IN THE SUPREME COURT OF FLORIDA

SHANA BARNES,
PETITIONER,

V.

CASE NO.: SC06-662

STATE OF FLORIDA,
RESPONDENT,

AMENDED BRIEF ON JURISDICTION

ON REVIEW FROM THE DISTRICT COURT OF APPEALS, FIRST DISTRICT STATE OF FLORIDA

SHANA BARNES #J18067
HOMESTEAD CORRECTIONAL INST.
19000 SW 377TH STREET, SUITE 200
FLORIDA CITY, FL 33034

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STATEMENT OF CASE AND FACTS

A. STATEMENT OF THE CASE

THE PETITIONER, HEREIN REFERRED TO AS BARNES, WAS CHARGED BY INFORMATION WITH SECOND DEGREE MURDER. (R.I 8-9). THIS CAUSE PROCEEDED TO TRIAL. A JURY FOUND BARNES GUILTY OF SECOND DEGREE MURDER (R II 204) BARNES FILED A MOTION FOR NEW TRIAL AND MOTION FOR JUDGMENT OF ACQUITTAL ARGUMENTS WERE MADE AS TO THE GRANTING OF BOTH MOTIONS. ALSO ARGUED WAS THE COURTS ERROR IN ALLOWING THE JURY TO HAVE A COPY OF PRIOR TESTIMONY, IMPROPER AND CONFUSING INSTRUCTIONS ABOUT THE USE OF JUSTIFIABLE FORCE AND DUTY TO RETREAT. THE CIRCUIT COURT DENIED THESE MOTIONS (SUPP. R 1-12) THE COURT SENTENCED BARNES TO 37 YEARS IN PRISON WITH A MINIMUM MANDATORY TERM OF 25 YEARS. PURSUANT TO SECTION 775.087, FLORIDA STATUTES (R II 208-220). BARNES, TIMELY FILED HER NOTICE OF APPEAL (R. II 268). THE FIRST DISTRICT COURT PER CURIAM AFFIRMANCE ON MARCH 6, 2006. BARNES FILED A TIMELY NOTICE TO INVOKE DISCRETIONARY JURISDICTION ON APRIL 6, 2006. ON APRIL 10, 2006 A MOTION TO ENLARGE PAGE LIMITS OF JURISDICTIONAL BRIEF WAS FILED. BRIEF ON JURISDICTION FILED ON APRIL 13, 2006. APRIL 20, 2006 THIS COURT DENIED MOTION TO ENLARGE PAGE LIMITS OF JURISDICTIONAL BRIEF, ALSO BRIEF ON JURISDICTION WAS STRICKEN. AN AMENDED BRIEF ON JURISDICTION AS ORDERED IS FILED IN A TIMELY FASHION.

B. STATEMENT OF THE FACTS

PRIOR TO TRIAL THE COURT CONSIDERED WHETHER THE STATE COULD INTRODUCE BARNES FORMER TRIAL TESTIMONY. THE CIRCUIT COURT DECIDED THE STATE COULD INTRODUCE TRANSCRIBED TESTIMONY (AS ADMISSIONS). VARIOUS OBJECTIONS WERE MADE INTER ALIA, REGARDING TESTIMONY; BECAUSE UNDUE EMPHASIZE WOULD BE PLACED ON TRANSCRIPT. ALSO, INADMISSIBLE PORTIONS OF FORMER TESTIMONY. TRIAL COURT RULES UPON OBJECTIONS, THEN CAUSE PROCEEDED TO TRIAL PRODUCING THE FOLLOWING RELEVANT FACTS (R II 385-400)

YEA CHRISTOPHER, WAS THE FIRST STATE WITNESS. BARNES RENEWED HER PRIOR OBJECTION TO THIS TESTIMONY. (R IV. 70). CHRISTOPHER WAS A CLOSE FRIEND OF GREGORY BARNES FOR 4 YEARS PRIOR TO HIS DEATH (JULY 16, 2000), AND NEVER MET BARNES. ON THE NIGHT OF JULY 15, 2000, CHRISTOPHER MET GREGORY - THEY WATCHED A BOXING MATCH AND HAD DINNER. AROUND MIDNIGHT GREGORY TOOK CHRISTOPHER HOME. (R IV 70-73) THE STATE INTRODUCED A TAPE OF BARNES'S 911 CALL. SHE STATED SHE SHOT HER INTOXICATED HUSBAND; THEY GOT INTO AN ARGUMENT. HE CHOKED HER IN THE BEDROOM AND THREW HER AROUND. SHE TRIED CALLING 911 THEN, BUT HE GRABBED THE PHONE. HE, ALSO TOLD BARNES, BITCH YOU BETTER LEAVE. GREGORY APPROACHED BARNES IN THEIR GARAGE WHILE SHE WAS IN THE CAR. HE SLAPPED HER IN THE FACE AND BUSTED HER LIP. (R IV 80-85). KATHY GRIFFEN, OF JSO WENT TO THE SCENE AND PHOTOGRAPHED BARNES. THERE WAS SOME SLIGHT REDNESS, SLIGHT SCRATCH/ABRASION ON THE RIGHT SIDE OF HER NECK. ALSO, PHOTOGRAPHED WAS BARNES LIP AND BROKEN FINGERNAILS (R IV 167-173). DWAYNE DARNELL, A PATROL OFFICER WITH JSO, SAW BARNES IN THE BACK OF A PATROL CAR. DARNELL, SAW BLOOD ON HER SHIRT COLLAR. ALSO, IDENTIFIED WAS A SMALL LACERATION ON HER UPPER LIP AND A SMALL SCRATCH ON HER NECK. BARNES, GAVE DARNELL A DETAIL ORAL ACCOUNT OF THE EVENTS, STARTING WITH GREGORY GOING TO A FRIEND'S HOUSE TO WATCH A FIGHT. HER UNSUCCESSFUL ATTEMPTS TO CONTACT HIM ON THE CELL PHONE; TO HER FINDING HIM IN THE BEDROOM OF THEIR HOUSE WOBBLING AND INTOXICATED. HE CHARGED AND PUSHED BARNES, A STRUGGLE BEGAN THERE AFTER HE CHOKED HER. SHE GRABBED A HANDGUN STORED IN A FANNY PACK LOCATED IN HEADBOARD. HE GRABBED FANNY PACK; SHE ATTEMPTS TO CALL 911 AT 9:30 AM, HE TOOK THE PHONE AND HUNG IT UP. ANOTHER STRUGGLE OCCURS THROWING BARNES TO THE FLOOR. SHE RETRIEVED ITEMS INCLUDING HANDGUN TO LEAVE THE HOUSE. EXISTING HOUSE VIA GARAGE; HE CURSED AT HER AND TOLD HER TO LEAVE SHE WAS BACKING

