IN THE SUPREME COURT OF FLORIDA

RONALD NESBITT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	CASE NO. SC02-1723
STATE OF FLORIDA,	)	
	)	DCA CASE NO. 5D01-203
Respondent,	)	
_____	)	

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S REPLY BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ARGUMENT

A VERDICT OF GUILT FOR AN UNCHARGED CRIME IS FUNDAMENTAL ERROR WHICH CANNOT BE WAIVED. WHETHER BECAUSE AGGRAVATED ASSAULT WAS NOT CHARGED OR BECAUSE AGGRAVATED ASSAULT WITH A WEAPON IS A NONEXISTENT CRIME, THE JUDGMENT AND SENTENCE MUST BE VACATED.

The Petitioner replies to clarify some key facts and points of argument.

Initially, the Petitioner must differ with the Respondent's expressed view that there is an issue concerning whether or not the information alleged the elements of aggravated assault, specifically the "deadly weapon" element. The Petitioner disagrees with the portion of Judge Harris' special concurrence, advocated by the State, that essentially finesses a "deadly" quality to the instrumentalities employed based upon the charged second-degree murder attempt, the latter charge rejected by the jury.

The Petitioner challenges the State's conclusion that the *probata* exceeded the *allegata*, particularly where the jury returned a special verdict that the offense was committed with a "weapon." The holding of the Fifth District Court of Appeal certified as being in conflict with decisions of the Second and Fourth District Courts of Appeal was that the conviction for aggravated assault with a deadly weapon where it exceeded the allegations of the charging document was not

fundamental error and had been waived. Nesbitt v. State, 819 So.2d 993,994 (Fla. 5th DCA 2002); Levesque v. State, 778 So.2d 1049 (Fla. 4th DCA 2001); and Mateo v. State, 757 So.2d 1229 (Fla. 2d DCA 2000). The Petitioner's arguments that aggravated assault with a weapon is a nonexistent crime and is fundamental error on the one hand, and that aggravated assault with a deadly weapon was not charged and was not sufficiently waived on the other hand remain unaddressed by the State. See Nesbitt v. State, 819 at 994 (Fla. 5th DCA 2002)(Harris, J., concurring specially).

The jury was instructed on attempted second-degree murder with a weapon, not a deadly weapon. (RB 3)[1] The charged weapon was as an enhancement to increase the charged attempt of second-degree murder from a second-degree felony to a first-degree felony. See Fla. Stat., Section 775.087, 777.04(4)(c), and 782.04(2)(2000). The Respondent, adopting part of the analysis of Judge Harris' special concurring opinion, argues that since attempted murder was charged the weapon charged as having been used must have been deadly: the adjective "deadly" in the information would be 'surplusage.' See Nesbitt v. State, 819 at 997 (Fla. 5th DCA 2002).

There are two problems with this analysis. Most immediately, there is the

[1]"RB" is a reference of the Respondent's Brief on the Merits.

problem of the jury having rejected the State's charge that the weapon was used in a deadly fashion, i.e., in an attempt to commit second degree murder. While arguably "deadly" would be surplusage as a modifier to a weapon found to have been used in the attempt to commit a deadly act, it is necessary to allege aggravated assault with a deadly weapon as a lesser-included-offense of attempted second-degree murder with a weapon. "It is error to give a jury instruction on a permissive lesser-included offense unless the accusatory pleading alleges all the elements of the lesser offense." Levesque v. State, 778 at 1050.

The second problem with an analysis that imputes deadliness to any instrumentality charged as having been used in a charged attempt of murder is that the enhancement quickly loses its meaning. All murder attempts would necessarily be "enhanced" to the next felony level based upon use of the imputed deadly weapon. One would then have to ask, "Over what would it be enhanced?" The argument is based upon fallacious reasoning, reducible to a hopeless tautology. Murder was attempted because of the use of a deadly weapon and the weapon was deadly because of its use in the attempted murder. Using the State's logic, aggravated assault would be a category one, necessarily-included lesser offense of attempted second-degree murder.

There is a subtle but important distinction in the (charged) use of a weapon

in a deadly manner and the use of a "deadly weapon" for purposes of enhancing simple assault to aggravated assault. Fla. Stat., Section 784.011, and Section 784.021 (2000). The deadly weapon contemplated in aggravated assault is not necessarily *used* at all. The "intentional, unlawful threat by word or act to do violence...coupled with the apparent ability to do so, and doing some act which creates a well-founded fear...that such violence is imminent" when done "*with* a deadly weapon" suggests some independent deadliness in the instrumentality quite apart from the manner in which it is used. Fla. Stat., Section 784.011, and Section 784.021 (2000). [Emphasis added.] The assault is expressly made "*with* a deadly weapon *without intent to kill*," i.e., with non-deadly intent. Fla. Stat., Section 784.021 (2000). [Emphasis added.]

On the issue of the Petitioner's waiver of objection to conviction of a crime which exceeded the allegations of the charging document, Judge Harris' analysis in his specially concurring opinion is commended to this Honorable Court:

> ...while defense counsel did not object to the instruction, it is clear that she did not request it. Nor did she rely on it in her closing argument. She explained the charges that the court intended to give to the jury but she rejected aggravated assault as a proper verdict on the same basis that she rejected attempted second degree murder with a weapon...Thus while defense counsel recognized the existence of the instruction on aggravated assault, and it would have been foolish for her to have ignored it, she

> did not seek to use the erroneous instruction to her advantage. Since the defense did not attempt to mislead the court and since the defense did not attempt to take advantage of an erroneous instruction, I would, as did the court in Ray, find that no waiver occurred, and that appellant may properly raise this fundamental error on appeal.

Nesbitt v. State, 819 at 996.

The defense had vehemently protested any more expansive definition of the two charged instrumentalities and had argued their nonlethal nature to the court in motion for judgment of acquittal and directly to the jury. The rationale of the Florida Supreme Court in Espinosa that a defendant must not be allowed to challenge the sufficiency of the evidence on an offense for which he has requested a jury instruction to prevent sandbagging and fraud upon the court simply does not apply to the facts of this case. State v. Espinosa, 686 So.2d 1345 (Fla. 1996).

The Petitioner, charged with the commission of a crime with a weapon, cannot be found guilty of a crime with a deadly weapon. A verdict which exceeds the *allegata* of the charging document is a nullity. On the other hand where the jury expressly found only that a "weapon" had been used in the aggravated assault, the conviction is for a nonexistent crime and therefore must be vacated. Each error is fundamental. Reversal is required.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the Petitioner requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal, vacate the judgment and sentence for aggravated assault, remand for entry of judgment for simple assault as the next and last lesser-included offense, and direct that the Petitioner be immediately released.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being hand delivered to: The Honorable Richard E. Doran, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and is being mailed to Ronald Nesbitt, Hamilton Correctional Institution (Main Unit), 10650 S.W. 46th Street, Jasper, Florida, 32052, on this 17th day of December, 2002.

ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER

STATEMENT CERTIFYING FONT

I hereby certify that the size and style of type used in this brief is 14 point Times New Roman.

ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER