IN THE SUPREME COURT OF FLORIDA

JIMMIE LEE ALEXANDER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO.65,666

INITIAL BRIEF ON MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts. In the brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE

The state attorney of the Seventeenth Judicial Circuit charged petitioner by information with possession of a concealed firearm in an automobile in violation of section 790.01(2), Florida Statutes (1981). R21. Petitioner filed a sworn motion to dismiss the information under Florida Rule of Criminal Procedure 3.190(c)(4). R22. In the motion, petitioner asserted that, when he was arrested, the firearm was "securely encased" within the meaning of section 790.001(16), Florida Statutes (Supp. 1982). The state filed a "traverse" saying that the firearm was in a black leather hand purse when petitioner was arrested, so that it was not "securely encased." R24-26. The trial court judge conducted a hearing at which he examined the black hand purse, and then denied the motion to dismiss. R11.

Petitioner entered a plea of nolo contendere, specifically reserving his right to appeal the denial of the motion to dismiss. R13-19. The trial court withheld adjudication and placed petitioner on probation. R27.

On appeal, the District Court of Appeal, Fourth District, affirmed the denial of the motion to dismiss and subsequent order withholding adjudication and placing petitioner on probation. The District Court also held Section 790.01(2), Florida Statutes (1981) to be constitutional. Alexander v. State, 450 So.2d 1212 (Fla. 4th DCA 1984).

After denial of rehearing, petitioner invoked the discretionary jurisdiction of this court.

STATEMENT OF THE FACTS

On September 7, 1982, petitioner, an employee of Wag's, was sitting in the driver's seat of his car, which was parked in the Wag's parking lot. Police Officer Lerman went up to petitioner and asked him for identification. Petitioner said he had identification and began to unzip his black leather hand purse. He then stopped unzipping it, zipped it back up, and said he did not have his wallet or identification on his person at that time. Lerman became suspicious of a bulky object in the pouch. He took the pouch from petitioner, opened it, found a firearm inside, and arrested appellant for possession of a concealed firearm. Also, in the purse were petitioner's wallet, driver's license, and other forms of identification. R22-26.

SUMMARY OF ARGUMENT

In this case, appellant had a pistol in a small zippered purse in his car. The state charged him with carrying a concealed firearm.

Section 790.01(2), Florida Statutes (1981) makes it a crime to possess a concealed firearm. Sections 790.25(5) and 790.001(16), Florida Statutes (Supp. 1982), however, provide that it is permissible to possess a firearm in a "gun case" or in a "closed box or container which requires a lid or cover to be opened for access."

The District Court of Appeal upheld the facial constitutionality of the foregoing statutory scheme, and ruled that it is a question of fact as to whether a man's zippered purse is a "gun case" or "container" under the foregoing statutes.

Now if it is a question of fact as to whether a man's purse is a "gun case" or "container," then reasonable persons can disagree on the matter. But if reasonable persona can disagree as to the application of the statute, a person of common intelligence cannot know whether he is in compliance with the law. Hence, either the foregoing statutory scheme is unconstitutional, or the District Court of Appeal erred by concluding that it is a question of fact as to whether the pouch was a "gun case" or "container" under the statute. The statutory scheme is also unconstitutional in that it is not rationally related to a legitimate state purpose.

If there was any doubt or ambiguity as to whether the pouch was a "container" or "gun case" under the statute, then it is the duty of the court to resolve the doubt in favor of the accused.

Here the zippered pouch was clearly a "container" or "gun case" under the statute, and petitioner is entitled to dismissal of the charges against him.