OUT OF THE GARAGE AND STOPPED TO HEAR WHAT HE WAS SAYING. HE APPROACHES THE CAR REACHES INSIDE AND SLAPPED HER FACE. SHE FIRED A WARNING SHOT; THEN SHE HEARD A THUMP ON CAR, CALLED 911 FOR ASSISTANCE. AFTER, BARNES ORAL STATEMENT DARNELL REQUESTED A WRITTEN STATEMENT. WRITTEN STATEMENT WAS INTRODUCED BY DARNELL READING STATEMENT. BARNES OBJECTIVE IN HAVING THE GUN WAS NOT TO KILL HER HUSBAND; SHE WANTED TO SCARE HIM SO SHE COULD LEAVE AND PROTECT HERSELF. DARNELL, DID SEE SIGNS OF STRUGGLE IN BEDROOM. BARNES NEVER SAID SHE WAS ANGRY AT GREGORY. GREGORY, THREW DOWN BARNES THREE SEPARATE TIMES. (R IV 184- R V 270). THE PARTIES DISCUSSED THE ISSUE OF PROVIDING THE JURY WITH A TRANSCRIPT OF BARNES PRIOR TRIAL TESTIMONY. SHE OBJECTED TO USE OF TRANSCRIPTS. THE COURT OVERRULED OBJECTIONS. AT PRE-TRIAL MOTION HEARING. THE TRIAL COURT SPECIFICALLY CONSIDERED WHETHER FORMER TRIAL TRANSCRIPT WAS ADMISSIBLE. TRIAL COURT CONSIDERED VARIOUS OBJECTIONS BY BARNES ON CERTAIN PARTS OF FORMER TESTIMONY. SHE ALSO, OBJECTED TO QUESTION/ ANSWERS IN THE FORMER TESTIMONY REGARDING DUTY TO RETREAT FROM HER OWN HOME. COURT AGREED SHE DID NOT HAVE TO LEAVE, BUT ACTIONS INDICTED SHE WAS LEAVING. COURT STATED JURY HAD TO DETERMINE REASONABLENESS OF ACTIONS; COURT OVERRULED OBJECTION. TRANSCRIPT OF FORMER TRIAL WAS READ TO THE JURORS VIA ROLE PLAY(ONE STATE ATTORNEY READING, WHILE THE OTHER ANSWERING QUESTIONS)(R II 385; R III 401-485; R VI 493-529). BARNES, OBJECTED TO QUESTION/ANSWER "SO WOULDN'T YOU AGREE COMING OUT OF THE MASTERBEDROOM, GOING OUT THIS FRONT DOOR YOU TAKE THE SIDEWALK AROUND THE FIRST CAR OR EVEN TO THE OTHER CAR? ANSWER- THE OTHER CAR WAS IN THE GARAGE. THIS WAS ERROR. COURT HAD PREVIOUSLY SUSTAINED THIS OBJECTION THE COURT ASKED DEFENSE COUNSEL IF HE WANTED A CURATIVE INSTRUCTION BARNES ARGUES THE CRITICAL ISSUE OF WHETHER SHE HAD A DUTY TO LEAVE THE HOUSE. SHE ASKED FOR THE FOLLOWING CURATIVE INSTRUCTION; BARNES WAS UNDER NO OBLIGATION TO LEAVE HER HOME. THE COURT REJECTED REQUEST FOR CURATIVE INSTRUCTION. COURT INSTRUCTED JURY THAT AN ERROR OCCURRED DURING THE READING OF TRANSCRIPT. PROPER QUESTION/ANSWER WAS RE-READ OMITTING THE QUESTION ABOUT THE FRONT DOOR/ SIDEWALK (R VI 483-490). BARNES, MOVED FOR JUDGMENT OF ACQUITTAL. SHE ARGUES STATES CIRCUMSTANTIAL EVIDENCE DID NOT REBUT CLAIM OF SELF-DEFENSE; ALSO ARGUES INSUFFICIENCY OF EVIDENCE TO ESTABLISH PROOF OF DEPRAVED MIND FOR SECOND DEGREE MURDER. COURT DENIED MOTION ON BOTH GROUNDS. DEFENSE PRESENTED ITS CASE(R. VI 513-518). JAMES WILLIAMS, HOMICIDE INVESTIGATOR WITH JSO SAW THE FOLLOWING AT SCENE: SIGNS OF STRUGGLE IN BEDROOM; BROKEN FINGERNAILS ON FLOOR; POSSIBLE BLOOD ON GARAGE DOOR. SHE COOPERATED AND WAS POLITE. SHE SPOKE OF PRIOR PUSHING, SHE WAS SCARED OF GREGORY. STATEMENTS OF PHYSICAL EVIDENCE GIVEN BY BARNES WERE CONSISTENT WHAT APPEARED TO BE BLOOD ON COLLAR OF HER SHIRT AND SHE APPEARED TO HAVE BEEN IN A FIGHT. THE FOLLOWING CHARACTER WITNESSES TESTIFIED TO HER REPUTATION AS A PEACEFUL PERSON; BEING VERY HONEST; WELL-LIKED AND RESPECTED. JAMES O'REILLY (R. VI 543-546); PAULETTE HINCKEN (R VI 584- 587); DAVID CARTER (R VII 627-628); PATTY SHEA (R VII 676-677); SUSAN SHACKA (R VII 684-685); NELLY FLYNN, WITNESSES BARNES AND GREGORY INTERACT WITH EACH OTHER. SHE WAS PASSIVE AND CALM. GREGORY WOULD TALK ANGRILY TO HER (R VIII 713-718); ANDREA GIGGETTS, SAID SHE WAS SUBSERVIENT WITH HER HUSBAND. HE WAS MUSCULAR AND STRONG. SHE NEVER EXPRESSED ANY FEELINGS OF SPITE/ HATRED TOWARDS HER HUSBAND (R VIII 734-742). SHE AGAIN OBJECTED TO INTRODUCTION OF THE FORMER TRIAL TESTIMONY. COURT FOUND THAT FORMER TESTIMONY WAS A SWORN STATEMENT CONTAINING ADMISSIONS, COURT OVERRULED OBJECTION BECAUSE THE TRANSCRIPT WAS THE PUBLISHING OF A DOCUMENT LIKE A WRITTEN STATEMENT BY WITNESS. (R VII 643-645). ON JULY 17, 2000, MICHELLE SMITH-SCARAZZI FROM PUBLIC DEFENDERS OFFICE PHOTOGRAPHED THE FOLLOWING INJURIES A SCRATCH MARK TO HER WAIST, NECK AND DAMAGE TO HER NAILS, ALSO BRUISING ON ARM AND ELBOW (R VIII 728-730). TRIAL COURT CONDUCTED A JURY INSTRUCTION CONFERENCE REGARDING INSTRUCTION ON THE USE OF JUSTIFIABLE FORCE. AFTER JURY INSTRUCTION AND DELIBERATIONS, THE JURY FOUND BARNES GUILTY OF SECOND DEGREE MURDER.

