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SUMMARY OF ARGUMENT

Respondent errs in suggesting that a defendant's ability to waive instruction on a lesser included offense amounts to an ability to preclude such instruction. Existing case law establishes the contrary.

Moreover, Petitioner reasserts that Section 775.021(4), Florida Statutes, as amended by Chapter 88-131, Laws of Florida, abolished Category 2 lesser included offenses. Respondent suggests that instruction on this category of offenses is necessary to give effect to the jury's "pardon power." In addition to its previously argued contention that such pardon power is an inadequate policy reason for such instruction, Petitioner submits that such a policy reason, even if accepted, cannot override the plain statement of the Legislature. In addition, the continuing confusion over this practice, as evidenced by recent cases, constitutes another policy reason why the schedule of Category 2 offenses should be withdrawn.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts as set out in its Brief on the Merits.

ARGUMENT

ISSUE I

IS THE STATE ENTITLED TO HAVE JURY INSTRUCTIONS GIVEN ON CATEGORY 2 INCLUDED LESSER OFFENSES, IN ADDITION TO CATEGORY 1 NECESSARILY INCLUDED LESSER OFFENSES, IN A CASE WHERE THE DEFENDANT REQUESTS THAT NO SUCH INSTRUCTIONS BE GIVEN AND KNOWINGLY AND INTELLIGENTLY WAIVES HIS RIGHT TO SUCH INSTRUCTIONS?

Respondent erroneously suggests that because a criminal defendant has the right to waive instruction on Category 2 lesser included offenses, he also has the right to preclude instruction on such offenses. The case law does not support such an argument. Respondent states, "A review of Florida law indicates no authority for the State to instruct the jury over the defendant's waiver." (Answer Brief, p.14) In so stating, Respondent overlooks the only authority directly on point to this case, Morrison v. State, 259 So.2d 502 (Fla. 3d DCA 1972), which states:

A trial court is not precluded, by objection of the defendant, from charging the jury on a lesser offense that is necessarily included in the offense charged, or on an offense which although not necessarily included, is one of the elements of which are embodied in the offense charged and the presence of which is sufficiently disclosed in the evidence. Since it would be proper for the jury to convict thereon under Section 919.16, it is proper for the Court to charge thereon.

Id. at 504.

Respondent's argument that any case based on Section 919.16, Florida Statutes, including State v. Washington, 268 So.2d 901 (Fla. 1972), and Courson v. State, 414 So.2d 207 (Fla. 3d DCA 1982), cannot be used as authority in view of the Legislature's subsequent amendment of Section 919.16, must be rejected. As Respondent himself recognizes, "The Supreme Court later adopted Rule 3.510, Fla.R.Cr.P., which provided the substance of Section 919.16, Florida Statutes, as a rule." (Answer Brief, p.14)

Established precedent clearly indicates that the State was entitled to an instruction on the permissibly included lesser offense, notwithstanding the all or nothing desires of the defendant. The certified question must be answered in the affirmative.

ISSUE II

WHETHER SECTION 775.021(4) AS AMENDED BY
CHAPTER 88-131, LAWS OF FLORIDA,
ABOLISHES CATEGORY 2 LESSER INCLUDED
OFFENSES?

It remains Petitioner's position that the Legislature's unambiguous language in Section 775.021(4), requires that the only category of "lesser included" offenses are offenses the elements of which are subsumed by the elements of the greater offense. The Respondent's only substantive answer to this position is the argument that instruction on "Category 2" lesser included offenses is necessary to allow the jury to exercise its "pardon power." That argument is unresponsive to the State's assertion that the Legislature by its language in Section 775.021(4) simply abolished so-called "permissive lesser included offenses." Even a valid policy reason will not overcome a statutory mandate. Petitioner will rely on its initial brief with respect to the validity of "pardon power" as a policy basis for instructing a jury as to separate crimes.

Confusion persists with respect to the practice of instructing on permissive lesser included offenses. In Cave v. State, Case No. 89-1694 (Fla. 1st DCA, April 4, 1991), the First District recently held that separate convictions for aggravated battery and armed robbery were proper, as the two are separate crimes pursuant to Section 775.021(4). In so holding, the First District recognized that conflicting authority existed in other

districts. The Court cited Rowe v. State, 15 F.L.W.D. 2891 (Fla. 2d DCA, November 28, 1990); Hall v. state, 549 So.2d 758 (Fla. 3d DCA 1989); and Sheppard v. State, 549 So.2d 796 (Fla. 5th DCA 1989). In Gould v. State, Case No. 75,833 (Fla., March 21, 1991), this Court found it necessary to clarify its previous opinion in Gallo v. State, 491 So.2d 541 (Fla. 1986). In Gould, the district court found that Gould's conviction under 794.011(4)(a), Florida Statutes, for sexual battery on a physically helpless victim was not supported by the evidence. The Court, under the authority of Section 924.34, Florida Statutes, directed the trial court to adjudicate Gould guilty of sexual battery under Section 794.011(5), as a necessarily included lesser offense. The Court relied on Gallo v. State, 491 So.2d 541 (Fla. 1986), for the proposition that a permissive lesser included offense was also a necessarily included lesser offense. This Court said, "We recede from Gallo to the extent it can be so interpreted." (Op. at 6, n.6) The Court found Section 924.34 applicable only to necessarily lesser included offenses and proceeded to remand with instructions that the district court direct the trial court to adjudicate Gould guilty of simple battery.

Petitioner reasserts that Section 775.021(4) as amended in 1988, requires that the practice of categorizing between necessarily and "permissibly" included lesser included offenses be discontinued. If, in fact, the accusatory pleadings and proof

adduced at trial support an instruction on the "permissive," lesser included offenses, by the plain terms of the statutory language, conviction and punishment of the lesser offense must be an addition to, not in lieu of, the greater charged offense. Such action will resolve scenarios such as those presented in Gould and Cave and will accomplish a tremendous clarification and streamlining of the law to the benefit of all involved. Petitioner urges this Court to clarify Fla.R.Crim.P. 3.510 to speak only to necessarily included offenses and to withdraw the schedule of Category 2 lesser included offenses from the standard jury instruction. Petitioner again submits that, in advancement of the orderly administration of justice, the Court's decision on this issue be made prospective from the date of the opinion. Witt v. State, 387 So.2d 922 (Fla. 1980)

CONCLUSION

WHEREFORE, in view of the foregoing argument and citation to authority, Petitioner respectfully asks this Honorable Court to answer the certified question in the affirmative.

Respectfully,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF ON THE MERITS has been furnished to CLYDE M. COLLINS, JR., 24 North Market Street, Suite 303, Jacksonville, Florida 32202, Counsel for Respondent, by U. S. Mail this 18th day of April, 1991.



VIRLINDIA DOSS