ARGUMENT

POINT I

SECTION 790.01(2), FLORIDA STATUTES (1981) AS MODIFIED BY SECTIONS 790.25(5), FLORIDA STATUTES (1982 supp.) AND 790.001(16), FLORIDA STATUTES (1982 supp.) IS FACIALLY UNCONSTITUTIONAL

Section 790.01(2), Florida Statutes (1981) provides:

> (2) whoever shall carry a concealed firearm on or about his person shall be guilty of a felony of the third degree, punishable as provided in s.775.082, s. 775.093, or s. 775.084

Section 790.25(5), Florida Statutes (Supp. 1982) provides:

> (5) POSSESSION IN PRIVATE CONVEYANCE.-Notwithstanding subsection (2), it is lawful and is not a violation of s. 790.01 to possess a concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use. Nothing herein contained prohibits the carrying of a legal firearm other than a handgun anywhere in a private conveyance when such firearm is being carried for a lawful use. Nothing herein contained shall be construed to authorize the carrying of a concealed firearm or other weapon on the person. This subsection shall be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons, including lawful self-defense as provided in s. 776.012.
>
> (e.s.)

Section 790.001(16), Florida Statutes (Supp.1982) provides:

> (16) "Securely encased" means encased in a glove compartment, whether or not locked; in a snapped holster; in a gun case, whether or not locked; in a zippered gun case; or in a closed box or container which requires a lid or cover to be opened for access.
>
> (footnote omitted)

Petitioner submits that the foregoing statutory scheme violates the due process clause of the state and federal constitutions in that it is not rationally related to a legitimate state purpose, and in that it is so vague that it does not give persons of ordinary intelligence fair notice what is proscribed.

A. In State v. Walker, 10 FLW (S.Ct.) 23 (Fla. Dec. 20, 1984), this Court adopted the opinion of the Second District Court of Appeal in State v. Walker, 444 So.2d 1137 (Fla. 2nd DCA 1984) in holding unconstitutional act that had made it a misdemeanor to keep a prescription drug in a container other than that in which it was received. The Second District Court of Appeal based its decision on the doctrine that a statute is facially unconstitutional if it does not bear a reasonable relationship to a legitimate state purpose.

A like case is Robinson v. State, 393 So.2d 1076 (Fla. 1980). There this Court held unconstitutional a statute forbidding the wearing of masks, saying that the statute was "susceptible to application to entirely innocent activities," and "susceptible of being applied so as to create prohibitions that

completely lack any rational basis." 393 So.2d at 1077.[1]

This Court has from time to time discussed the legislative purpose behind various statutes forbidding the possession of concealed firearms. In Sutton v. State, 12 Fla. 135 (1867), this Court said of a predecessor of section 790.01:

> The statute was not intended to infringe upon the rights of any citizen to bear arms for the "common defense." It merely directs how they shall be carried, and prevents individuals from carrying concealed weapons of a dangerous and deadly character, on or about the person, for the purpose of committing some malicious crime, or of taking some undue advantage over an unsuspecting adversary. When no such evil intentions possess the mind, men in vexed assemblies or public meetings, conscious of their advantage in possessing a secret and

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[1] In Watson v. Stone, 148 Fla. 516, 4 So.2d 700 (1941), this Court wrote that the possession of a concealed firearm in an automobile is an essentially innocent activity, saying:

> The business men, tourists, commercial travelers, professional man on night calls, unprotected women and children in cars on the highways day and night, State and County officials, and all law-abiding citizens fully appreciate the sense of security afforded by the knowledge of the existence of a pistol in the pocket of an automobile in which they are traveling. It cannot be said that it is placed in the car or automobile for unlawful purposes, but on the other hand it was placed therein exclusively for defensive or protective purposes. These people, in the opinion of the writer, should not be branded as criminals in their effort of self preservation and protection, but should be recognized and accorded the full rights of free and independent American citizens.
>
> 4 So.2d at 702-703

> deadly weapon, often become insulting and overbearing in their intercourse, provoking a retort or an assault, which may be considered as an excuse for using the weapon, and a deadly encounter results, which might be avoided where the parties stand on a perfect equality, and where no undue advantage is taken.
>
> 12 Fla. at 136-137