SUMMARY OF ARGUMENT

IN THIS CASE THERE ARE THREE ISSUES WHICH EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT AND OTHER DISTRICT COURT OF APPEALS.

INSUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT SECOND DEGREE MURDER WERE PETITIONER ACTED WITH A DEPRAVED MIND WITH ILL WILL SPITE, HATRED, MALICE OR EVIL INTENT. THE FIRST DISTRICT COURT OF APPEALS SHOULD HAVE REVIEWED THE RECORD AND EVIDENCE IN IT'S STANDARD FOR DE NOVO REVIEW, IN ADDITION TO THE MOTION FOR JUDGMENT AND ACQUITTAL, BASED ON THE CIRCUMSTANTIAL EVIDENCE ESTABLISHED IN THIS COURT WITH PAGAN V. STATE, 830 SO.2d 792 (FLA. 2002).

THE FIRST DISTRICT COURT OF APPEALS FAILED TO ADHERE TO THE STANDARD OF REVIEW FOR SUFFICIENCY OF EVIDENCE. WHERE THE EVIDENCE PROVIDED BY THE STATE WAS INSUFFICIENT TO WARRANT A CONVICTION AND DID NOT CONTRADICT PETITIONER'S THEORY OF SELF-DEFENSE AS HELD IN THE SECOND DISTRICT COURT OF APPEALS WITH LIGHT V. STATE, 841 SO.2d 623 (FLA. 2nd DCA 2003); TILLMAN V. STATE, 842 SO.2d 922 (FLA 2nd DCA 2003); AND WILLIAMS V. STATE, 674 SO.2d 177 (FLA. 2nd DCA 1996).

THE FIRST DISTRICT COURT OF APPEALS SHOULD HAVE VIEWED THE PETITIONER'S FACTS AND CIRCUMSTANCES SEPARATELY IN IT'S DE NOVO REVIEW AS SET IN LEE V. ST. JOHNS COUNTY COMMISSIONERS, 776 SO.2d 1110 (FLA. 5th DCA 2000). INSTEAD OF FROM THEIR PREVIOUS DECISION IN EASLEY V. STATE, 878 SO.2d 473 (FLA 1st DCA 2004)

SECOND ISSUE WAS TRIAL COURT'S ERRONEOUS DECISION IN ALLOWING THE JURY TO USE TRIAL TRANSCRIPTS IN IT'S DELIBERATIONS, WHICH IS CONTRARY TO FLA. R. CRIM. P 3.400(a). JANSON V. STATE 730 SO.2d 734 (FLA 5th DCA 1999) THERE ARE NUMEROUS CASES HELD BY THIS COURT AND OTHER DISTRICT COURT OF APPEALS THAT ADDRESS DEPOSITIONS IN JURY DELIBERATIONS YOUNG V. STATE, 645 SO.2d 965 (FLA. 1994) DEPOSITIONS ARE VERY SIMILIAR TO TRANSCRIPTS, BOTH ARE TAKEN UNDER OATH AND ARE ORAL TESTIMONY. BY ALLOWING ANY TRANSCRIPTS IN THE JURY ROOM WITHOUT JUDGES REQUESTING THEM AFFECTS THE WHOLE TRIAL STRUCTURE AND PROCEEDINGS, IT IS ALSO A QUESTION OF GREAT PUBLIC IMPORTANCE,

THIRD ISSUE IS FIRST DISTRICT COURT OF APPEALS DENYING PETITIONER'S CLAIM OF A RIGHT TO A FAIR TRIAL BECAUSE OF TWO INCONSISTENT CONTRADICTORY AND CONFUSING JURY INSTRUCTIONS ON THE DUTY TO RETREAT. BUTLER V. STATE, 493 SO.2d 451 (FLA. 1986), MCKENZIE V. STATE, 830 SO.2d 234 (FLA 4th DCA 2002) AND POLLACK V. STATE, 818 SO.2d 654 (FLA 3rd DCA 2002). HOLDS REVERSIBLE ERROR OCCURS WHEN GIVING CONFUSING AND MISLEADING JURY INSTRUCTIONS, GIVING OF CONTRADICTORY JURY INSTRUCTIONS COMBINED WITH PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENTS HAS A CUMULATIVE EFFECT CAUSING MORE CONFUSION THAN CLARITY AS TO WHAT PETITIONER'S DUTY WAS. THIS ERROR RESULTED IN A GUILTY VERDICT FOR PETITIONER.

THE PETITIONER, HEREIN SETS FORTH HER ARGUMENTS AND CONTENDS THAT THE DECISION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH PREVIOUS DECISIONS OF THIS COURT AND OTHER DISTRICT COURT OF APPEALS. PETITIONER HONORABLY REQUEST THIS COURT TO ACCEPT JURISDICTION AND SETTLE CONFLICT.

JURISDICTIONAL STATEMENT

THE FLORIDA SUPREME COURT HAS DISCRETIONARY JURISDICTION TO REVIEW A DECISION OF A DISTRICT COURT OF APPEAL THAT EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THE SUPREME COURT OR ANOTHER DISTRICT COURT OF APPEAL ON THE SAME POINT OF LAW. ART V § 3(b)(3) FLA. CONST. (1980); FLA. R. APP. P 9.030(a)(2)(A)(iv).

ARGUMENT - ISSUE I

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL DENYING BARNES'S CLAIM FOR JUDGMENT OF ACQUITTAL AS TO SECOND DEGREE MURDER: THERE WAS NO EVIDENCE TO SUPPORT CONVICTION THAT BARNES ACTED OUT OF ILL WILL, SPITE, HATRED, MALICE/EVIL INTENT. THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT ON THE SAME POINT OF LAW.

