas* and require courts to review the facts and evidence of a particular case to determine whether they support an instruction on justifiable and excusable homicide before holding that a jury instruction error requires a new trial. The State's argument fails because it overlooks manslaughter's unique status as a residual offense that is defined by what it is not.

Manslaughter is defined by statute as a killing "which is not justifiable or excusable homicide or murder. § 782.07, Fla. Stat. (2014); *Stockton v. State,* 544 So. 2d 1006 (Fla. 1989). In *Stockton,* this Court explained the unique nature of this offense:

> Manslaughter is a residual offense, defined by reference to what it is not. In order to define manslaughter completely, the definitions of justifiable and excusable homicide and murder must be included. An instruction on manslaughter which omits the definitions of justifiable and excusable homicide is, therefore, incomplete.

Id at 1007-8. Just last year, this Court reaffirmed that a failure to properly define manslaughter is not subject to the Reed/Delva test for fundamental error based on a case-specific look at the evidence:

> "Characterized by what it is not, manslaughter is considered a residual offense. Consequently, we have held that the failure to provide a complete instruction on manslaughter may constitute fundamental error." *Montgomery,* 39 So. 3d at 258 (citation omitted). "This is true regardless of whether there is ample evidence to convict the defendant of the higher crime." *Williams,* 123 So. 3d at 29. "[W]hether the evidence of guilt is overwhelming or whether the prosecutor has or has not made an inaccurate instruction a feature of the prosecution's argument are not germane to whether the error is fundamental." *Id.* (quoting *Reed v. State,* 837 So. 2d 366, 369 (Fla. 2002)).

Griffin v. State, 160 So. 3d 63 (Fla. 2015).

Any homicide that is not first degree murder, second degree murder, or justifiable or excusable homicide is, by definition, manslaughter. § 782.07, Fla. Stat. (2014). Thus, an instruction defining justifiable and excusable homicide is necessary to draw the line between what is lawful conduct and what is criminal. The instruction does not merely define an element of the offense, but the criminal nature of the act itself:

> It is well-settled law that the "failure to give instructions and definitions of excusable and justifiable homicide in a murder or manslaughter case constitutes fundamental error because the trial court fails to advise the jury as to what constitutes lawful acts versus unlawful acts.

Richardson v. State, 818 So. 2d 679, 680 (Fla. 3rd DCA 2002).

Without this necessary instruction, the jury is incapable of determining whether or not a manslaughter was committed, irrespective of the particular facts of the case. It is for this reason that the Court fashioned the one-step removed rule, establishing that the failure to instruct on justifiable or excusable homicide requires a new trial if the defendant is convicted of manslaughter or second degree murder, or attempt.

To abolish this rule, the Court would have to overturn far more precedent than just the *Lucas* decision. For nearly a century, it has been the law of this state that a trial court must instruct the jury on justifiable and excusable homicide in every homicide case. *Graives v. State,* 127 Fla. 182, 172 So. 716 (Fla. 1936). In 1965, the Court held that the failure to do so results in an incomplete and misleading definition of the crime, due to its nature as a residual offense. *Hedges v. State,* 172 So. 2d 824 (Fla. 1965), *receded from on other grounds, Weiand v. State,* 732 So. 2d 1044 (Fla. 1999). The failure to give such an instruction is per se reversible error and not subject to harmless error analysis. *Rojas v. State,* 552 So. 2d 914, 915-16 (Fla. 1989); *see also Stockton,* supra.

At one time, there were two separate jury instructions on justifiable and excusable homicide: a long-form instruction to be given when there was evidence supporting a finding of justifiable and excusable homicide, and a shorter

instruction for when there was no such evidence. However, the Court "mercifully put an end to the dual instructions" nearly 25 years ago, approving a single instruction on justifiable and excusable homicide to be given in all cases. *Summers v. State,* 672 So. 2d 617, 618 n.1 (Fla. 5th DCA 1996). In making this change, the Court expressly rejected the argument that no instruction on excusable homicide is necessary unless it has a basis in the evidence:

> Furthermore, we do not concur with the committee's suggestion that no portion of the excusable homicide instruction need be read when it has no basis in the evidence. We say that because Florida case law has consistently held that manslaughter is a residual offense which cannot be properly defined without an explanation that justifiable homicide and excusable homicide are excluded from the crime. *Rojas v. State,* 552 So. 2d 914 (Fla. 1989); *Hedges v. State,* 172 So. 2d 824 (Fla. 1965). Because a manslaughter instruction will have to be given in every homicide case, the instruction on excusable homicide will also have to be included. We do, however, concur with the committee's suggestion that only one instruction on excusable homicide need be given rather than both the current short and long forms.

Standard Jury Instructions - Criminal Cases No. 92-1, 603 So. 2d 1175, 1176 (Fla. 1992).

The State's position would not only be a step backward to this long-rejected approach of looking to the facts of each individual case, it would go even further by saying that no instruction at all on justifiable and excusable homicide, long or short, is required unless the evidence supports such a defense. That has never been

the law of this state, nor should it be. Just last year, this Court reaffirmed in *Griffin* that the failure to draw a line between excusable homicide and criminal manslaughter is not subject to harmless error analysis. The State bears the burden of proving that a crime was committed regardless of whether the defendant presents evidence supporting a defense or stands mute. *Griffin,* 160 So. 3d at 68. Thus, by pleading not guilty, a defendant puts the elements of manslaughter at issue in the case.

Hedges, Rojas, Stockton, and *Lucas* were all correctly decided. Excusable homicide is not an element of manslaughter or an affirmative defense; it is a lawful, non-criminal act. A jury must be instructed on that point so as not to be misled about what constitutes a criminal homicide and what doesn't. The absence of justifiable or excusable homicide is pertinent or material to what the jury must consider before rendering a verdict. As such, there is no conflict between *Lucas* and the *Reed/Delva* line of cases concerning fundamental error in jury instructions. For this reason, the Court should answer the certified question in the affirmative.

Under principles of *stare decisis,* precedent should be followed unless a departure is necessary to vindicate other principles of law or remedy a continued injustice. *Haag v. State,* 591 So. 2d 614, 618 (Fla. 1992). In this case, the definitions of justifiable and excusable homicide are contained in the standard instruction on introduction to homicide, and there is no reason for the court to omit

this instruction unless specifically requested by the defense on the record. As defense counsel stated at oral argument in the case of *State v. Moore,* Case No. SC13-1236, such omissions are exceedingly rare. There is no compelling reason to discard decades of precedent and subject such a rare yet critical error to harmless error analysis. This Court should reaffirm its prior holdings and ensure that juries are properly instructed in homicide cases.

Conclusion

Based on the foregoing, the Respondent requests that the certified question be answered in the AFFIRMATIVE, and the decision of the First District Court of Appeal be APPROVED.

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Certificate of Service

I HEREBY CERTIFY that I have furnished a true and correct copy of the foregoing initial brief by electronic service to Matthew Pavese, Assistant Attorney General, at Matthew.Pavese@myfloridalegal.com on May 4, 2016.

/s/ Baya Harrison
Baya Harrison

Certificate of Compliance

I CERTIFY that the foregoing document was prepared in Times New Roman 14-point font, per Fla. R. App. 9.210.

/s/ Baya Harrison
Baya Harrison