In Carlton v. State, 63 Fla. 1, 58 So. 486 (1912), this Court discussed a predecessor of section 790.01 as follows:

> It is next contended that section 3262 is unconstitutional, because it excepts sheriffs and other police officers from its operation, and permits them to carry concealed weapons, which is denied to others. We are not referred to any special provision of our state Constitution which this statute is supposed to violate, and none occurs to us at this time. Apparently the exception or classification is based upon a public necessity growing out of the difficulties and hazards which sheriffs and other officers encounter in dealing with dangerous characters. These statutes against carrying concealed weapons have no connection with section 20 of the Bill of Rights, which preserves to the people the right "to bear arms in defense of themselves and the lawful authority of the state." This section was intended to give the people the means of protecting themselves against oppression and public outrage, and was not designed as a shield for the individual man, who is prone to load his stomach with liquor and his pockets with revolvers or dynamite, and make of himself a dangerous nuisance to society.
>
> 58 So. at 488

In Watson v. Stone, supra, Justice Buford wrote a concurring opinion setting forth the legislative history and purposes of Florida laws forbidding the carrying of concealed weapons, but his remarks are perhaps more of historical than legal significance, and is mentioned here only for purposes of completeness.[2]

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[2] Justice Buford wrote in Watson:

Annotation--Concealed Weapons, 43 ALR 2d 492, 495-497 (1955) contains a survey of American case law as to the purpose of such enactments.

From the foregoing, it appears that the principle purpose of the statutes which forbid the carrying of a concealed firearm in an automobile is to protect the unwary public (and especially police officers) from sudden, unforeseen assaults committed by persons producing weapons from places of concealment. Appellant submits that the statutes are not rationally related to this purpose.

> I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed then the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied. We have no statistics available, but it is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute. It is also safe guess to say that not more than 5% of the men in Florida who own pistols and repeating rifles have ever applied to the Board of County Commissioners for a permit to have the same in their possessios and there has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.
>
> 4 So.2d at 703
> (Buford,J., concurring)

Cigar boxes, picnic baskets, purses, and shoe boxes are all boxes or containers which require a lid or cover to be opened for access. Even those little "safes" which children make by gluing together the pages of books and then hollowing out the insides are containers requiring a cover or lid. Thus, section 790.001(16) makes all of the foregoing items authorized receptacles for firearms in automobiles. It also authorizes the possession of a firearm in an unlocked gun case.

But how is a policeman safe from a firearm hidden in a cigar box or unlocked case? The obvious answer is that the policeman is not safe. Indeed, the person with a firearm hidden in a cigar box or other receptacle may be like the person in Sutton who possesses a firearm for legitimate purposes and with "no evil intentions," but who, emboldened by this secret strength, escalates a trivial confrontation into a "deadly encounter." Thus the statute not only fails to serve its purposes, but actually defeats it. Hence the statute is not reasonably related top its purpose and is therefore unconstitutional.

B. In Zachary v. State, 269 So.2d 669 (Fla. 1972), this Court upheld the constitutionality of section 790.19, Florida Statutes as against an attack that it was so vague and overbroad as to violate the due process clauses of the state and federal constitutions. The Court articulated the following standard:

> The test of a statute insofar as vagueness is concerned is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice. Appellant in his brief recognizes this basic test, citing United States v. Harriss, 347 U.S. 612-617, 74 S.Ct. 808, 812, 98 L.Ed. 989-996, to the following effect: "The constitutional requirement of definiteness is violated by a criminal statute

> that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."
>
> 269 So.2d at 670
> (footnote omitted).

See also Linville v. State, 359 So.2d 450 (Fla. 1978), where this Court wrote: "...due process will not tolerate a law which forbids or requires the doing of an act in terms so vague that the person of common intelligence must necessarily guess at its meaning." 359 So.2d at 452.

Petitioner submits that the statutory scheme pertaining to the carrying of firearms in automobiles is unconstitutional under Zachary and Harriss since the term "gun case" is undefined.