THERE ARE THREE (3) POINTS OF CONFLICT BEFORE THIS COURT WHICH ARE; **1)** DISTRICT COURT SHOULD HAVE VIEWED THE RECORD AND EVIDENCE IN IT'S STANDARD FOR DE NOVO REVIEW, IN ADDITION TO, THE ORDER ON A MOTION FOR JUDGMENT OF ACQUITTAL, BASED ON THE CIRCUMSTANTIAL EVIDENCE STANDARD OF REVIEW. **1.** THE STANDARD OF REVIEW HAS BEEN ESTABLISHED BY THE FLORIDA SUPREME COURT AND FIFTH DISTRICT COURT OF APPEALS AS FOLLOWS: FLOYD V. STATE, 913 SO.2d 564 (FLA. 5TH DCA 2005) AND DARLING V. STATE, 808 SO.2d 145 (FLA 2002) AND DUGAN V. STATE, 830 SO.2d 792 (FLA. 2002) AND SUTTON V. STATE, 884 SO.2d 332 (FLA. 5TH DCA 2003). **2.** THE EVIDENCE IN THE BARNES'S CASE IS TOTALLY CIRCUMSTANTIAL; THERE WAS NO EVIDENCE THAT BARNES SHOT HER HUSBAND OUT OF ANGER/JEALOUSLY; NO WITNESSES TO CONTRADICT STATEMENT GIVEN BY BARNES; NO EVIDENCE TO REBUT BARNES'S HYPOTHESIS OF SELF-DEFENSE; STATEMENT GIVEN BY BARNES WAS CONSISTENT WITH THEORY OF SELF-DEFENSE; NO EVIDENCE BARNES ACTED WITH A DEPRAVED MIND AND NO EVIDENCE THAT BARNES KNEW HER HUSBAND/VICTIM WAS WITH ANOTHER WOMAN.

BLACK'S LAW DICTIONARY (8TH EDITION) DEFINES CIRCUMSTANTIAL EVIDENCE AS: EVIDENCE BASED ON INFERENCE AND NOT ON PERSONAL KNOWLEDGE/OBSERVATION, ALL EVIDENCE THAT IS NOT GIVEN BY EYEWITNESS TESTIMONY.

BASED ON THE DEFINITION OF CIRCUMSTANTIAL EVIDENCE ALL THE STATE DID WAS PRESENT WHAT PROBABLY OR COULD OF HAPPENED. NO EVIDENCE WHATSOEVER WAS PRESENTED TO REFUTE BARNES HYPOTHESIS OF INNOCENCE. THE ONLY FACT PROVEN THROUGH A WITNESS WAS THE HUSBAND/VICTIM SOME, TWO HOURS PRIOR HAD BEEN IN THE COMPANY OF A FEMALE FRIEND. THIS FACT STILL DID NOT PROVE THE INTENT ELEMENT OF DEPRAVED MIND ILL WILL, SPITE, HATRED AND MALICE. BECAUSE BARNES HAD NO KNOWLEDGE OF THIS FACT ON THE NIGHT IN QUESTION. **3.** THE SECOND DISTRICT COURT HAS DEFINED OR EXPLAINED CIRCUMSTANTIAL EVIDENCE WITH THE FOLLOWING CASE: E.E.W V. STATE, 915 SO.2d 633 (FLA 2ND DCA 2005) WHERE THE EVIDENCE IS ENTIRELY CIRCUMSTANTIAL, NO MATTER HOW STRONGLY IT MIGHT SUGGEST GUILT, UNLESS THE EVIDENCE IS INCONSISTENT WITH ANY REASONABLE HYPOTHESIS OF INNOCENCE, A CONVICTION MAY NOT BE UPHELD. WHERE THE STATE FAILS TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH A PRIMA FACIE CASE OF THE CHARGED CRIME, A JUDGMENT OF DISMISSAL IS REQUIRED DAVIS V. STATE, 781 SO.2d 1154 (FLA 2ND DCA 2000) "EVIDENCE THAT CREATES NOTHING MORE THAN A STRONG SUSPICION THAT A DEFENDANT COMMITTED THE CRIME IS NOT SUFFICIENT TO SUPPORT A CONVICTION. WHERE TWO OR MORE INFERENCES IN REGARD TO THE EXISTENCE OF A CRIMINAL ACT MUST BE DRAWN FROM THE EVIDENCE AND THEN PYRAMIDED TO PROVE THE CRIME CHARGED, THE EVIDENCE LACKS THE CONCLUSIVE NATURE TO SUPPORT A CONVICTION." **4.** THE FIRST DISTRICT COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS PREVIOUSLY HELD. THE SUPREME COURT AND FIFTH DISTRICT COURTS HAVE HELD THAT WHEN THERE IS COMPETENT SUBSTANTIAL EVIDENCE OF DIRECT AND CIRCUMSTANTIAL EVIDENCE. IT IS SUFFICIENT TO SUPPORT A JURY'S VERDICT TO CONVICT. HOWEVER, THE SECOND DISTRICT COURT HAS HELD THAT EVIDENCE THAT IS ENTIRELY CIRCUMSTANTIAL, NO MATTER HOW STRONGLY IT MIGHT SUGGEST

GUILT, IS NOT SUFFICIENT TO SUPPORT A CONVICTION. UNLESS THE EVIDENCE IS NOT CONSISTENT WITH ANY REASONABLE HYPOTHESIS OF INNOCENCE. WHEN THE STATE PRESENTS PURE SPECULATION AND THERE IS NO EVIDENCE TO SUPPORT THEORY A CONVICTION CANNOT STAND.

