IN THE SUPREME COURT OF FLORIDA

ROBERT LAVON SANDERS,

Petitioner,

v. CASE NO. **SC03-640**

STATE OF FLORIDA,

Respondent.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **THIRD** JUDICIAL CIRCUIT,
IN AND FOR **COLUMBIA** COUNTY, FLORIDA

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE(S)**

OTHER SOURCES

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REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

References to the State's answer brief shall be as " ," followed by the appropriate pages in parentheses. All other references shall be as set forth initially.

ARGUMENT

ISSUE

THE FIRST DISTRICT COURT OF APPEAL ERRED IN CONCLUDING THAT A DEFENDANT CAN NEVER MAKE A COLORABLE CLAIM THAT HIS ATTORNEY WAS INEFFECTIVE FOR NOT REQUESTING JURY INSTRUCTION FOR A NECESSARILY LESSER INCLUDED OFFENSE TO THAT CHARGED.

A lesser included offense gives the jury an opportunity to most closely fit the facts of some situation with a range of possible crimes. Rather than a binary guilty or not guilty, the "third option" or lesser included offense offers the jury the opportunity to make a nuanced response Without them, they can only, in a hamfisted way, make the best match, which, in some cases may be unconstitutionally unacceptable. See, Beck v. Alabama, 477 U.S. 625 (1980).

The State relies on the United States Supreme Court's case of Schad v. Arizona, 501 U.S. 624 (1991), to limit the logical reach of its earlier decision in Beck. (Respondent's brief at p. 14 et. seq.). In the former case, Schad was charged with first degree murder. Besides wanting the jury instructed on second degree murder, a necessarily lesser included offense, he wanted them also given guidance on a lesser offense of robbery. Relying on Beck, he wanted them told of "every lesser included offense supported by the evidence." Id. at 646 (Emphasis

supplied.) The nation's high court found no merit to that argument because, under Beck, the jury's "third option" was not robbery but second degree murder. They rejected, as irrational, that a jury might have convicted the defendant of robbery had they been instructed on that offense, but since they were not, they convicted him of capital murder to keep him off the streets rather than second degree murder.

Florida, many years earlier, pioneered that reasoning, but in somewhat different language. State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978)

> For the purpose of clarification, we note that Lomax involved a trial court's failure to give a requested instruction on a lesser-included offense that was only One step removed from the offense charged, while in DeLaine, as in the present case, the trial judge gave instructions on the next immediate lesser- included offense but refused to instruct the jury on an offense Two steps removed. The significance of that distinction is more than merely a matter of number or degree, since in the latter situation, unlike the former, the jury is given a fair opportunity to exercise its inherent "pardon" power by returning a verdict of guilty as to the next lower crime. For example, if a defendant is charged with offense "A" of which "B" is the next immediate lesser-included offense (one step removed) and "C" is the next below "B" (two steps removed), then when the jury is instructed on "B" yet still convicts the accused of "A" it is logical to assume that the panel would not have found him guilty only of "C" (that is, would have passed over "B"), so that the failure to instruct on "C" is harmless. If, however, the jury only receives instructions on "A" and "C" and returns a conviction on "A", the error cannot be harmless because it is impossible to determine whether the jury, if given the opportunity, would have "pardoned" the defendant to the extent of convicting him on "B" (although it may have been unwilling to make the two-step leap downward to "C").

(Emphasis supplied.). Abreau remains good law as does its reasoning. See, Iseley v. State, 29 Fla. L. Weekly D 125 (Fla. 5th DCA January 2, 2004).

Thus, in this case the jury had the "all or nothing" choice of convicting Sanders of robbery with a firearm or simple robbery. Had they had the intermediate or necessarily lesser or offense "B" option of robbery with a weapon they may not have convicted him of robbery with a firearm. Without that third option, this Court cannot assume, as the First District did, that the jury convicted Sanders of robbery with a firearm because the evidence established that crime beyond a reasonable doubt. As Beck reasons, with Schad's approval, without giving the jury the one step removed lesser offense, it may convict of the higher offense because the defendant was guilty of something and the higher offense was the best fit it could make, given its choices. Or, it may have "pardoned" him to extent that it found him guilty of simple robbery. Neither choice represented the jury's findings of fact, but one or the other was the best they could do given the choice they had to make.

CONCLUSION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to **THOMAS D. WINOKUR**, Assistant Attorney General, The Capital, Tallahassee, FL 32399-1050; and to Petitioner, **ROBERT LAVON SANDERS**,#I02767, Holmes Correctional Institution, 3142 Thomas Drive, Bonifay, FL 32425, on this date, February 6, 2004

.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that pursuant to Rule 9.201(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

Respectfully submitted,

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