How is one to know whether a particular item is a "gun case"? Does the intent of the manufacturer control, so that the prosecution must call in the head of R & D at the leather company to say just what it what he had in mind when he made the case in question? Does the defendant's intent control, or is it simply that everyone knows a gun case when he sees one? If the latter is true, what about gun cases that do not look like gun cases? As the National Rifle Association pointed out in its amicus curiae brief below, there are gun cases shaped like purses, like brief cases, like boxes, and like books. Who is to say what is a gun case and what is not? As this Court pointed out in Zachary, the constitution demands certainty as to whether a particular item fits within the statutory language. The District Court of Appeal ruled below, however, that there is no certainty on this matter,

and that it is a question of fact as to whether an item is a gun case. But if the District Court is correct, the statute does not give fair notice to a person of ordinary intelligence as to whether his contemplated conduct is forbidden by the statute. Hence the statutory scheme is unconstitutional.

C. Summary.

From the foregoing, the statutory scheme pertaining to the possession of concealed firearms in automobiles violates the due process clauses of the state and federal constitutions.

POINT II

THE DISTRICT COURT OF APPEAL ERRED BY UPHOLDING THE DENIAL OF APPELLANT'S MOTION FOR DISCHARGE

A. Facts

The state charged petitioner with carrying a concealed firearm, and petitioner filed a motion to dismiss the charge pursuant to Florida Rule of Criminal Procedure 3.190(c)(4). The motion set forth the following facts:

> 1. On September 7, 1982 the defendant was seated in the Driver's seat of his automobile.
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> 2. Defendant's automobile was parked in the Wag's Parking lot at 1661 S. Federal Highway, Fort Lauderdale.
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> 3. On September 7, 1982 defendant was employed by Wag's.
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> 4. Officer Edmondston (plain clothes) became suspicious of the defendant and sent Officer Lerman (marked unit) over to investigate.
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> 5. Officer Lerman asked the defendant for identification.
>
> 6. The defendant opened his zippered pouch and looked for his identification.
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> 7. The defendant being unable to find his identification closed the pouch (zippered it shut).
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> 8. Police Officer Lerman became suspicious of bulky object in the pouch.
>
> 9. Police Officer Lerman opened the pouch.
>
> 10. Police Officer Lerman arrested the defendant for Carrying a Concealed Firearm.
>
> R2

The prosecutor then filed a traverse pursuant to Florida Rule of Criminal Procedure 3.190(d). R24. The traverse agreed

to the facts set forth in the motion to dismiss, except to take issue with items 6 and 7 of the motion as follows:

> 6. The state specifically denies Paragraph Six of the defendant's Sworn Motion to dismiss and further asserts that when first asked for his identification by Officer Lerman, the defendant stated that he had some and the defendant started to unzip a black leather hand purse. The defendant stopped unzipping the purse, zipped it back up real quick and then told Officer Lerman that he did not have his wallet or any identification on his person at this time.
>
> 7. The state specifically admits in part Paragraph Seven of the defendant's Sworn Motion to Dismiss: the defendant zippered the purse shut; and specifically denies in part Paragraph Seven of the defendant's Sworn Motion to Dismiss: the defendant never actually looked inside the purse and Officer Lerman later found the defendant's wallet, drivers license and other forms of identification in defendant's purse after the defendant denied having his wallet or any identification.

R24-25.

The trial court conducted hearings on the motion to dismiss, examined the zippered pouch, and then denied the motion, saying:

> THE COURT: It will be the opinion of this Court and finding of this Court that this purse does not constitute a zippered gun case. Although it does have a zipper to it, it does not -- It is not a zippered gun case, as contemplated by the law. It is not an enclosed box and does not constitute a closed box or container that requires a lid or cover.
>
> It is not a holster. It is not the kind of gun case that they are talking about under the statute.
>
> There are two kinds of gun cases. One is hard and one is soft. The one that is soft has a zipper and the one that is hard has a snap on it.