THE PETITIONER HAS ESTABLISHED A CONFLICT BETWEEN THE FLORIDA SUPREME COURT WITH DARLING AND PAGAN; THE FIFTH DISTRICT COURT OF APPEALS WITH FLOYD AND SUTTON; SECOND DISTRICT COURT OF APPEALS WITH E.E.W AND DAVIS, SUPRA. THIS HONORABLE COURT SHOULD ACCEPT JURISDICTION TO SETTLE THE CONFLICT. **B)** THE DISTRICT COURT SHOULD HAVE REVERSED JUDGMENT AND SENTENCE BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT CONVICTION. CONFLICTING DECISIONS EXIST WITH OTHER DISTRICT COURTS OF APPEAL AND/OR THE FLORIDA STATUTES CODE. **1.** SECTION § 782.04(2), FLORIDA STATUTES DEFINES SECOND-DEGREE MURDER AS "THE UNLAWFUL KILLING OF A HUMAN BEING, WHEN PERPETRATED BY ANY ACT IMMINENTLY DANGEROUS TO ANOTHER ..." THE STANDARD JURY INSTRUCTIONS DEFINE THE PHRASE "IMMINENTLY DANGEROUS TO ANOTHER AND EVINCING A DEPRAVED MIND" AS FOLLOWS: AN ACT IS IMMINENTLY DANGEROUS TO ANOTHER AND DEMONSTRATING A DEPRAVED MIND IF IT IS AN ACT OR SERIES OF ACTS THAT: **1)** A PERSON OF ORDINARY JUDGMENT WOULD KNOW IS REASONABLY CERTAIN TO KILL OR DO SERIOUS BODILY INJURY TO ANOTHER, **AND 2)** IS DONE FROM ILL WILL, HATRED, SPITE OR EVIL INTENT. **AND 3)** IS OF SUCH A NATURE THAT THE ACT ITSELF INDICATES AN INDIFFERENCE TO HUMAN LIFE.
2. THE SECOND AND FIFTH DISTRICT COURTS HAVE REPEATELY HELD THAT IF EVIDENCE IS INSUFFICIENT TO SUPPORT CONVICTION, A JUDGMENT OF ACQUITTAL IS APPROPRIATE IF THE STATE FAILS TO PRESENT SUFFICIENT EVIDENCE. LIGHT V. STATE, 841 SO.2d 623 (FLA 2nd DCA 2003); TILLMAN V. STATE, 842 SO.2d 922 (FLA 2nd DCA 2003); SANTIAGO V. STATE, 874 SO.2d 617 (FLA 5th DCA 2004) **3.** THE FIRST DISTRICT COURT OF APPEALS CONFLICTS WITH THE DECISIONS FROM THE SECOND AND FIFTH DISTRICTS. IN THIS CASE THE FIRST DISTRICT CLAIMED ADEQUATE EVIDENCE SUPPORTING IT'S THEORY OF THE EVENTS AND DEMEANOR OF BARNES WAS PRESENTED THERE WAS NO FACTUAL OR LEGAL EVIDENCE PRESENTED BY THE STATE EITHER THROUGH WITNESSES OR BARNES'S EXPLANATION TO EXCLUDE HER HYPOTHESIS OF INNOCENCE. **4.** WHEN SUFFICIENT EVIDENCE DOES NOT SUPPORT ALL THE ELEMENTS OF AN OFFENSE, A CONVICTION CANNOT STAND. STATE MUST PROVE THAT ALL THE ACTS **[1,2,3]** DEFINED IN THE PHRASE "IMMINENTLY DANGEROUS TO ANOTHER AND DEMONSTRATING A DEPRAVED MIND" WERE MET. ACT TWO(2) STATES "IS DONE FROM ILL WILL, HATRED, SPITE OR EVIL INTENT" AND THIS IS INCLUSIVE WITH ACTS ONE(1) AND THREE(3). SEE WILLIAMS V. STATE, 674 SO.2d 177 (FLA. 2nd DCA 1996); MCDANIEL V. STATE, 620 SO.2d 1308 (FLA 4th DCA 1993); HARASA V. STATE, 394 SO.2d 544 (FLA 5th DCA 1981)

BARNES HAS SHOWN A CONFLICT IN THE FIRST DISTRICT COURT OF APPEALS DECISION AND THAT OF THE SECOND DISTRICT COURT OF APPEALS LIGHT; TILLMAN AND WILLIAMS; FOURTH DISTRICT COURT OF APPEALS MCDANIEL AND FIFTH DISTRICT COURT OF APPEALS HARASA AND SANTIAGO, SUPRA.
C) DISTRICT COURT SHOULD HAVE VIEWED BARNES'S FACTS AND CIRCUMSTANCES SEPARATELY FROM THEIR PREVIOUS DECISION IN EASLEY V. STATE, 878 SO.2d 473 (FLA 1st DCA 2004) **1.** THE FIRST DISTRICT COURT OF APPEALS RELIED HEAVILY ON EASLEY IN AFFIRMING BARNES APPEAL EVEN THOUGH THE CIRCUMSTANCES AND EVIDENCE GREATLY DIFFER. **a.** BOTH THE FIFTH DISTRICT COURT AND FEDERAL DISTRICT COURTS HAVE DEFINED THE MEANING OF "DE NOVO". SEE LEE V. ST. JOHN COUNTY COMMISSIONERS, 776 SO.2d 1110 (FLA 5th DCA 2001) AND HEGGY V. HEGGY, 944 F.2d 1537 (10th CIR. 1991) **b.** THE DIFFERENCE BETWEEN BARNES'S CASE AND THAT OF EASLEY IS AS FOLLOWS: THE STATE PRESENTED SUFFICIENT EVIDENCE TO DISPROVE HER THEORY OF ACTING OUT OF SELF-DEFENSE. FACTS IN EVIDENCE: LACK OF VISIBLE PHYSICAL INJURIES; PHONE

BOOK OPEN TO PRINTING COMPANIES AND PRIVATE INVESTIGATORS; EMPTY SUITCASES BY THE COUCH; INTERCEPTING MAIL FROM HER HUSBAND/VICTIM GIRLFRIEND; STATEMENT OF THAT BEING THE "LAST STRAW" A COUPLE OF DAYS BEFORE SHE SET SUITCASES OUT AND TOLD HUSBAND THAT SHE WAS LEAVING, ALONG WITH THE CHILDREN; WITNESSES TO DISPOSE ACCOUNT OF EVENTS(PRIOR DURING AND AFTER). STATE DID SUBMIT EVIDENCE FROM WHICH THE JURY COULD REASONABLY INFER THAT BARLEY ACTED OUT OF ANGER AND JEALOUSLY BECAUSE SHE DISCOVERED THAT HER HUSBAND/VICTIM WAS HAVING AN EXTRAMARITAL AFFAIR. WHERE AS WITH BARNES'S CASE, THE FOLLOWING EXISTS: THE STATES FIRST WITNESS WAS A FRIEND OF BARNES'S HUSBAND/VICTIM. THOUGH VERA CHRISTOPHER KNEW BARNES'S HUSBAND/VICTIM FOR APPROXIMATELY FOUR(4) YEARS PRIOR TO HIS DEATH, SHE NEVER MET BARNES. BARNES WAS ALSO UNAWARE THAT CHRISTOPHER WAS WITH HER HUSBAND/VICTIM. THREE(3) STATE WITNESSES FROM J.S.O COLLABORATED BARNES VISIBLE PHYSICAL INJURIES, DUANE DANIEL, PATROL OFFICER TESTIFIED SEEING BLOOD ON THE COLLAR OF BARNES'S SHIRT, SMALL LACERATION ON HER UPPER LIP AND SMALL SCRATCH ON HER NECK. KATHY GIFFEN, SAW SOME SLIGHT REDNESS ON HER NECK IN ADDITION, TO INJURIES ALREADY IDENTIFIED. JAMES WILLIAMS, SAW SIGNS OF A STRUGGLE IN THE BEDROOM. HUSBAND/VICTIM ENGAGED BARNES IN ANOTHER ALTERCATION AND BARNES USED A FIREARM TO WARD OFF FURTHER ATTACKS RESULTING IN WEAPON BEING FIRED. BARNES CALLED 911 DURING ALTERCATION, BUT WAS UNABLE TO STATE NATURE OF CALL, DUE TO HUSBAND/VICTIM TAKING PHONE. HUSBAND/VICTIM WAS INTOXICATED AT TIME OF ALTERCATION WITH A BLOOD ALCOHOL LEVEL OF .16. SECOND CALL TO 911 WAS MADE TO REPORT ALTERCATION, GET MEDICAL ATTENTION AND SUPPORTS CLAIM OF SELF-DEFENSE. BARNES, HUSBAND/VICTIM WERE THE ONLY TWO AT SCENE.

STATES'S CASE WAS BASED ON CIRCUMSTANTIAL EVIDENCE. FACT ALONE OF HUSBAND/VICTIM BEING IN THE PRESENCE OF A FEMALE FRIEND DOES NOT SUPPORT ACTING WITH A DEPRAVED MIND. C. THE FIRST DISTRICT COURT RELIED ON BARLEY TO AFFIRM THE JURY'S DECISION IN BARNES'S CASE. WHERE SOME FACTS MAYBE SIMILAR THE CIRCUMSTANCES AND SUFFICIENCY OF EVIDENCE DIFFERS. WHERE AS THE SUPREME COURT HAS ESTABLISHED THAT SUCH REVIEWS BE DONE ON A CASE BY CASE BASIS.

BARNES HAS ESTABLISHED A CONFLICT BETWEEN THE FIFTH DISTRICT COURT IN LEE AND HEGGY FEDERAL DISTRICT COURT. THIS HONORABLE COURT SHOULD ACCEPT JURISDICTION TO SETTLE THE CONFLICT.

THE FLORIDA SUPREME COURT HAS JURISDICTION TO SETTLE CONFLICTS BETWEEN THE DISTRICT COURT OF APPEALS AND PRIOR DECISIONS IN THE FLORIDA SUPREME COURT ON THE SAME MATTER OF LAW. BARNES HAS ASSERTED SUBSTANTIAL CONFLICTS IN WHICH THE FIRST DISTRICT COURT OF APPEALS DID NOT REVIEW BARNES'S CAUSE UNDER THE CIRCUMSTANTIAL EVIDENCE STANDARD AS PROVIDED IN FLOYD, DARLING, PAGAN, SUTTON, R.R.W AND DAVIS. THE FIRST DISTRICT COURT OF APPEALS FAILED TO ADHERE TO THE STANDARD OF REVIEW FOR THE SUFFICIENCY OF EVIDENCE. WHERE THE EVIDENCE PROVIDED BY THE STATE WAS INSUFFICIENT TO WARRANT A CONVICTION AND DID NOT CONTRADICT BARNES'S THEORY OF SELF-DEFENSE AS HELD IN LIGHT, TILLMAN, SANTIAGO, WILLIAMS, MCDANIEL, MARSA. IN ADDITION, THE FIRST DISTRICT COURT OF APPEALS FAILED TO APPLY A SUFFICIENT DE NOVO REVIEW, INSTEAD RELIED ON IT'S PREVIOUS DECISION IN BARLEY. CONTRARY TO LEE AND HEGGY. THIS COURT SHOULD ACCEPT JURISDICTION AND SETTLE THE ESTABLISHED CONFLICTS.

ISSUE II

THE DECISION OF THE FIRST DISTRICT COURT OF APPEALS IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT AND THAT OF OTHER DISTRICT COURT

OF APPEAL'S, WHERE IT UPHELD THE TRIAL COURT'S ERRONEOUS DECISION IN ALLOWING THE JURY TO USE TRIAL TRANSCRIPTS IN IT'S DELIBERATIONS, WHICH IS CONTRARY TO FLA. R. CRIM. P 3.400(A)

THE CONFLICT OF THE FIRST DISTRICT OF APPEALS BEGINS IN JANSON V. STATE, 730 SO.2d 734 (FLA 5TH DCA 1999) WHICH STATES; "ALTHOUGH IT WOULD HAVE BEEN PROPER TO REREAD THE TESTIMONY TO THE JURY IN THE COURTROOM APPARENTLY NO FLORIDA CASE HAS CONSIDERED THE EFFECT OF ALLOWING THE JURY TO REVIEW THE TRANSCRIPT OF A WITNESS'S TESTIMONY IN THE JURYROOM . . . WE BELIEVE THAT THE SAME RATIONALE [YOUNG V. STATE, 645 SO.2d 965 (FLA. 1994)] APPLIES TO TRANSCRIPTS ALLOWED INTO JURYROOM".

RULE 3.400(A) MATERIALS TO THE JURYROOM, SPECIFICALLY OMITS TRANSCRIPTS FROM JURY DELIBERATIONS.

RULE 3.410 IS THE PROVISION WHERE THE JURY CAN OBTAIN A READING OF TESTIMONY UPON **REQUEST**. SEE AVILA V. STATE, 781 SO.2d 413 (FLA 4TH DCA 2001).

THERE ARE NUMEROUS CASES HELD BY THIS COURT AND OTHER DISTRICT COURTS THAT DO NOT PERMIT DEPOSITIONS OR VIDEO DEPOSITIONS IN DELIBERATIONS DUE TO THE INFLUENCE OF THE JURY'S RELIANCE ON SUCH MATERIALS. IN SCHOEPPL V. OKOLOWITZ, 138 SO.2d 124 (FLA 3RD DCA 1961). IT WAS HELD THAT, "IT IS CERTAINLY NOT THE POLICY OF THE LAW, TO GIVE SUPERIORITY TO DEPOSITIONS OVER ORAL PROOFS, WITH THE ORAL PROOFS, GIVEN BY WITNESSES ON THE STAND THE JURY MUST BE CONTENT AND MAKEUP THEIR MINDS UPON IT, SOME OF WHICH, IMPORTANT TO BE REMEMBERED ... THE ADVERSARY HAVING NO OTHER THAN WRITTEN TESTIMONY CONTAINED IN DEPOSITIONS, WHICH THE JURY, TAKING WITH THEM CAN READ, DISCUSS, DISSECT, AND IF DISPOSED TO RULE THE WORDS FROM THEIR TRUE MEANING ..."