> It will be the findings of this Court that the motion to dismiss will be denied. That is in the case of the State of Florida versus Jimmie Lee Alexander 82-9331 CF.
>
> R11 (e.s.)

Petitioner then entered a plea of nolo contendere, specifically reserving his right to appeal the trial court's denial of the motion to dismiss. R13-14. The prosecutor stipulated that "the Motion to Dismiss for appellate purposes would be dispositive," R13, and specifically requested that photographs of the zippered pouch be placed in the record-on-appeal. R19. In accepting the plea, the trial court said to petitioner: "This is a question that will be taken up to the Fourth District. The question is whether this constituted a concealed firearm." R18.

On appellate review, the Fourth District Court of Appeal ruled that the trial court correctly denied the motion to dismiss because "there remained a dispute of material fact," namely whether the zippered pouch was a "zippered gun case" under the statute.

B. Applicable Law.

Florida Rule of Criminal Procedure 3.190(c)(4), authorizes pretrial motions to dismiss on the following ground:

> There are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant. The facts on which such motion is based should be specifically alleged and the motion sworn to.

Florida Rule of Criminal Procedure 3.190(d) provides:

> TRAVERSE OR DEMURRER. The State may traverse or demur to a motion to dismiss which alleges factual matters. Factual matters alleged in a motion to dismiss shall be deemed admitted unless specifically denied by the State in such traverse. The court may receive evidence on any issue of fact necessary to the decision on

> the motion. A motion to dismiss under (c)(4) of this rule shall be denied if the State files a traverse which with specificity denies under oath the material fact or facts alleged in the motion to dismiss. Such demurrer or traverse shall be filed a reasonable time before the hearing on the motion to dismiss.
>
> (e.s.)

The term "material fact" is not specifically defined in the rule. Nevertheless, there is a substantial body of case law involving the directly analogous question: what is a question of fact as opposed to a question of law?

In Simmons v. State, 160 Fla. 626, 36 So.2d 207 (1948), this Court wrote that issues of fact in a criminal case are disputes between the state and the defendant as to what actually existed or occurred at the particular time and place in question." 36 So.2d at 208. The legal effect of undisputed material facts is a question of law. Brannen v. State, 94 Fla. 656, 114 So. 429,431 (1927). Thus determinations which do no more than attach legal significance to historical facts are conclusions of law. Bratton v. City of Detroit, 704 F.2d 878, 899 (6th Cir. 1983). These principles apply where the state, notwithstanding the filing of a traverse, essentially agrees to the relevant historical facts. State v. Holliday, 431 So.2d 390 (Fla. 1st DCA 1983), Kuhn v. State, 439 So.2d 291 (Fla. 3rd DCA 1983).

Analogous to the case at bar are cases where there is a question as to whether a particular object is a firearm as defined in Section 790.001, Florida Statutes (1983). The case law is that, where there is no dispute but that a particular object is not capable of firing projectiles, the issue of whether the object is a firearm involves a question of law and not a

question of fact. Cf. M.M. v. State, 391 So.2d 366 (Fla.1st DCA 1980). See specially the cases gathered in Gwinn v. Deane, 613 F.2d 1, 3 n.5 (1st Cir. 1980).

C. Discussion

Petitioner respectfully submits that the District Court of Appeal erred by ruling that it was a question of fact as to whether the zippered pouch in question was a gun case or container requiring a cover or lid.

If the Court of Appeal is correct, how does the statute give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, as required by the state and federal constitutions? Suppose Jones goes into Lawyer Smith's office, sets a zippered pouch on the lawyer's desk, and says: "Lawyer Smith, I wish to comply with law. Is it legal or illegal for me to carry a gun in this zippered pouch in my car?" What is Lawyer Smith to say? If the law provides Jones no certain answer, then the statute is unconstitutional under this Court's teachings in Zachary v. State, 269 So.2d 669 (Fla. 1972). Thus the Court of Appeal cannot be right in holding that there was a question of fact as to whether the zippered pouch was a gun case or container requiring a cover or lid under the statute.