IN BARNES'S CASE, THE TRIAL COURT OVER BARNES OBJECTION ADMITTED INTO EVIDENCE HER PRIOR TRIAL TESTIMONY. THE STATE ARGUED THE TRANSCRIPT WAS NOT ACTUALLY TRANSCRIPT OF PRIOR TESTIMONY IT WAS JUST BARNES'S STATEMENTS. THE COURT FOUND THAT THE PRIOR TRIAL TESTIMONY WAS NOT TESTIMONY IN THIS TRIAL BUT IT WAS A SWORN STATEMENT CONTAINING ADMISSIONS BY BARNES. PRIOR TRIAL TESTIMONY WAS ADMITTED INTO EVIDENCE AS AN EXHIBIT. THE ORIGINAL TESTIMONY WAS HEAVILY REDACTED TO REMOVE IMPROPER MATERIAL. THEREFORE, TESTIMONY COULD NOT BE ADMITTED IN ORIGINAL FORMAT. THE FOLLOWING TOOK PLACE BEFORE JURORS TO GET PRIOR TRIAL TESTIMONY TRANSCRIBED. AT NEW TRIAL 400(2) STATE PROSECUTORS ROLE PLAYED USING A QUESTION AND ANSWER FORMAT. THE ROLE PLAY OF PRIOR TRIAL TESTIMONY NOW BECAME APART OF THE CURRENT TRIAL'S TRANSCRIPTS. THIS WAS IN TURN TRANSCRIBED AND PROVIDED TO JURORS TO TAKE INTO DELIBERATIONS. BY DOING THIS DIRECTLY VIOLATES RULE 3.400(A)

A QUESTION OF GREAT PUBLIC IMPORTANCE WERE THE ALLOWANCE OF ANY TRANSCRIPTS IN THE JURYROOM FOR DELIBERATIONS WITHOUT THE JURORS REQUESTING THEM AFFECTS THE WHOLE TRIAL STRUCTURE AND PROCEEDINGS AND CONSTITUTES PREJUDICE.

BARNES HAS ESTABLISHED A CONFLICT BETWEEN THE THIRD DISTRICT COURT OF APPEALS IN SCHOEPPL, FOURTH DISTRICT COURT OF APPEALS IN AVILA, FIFTH DISTRICT COURT OF APPEALS IN JANSON AND THIS COURT WITH YOUNG. THIS HONORABLE COURT SHOULD ACCEPT JURISDICTION TO SETTLE THE CONFLICTS.

THE FLORIDA SUPREME COURT HAS JURISDICTION TO SETTLE CONFLICTS BETWEEN THE DISTRICT COURT OF APPEALS AND PRIOR DECISIONS IN THE FLORIDA SUPREME COURT ON THE SAME MATTER OF LAW. BARNES HAS ASSERTED SUBSTANTIAL CONFLICTS IN WHICH THE FIRST DISTRICT COURT OF APPEALS ALLOWED THE USE OF TRIAL TRANSCRIPTS IN IT'S DELIBERATION. THIS COURT SHOULD ACCEPT JURISDICTION AND SETTLE THE ESTABLISHED CONFLICT. ALSO ADDRESS THE QUESTION OF GREAT PUBLIC IMPORTANCE.

ISSUE III

THE DECISION OF THE FIRST DISTRICT COURT OF APPEALS DENYING BARNES CLAIM OF A RIGHT TO A FAIR TRIAL BECAUSE OF TWO INCONSISTENT CONTRADICTORY AND CONFUSING JURY INSTRUCTIONS ON THE DUTY TO RETREAT.

THE CONFLICT BEGINS WITH THE FIRST DISTRICT COURT OF APPEALS AND THE FLORIDA SUPREME COURT IN BUTLER V. STATE, 493 SO.2d 451 (FLA. 1986) STATES: "THE EXTREMELY MISLEADING AND CONFUSING JURY INSTRUCTION THAT DID NOT PERTAIN TO ANY EVIDENCE PRESENTED AT TRIAL DID NOT CONSTITUTE HARMLESS ERROR BECAUSE THERE EXISTS A REASONABLE POSSIBILITY THAT IT CONTRIBUTED TO THE CONVICTION. ANY ASSERTION THAT THE ERRANT JURY INSTRUCTION WAS HARMLESS BEYOND A REASONABLE DOUBT IS CLEARLY REBUTTED WHEN THE JURY'S INSTRUCTION IS COMBINED WITH COMMENTS MADE BY THE PROSECUTOR DURING CLOSING ARGUMENTS." THE FLORIDA SUPREME COURT HAS HELD THAT JURY INSTRUCTIONS SHOULD NOT BE CONFUSING OR MISLEADING.

TRIAL COURT GAVE THE STANDARD JURY INSTRUCTION FOR JUSTIFIABLE USE OF DEADLY FORCE. INSTRUCTING ON RETREAT AND DEFENSE OF HOME AGAINST CO-OCCUPANT. SEE STANDARD JURY INSTRUCTION 3.6(F)

THESE TWO INSTRUCTIONS PLAINLY CONTRADICT EACH OTHER. ONE MAKING IT NECESSARY TO RETREAT, THE OTHER INSTRUCTION LIMITING THE DUTY TO A REASONABLE RETREAT WITHIN HOME IF POSSIBLE.

PROSECUTOR REPEATEDLY TOLD THE JURY THAT IF BARNES "NO ONES SAYING SHE HAS TO LEAVE THE HOUSE, BUT SHE WAS LEAVING THE HOUSE. THAT RELATES TO HOW SCARED SHE WAS AND WHAT SHE HAD TO DO TO STOP HIM. WHAT SHE HAD TO DO WAS TAKE HER FOOT OFF THE BRAKE AND PUT IT ON THE GAS." (R.IX 871) "THE DEFENDANT WAS IN THE CAR BACKING OUT, BACKING OUT. THE VICTIM'S IN HIS UNDERWEAR. HE'S NO THREAT AT ALL IF SHE JUST KEPT BACKING OUT." (R. IX. 895) "YOUR COMMON SENSE TELLS YOU THAT IF SHE'S GOT THAT STEEL ENCASED AROUND HER, SHE HAS IN DEFENSE AND IS IN NO DANGER FROM ANYONE AT THAT POINT. ALL SHE HAS TO DO WAS DRIVE OUT OF THAT DRIVEWAY" (R. IX 948) "THE PROSECUTOR ARGUES TO THE JURY THAT ALTHOUGH BARNES DID NOT HAVE TO RETREAT FROM HER HOME, SHE COULD HAVE AVOIDED THE SHOOTING OF HER HUSBAND." (R. IX 871, 941, 948-900).

THIS ARGUMENT REPEATEDLY EMPHASIZED AND CAPITALIZED UPON THE ERRONEOUS JURY INSTRUCTION GIVEN BY THE COURT. THE INSTRUCTION GIVEN COUPLED WITH THE PROSECUTOR'S COMMENTS, SERVED TO MISLEAD THE JURY AS TO THE ENTIRE THEORY OF DEFENSE.

THE CONFLICT CONCERNING MISLEADING JURY INSTRUCTION BEGINS IN THE DISTRICT COURT OF APPEALS WITH POLLACK V. STATE, 818 SO.2d 654 (FLA 3rd DCA 2003); MCKENZIE V. STATE, 830 SO.2d 234 (FLA. 4th DCA 2003); TINKER V. STATE, 784 SO.2d 1198 (FLA. 2nd DCA 2001) AND KIERLANS-EL V. STATE, 883 SO.2d 383 (FLA 4th DCA 2004).

BARNES HAS SET FORTH THE VALID CONFLICT BETWEEN THIS COURT WITH BUTLER. THE SECOND DISTRICT COURT OF APPEALS IN TINKER. THIRD DISTRICT COURT OF APPEALS IN POLLACK AND FOURTH DISTRICT COURT OF APPEALS WITH MCKENZIE, KIERLANS-EL WHICH HOLDS REVERSIBLE ERROR OCCURS WHEN GIVING CONFUSING, MISLEADING AND CONTRADICTORY JURY INSTRUCTIONS. THIS HONORABLE COURT SHOULD ACCEPT JURISDICTION TO SETTLE THE CONFLICTS.

CONCLUSION

THIS COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION BELOW, AND THE COURT SHOULD EXERCISE THAT JURISDICTION TO CONSIDER THE MERITS OF THE PETITIONER'S ARGUMENTS.

RESPECTFULLY SUBMITTED,

/s/ Shana Barnes

SHANA BARNES #J16067
HOMESTEAD CORRECTIONAL INSTITUTION
19000 SW 377th STREET, SUITE 200
FLORIDA CITY, FL 33034

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I PLACED THIS DOCUMENT AND SIX(6) COPIES IN THE HANDS OF HOMESTEAD CORRECTIONAL INSTITUTION STAFF FOR MAILING TO:

FLORIDA SUPREME COURT
SUPREME COURT BUILDING
CLERK OF COURT-THOMAS HALL
500 SOUTH DUVAL STREET
TALLAHASSEE, FL 32399-1925

(AND)

CHARLES J CRIST
ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050

ON THIS 10th DAY OF MAY, 2006

RESPECTFULLY SUBMITTED,

/s/ Shana Barnes

SHANA BARNES #J16067
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FLORIDA CITY, FL 33034

IN THE SUPREME COURT OF FLORIDA

SHANA BARNES,
PETITIONER,

V.

CASE NO.: SC06-662

STATE OF FLORIDA,
RESPONDENT,

APPENDIX

INDEX TO APPENDIX

RESPECTFULLY SUBMITTED,

/s/ Shana Barnes

SHANA BARNES J18067
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FLORIDA CITY, FL 33034

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

SHANA BARNES,

Appellant,

v.

CASE NO. 1D04-5450

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed March 3, 2006.

An appeal from the Circuit Court for Duval County. L. Page Haddock, Judge.

James T. Miller, Jacksonville, for Appellant.

Charles J. Crist, Jr., Attorney General, and Thomas D. Winokur, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Shana Barnes appeals her conviction for the second-degree murder of her husband, Gregory Barnes. Appellant argues five issues on appeal: (1) the State failed to present sufficient evidence to support a conviction for second-degree murder; (2) the trial court erred by allowing portions of appellant's prior testimony to be taken into the

APPENDIX "A"

jury room during deliberations; (3) the trial court gave confusing and contradictory instructions as to the law of the duty to retreat; (4) the trial court erroneously instructed the jury on provocation as a part of the overall instruction on the justifiable use of deadly force; and (5) the State denied appellant a fair trial by misstating the law of the duty to retreat in its closing argument. We address only the first three issues and affirm the conviction and sentence.

Appellant claims that the State failed to present evidence sufficient to support a conviction of second-degree murder and, as a result, the trial court erred when it denied appellant's motion for a judgment of acquittal on the charge. We review an order on a motion for a judgment of acquittal de novo to determine whether the evidence is legally adequate to support the charge. See Jones v. State, 790 So. 2d 1194 (Fla. 1st DCA 2001). In so doing, we must view the evidence in a light most favorable to the State. Id. at 1197. A review of the record demonstrates that the State presented the jury with adequate evidence supporting its theory that appellant shot and killed her husband in a fit of anger over his behavior on the night in question. Despite appellant's claim that she acted in self-defense, the issue of whether a defendant acted in self-defense is a question of fact for the jury. See Rasley v. State, 878 So. 2d 473, 476 (Fla. 1st DCA 2004) ("A motion for judgment of acquittal should not be granted unless the 'evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law.'" (quoting Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974))). As the State

presented sufficient evidence that appellant did not act in self-defense, but rather killed her husband in a fit of anger, we must affirm the jury's decision. Rasley, 878 So. 2d at 477.

Appellant next argues that the trial judge erred by allowing the jury to take an exhibit containing portions of Appellant's prior testimony into the jury room. Appellant argues that this constituted error because the jury might have placed greater emphasis on Appellant's prior testimony than it did on other witness testimony. See Young v. State, 645 So. 2d 965 (Fla. 1994). We review the admission or exclusion of evidence for an abuse of discretion. See McBride v. State, 913 So. 2d 696 (Fla. 1st DCA 2005). The trial judge properly admitted the statements in question as an exhibit of numerous admissions made by the Appellant. See Delacruz v. State, 734 So. 2d 1116, 1122 (Fla. 1st DCA 1999) (finding that defendant's prior statements, whether exculpatory or not, were admissible against defendant as admissions under section 90.803(18), Florida Statutes (citing Charles W. Ehrhardt, Florida Evidence § 803.18, at 733-34 (1999 ed.))). The fact that the State published the exhibit to the jury does not turn the exhibit into "testimony." Accordingly, the trial judge acted within his discretion to allow the jury to take the exhibit into the jury room. See Fla. R. Crim. P. 3.400(a)(4) (permitting the judge to allow "all things received into evidence other than depositions" into the jury room).

We last address Appellant's argument that the trial judge confused or misled the jury on the duty to retreat in his overall instruction on the justifiable use of deadly force. Appellant claims that by giving the standard instruction on the general duty to retreat as well as the instruction on the co-occupant non-duty to retreat from one's home, the trial judge confused or misled the jury into thinking appellant had a duty to retreat from her home. A trial judge's decision to give or withhold a particular instruction is reviewed for an abuse of discretion. See Palmore v. State, 838 So. 2d 1222, 1223 (Fla. 1st DCA 2003). Nevertheless, a trial court should not give instructions that are confusing, contradictory, or misleading. See Butler v. State, 493 So. 2d 451, 452 (Fla. 1986). The trial judge used the general instruction on duty to retreat to frame the issue at the outset. The trial judge then explicitly instructed the jury that Appellant was not required to retreat from her home:

> However, the defendant was not required to flee her home and had the lawfully [sic] right to stand her ground and meet force with force even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent the imminent commission of aggravated assault or felony battery.

(emphasis added). The trial judge's instruction also made clear that the attached garage in which the killing occurred was part of the house. We find that the instruction was neither confusing nor misleading.

As we find no error on the part of the trial court, we AFFIRM.

KAHN, C.J., PADOVANO and THOMAS, JJ., CONCUR.