Petitioner respectfully contends that there were no questions of fact below. It was agreed that appellant had a gun in the zippered pouch in his car. Those are the only material facts. The issues of whether petitioner unzipped the pouch all the way, and what he said to the policeman, are irrelevant to the simple legal question: was the zippered pouch a lawful receptacle for a firearm in a car?

Petitioner contends that the zippered pouch was an authorized receptacle. Under this Court's teachings in Watson v. Stone, 148 Fla. 516, 4 So.2d 700 (1941),[3] the statutory scheme

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[3] In Watson, this Court construed a predecessor of the present concealed firearm statute, and said:

> Rules for the construction of statutes are recognized by this Court. Penal Laws should be strictly construed and those in favor of the accused should receive a liberal construction. See Sanford v. State, 75 Fla. 393, 78 So. 340. In the construction of penal statutes, if there is any doubt as to its meaning, the Court should resolve the doubt in favor of the citizen. See State ex rel. Cherry v. Davidson, 103 Fla. 954, 139 So. 177. Any doubt or ambiguity in the provisions of criminal statutes are to be construed in favor of the citizen, life and liberty. See City of Leesburg v. Ware, 113 Fla. 760, 153 So. 87. Statutes prescribing punishment and penalties should not be extended further than their terms reasonably justify. See Snowden v. Brown, 60 Fla. 212, 53 So. 548. If doubt exists as to the construction of a penal statute, it is the duty of the court to resolve such doubt in favor of the citizen and against the State. Accused must be plainly and unmistakably within the criminal statute to justify conviction. See Rogers v. Cunningham, 117 Fla. 760, 158 So.430.
>
> 4 So.2d at 701

See also Dowlut and Knoop, "State Constitutions and the Right to Keep and Bear Arms," 7 Oklahoma City University Law Review 177 (Summer 1982), where the authors wrote of state constitutional provisions similar to Florida's guaranteeing the right to bear arms:

> The delving into the historical reasoning and the intent of the Framers has also led to the conclusion that the right to bear arms, like any constitutional right, is an important guarantee requiring liberal construction. The Constitution is the supreme law,and courts are not to substitute their judgment for that of the Framers and the people who adopted it as to what the guarantee should protect or to indulge in constitution-making under the guise of interpretation.

pertaining to concealed firearms must be strictly construed. Specifically sections 790.25(5) and 790.001(16), which favor the right to bear arms in automobiles, should receive liberal construction. If there is any doubt or ambiguity as to whether the zippered pouch was a gun case or a container requiring a cover or lid, then the court has a duty to resolve such doubt in favor of the citizen and against the government.

Photographs of the zippered pouch are contained in the record at bar. They reveal a man's purse rather in the form of a miniature portfolio. One opens it by unzipping the zipper and lifting the lid. Appellant used it to store a gun. Hence it was a "closed box or container which requires a lid or cover to be opened for access," or a "gun case," or both under section 790.001(16). The District Court of Appeal erred by affirming the denial of the motion to dismiss.

D. Summary

There were no disputed material facts in the trial court, and the undisputed facts did not establish a prima facie case of guilt. This cause should be remanded to the trial court with instructions to set aside its judgment and order of probation and to dismiss the information.

> In searching for guidelines to set the margins for conduct protected by the right to bear arms in defense of self and state the focus has been on the literal interpretation of the guarantee. If the conduct can be characterized as essential for defense of self or defense of the state, it will be protected.
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> Ibid. at 212 (footnotes omitted).

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, petitioner respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal and remand this cause with such directives as may be deemed appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Marlyn Altman, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, 33401 this 4th day of February, 1985.

Of Counsel