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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

DAVID G. JACKSON, JR.,

Respondent.

CASE NO. 66728

RESPONDENT'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
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ATTORNEY FOR RESPONDENT

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RESPONDENT'S BRIEF ON JURISDICTION

STATEMENT OF THE CASE AND FACTS

As set forth in the opinion of the District Court of Appeal, Fifth District, the defendant below, David G. Jackson, Jr., was charged with and convicted of the offenses of: (1) fleeing a police officer; (2) battery on a law enforcement officer; and (3) resisting arrest with violence. Jackson v. State, 10 FLW 223 (Fla. 5th DCA January 17, 1985). The facts giving rise to these charges show that Wandell, a patrolling police officer, became suspicious of three black males standing in the street. As Wandell approached them, the defendant got into his automobile and drove away. Wandell radioed for assistance "to catch the vehicle," and two other officers, Borges and Brewster, followed Jackson in their patrol cars with lights flashing. At one point the defendant stopped, but then drove off again. The officers pursued with sirens sounding. Finally,

Brewster pulled in front of Jackson and their automobiles collided in front of Jackson's house. When the police officers approached Jackson's stopped vehicle with drawn guns a struggle ensued, ultimately resulting in Jackson being subdued and taken to the police station. There were several witnesses to the struggle, and their versions of the incident varied significantly. Id. As stated in the state's brief in the district court and as noted by the district court's opinion, "Whether the police were using unlawful or excessive force was dependent on which version of the facts the jury believed." Id.

On appeal to the district court, Jackson argued, inter alia, that the trial court erred in refusing to give an instruction on self-defense based on the law as stated in Ivester v. State, 398 So.2d 926 (Fla. 1st DCA 1981), **review denied**, 412 So.2d 470 (Fla. 1982), to-wit:

> It is lawful to defend oneself against unlawful or excessive force, even when being arrested.

Defense counsel also objected to the giving of an instruction based on Standard Jury Instruction (Criminal) 3.04(b) that the defendant was not justified in the use of any force to resist an arrest and therefore the defendant could not be acquitted on the grounds of self-defense if he was being arrested. Jackson v. State, supra.

The District Court of Appeal, Fifth District, reversed the defendant's convictions of battery on a law enforcement officer and resisting arrest with violence, following the

decisions of Ivester v. State, supra; and Allen v. State, 424 So.2d 101 (Fla. 1st DCA 1983), **review denied**, 436 So. 2d 97 (Fla. 1983). Based on these cases, the Court ruled that the defendant's requested instruction was a correct statement of the law and the instruction which the trial court gave (based on the standard jury instruction) was erroneous:

> As pointed out in the recent case of Allen v. State,[citation omitted], this standard jury instruction is wrong because it tells a jury that force by an arrestee may **never** be used, even to rebut excessive force, if he knows, or reasonably should know, that his assailant is a law enforcement officer. This is not the law, and never has been.

The Court then contrasted the law concerning resisting arrest with that of self-defense from excessive force by the police to affect that arrest. The Court stated that an arrest, whether lawful or unlawful, may never be resisted with violence; however, any excessive force accompanying such arrest may be forcefully defended against as provided by section 776.012, Florida Statutes (1983). Jackson v. State, supra.

The effect of denying the defendant's requested instruction and of giving the objectionable instruction, the Court held, actually removed the self-defense issue from the jury's province. Since there existed ample evidence of excessive force which the jury could have believed, the Court reversed the defendant's convictions on counts 2 and 3. Id.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THE INSTANT CASE DOES NOT CONFLICT WITH THE CASES CITED BY THE PETITIONER SINCE THOSE CASES DID NOT DEAL WITH THE ISSUE PRESENTED HERE OF DEFENDING ONESELF AGAINST UNLAWFUL AND EXCESSIVE FORCE DURING AN ARREST, AND SINCE THE ISSUE WAS SUPPORTED BY THE EVIDENCE.

No direct and express conflict necessary to confer jurisdiction upon this Court is present between the instant case and those of Lowery v. State, 356 So.2d 1325 (Fla. 4th DCA 1978); In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981); and Griffin v. State, 370 So.2d 860 (Fla. 1st DCA 1979). This Court should therefore decline to exercise its discretionary jurisdiction in this case.

In Lowery v. State, supra, as correctly stated by the petitioner, the court held that one could not use violence to resist even an unlawful arrest. That holding does not conflict with the instant decision which reaffirms that rule of law by clearly stating that "an arrest, whether lawful or unlawful, may never be resisted with violence." Jackson v. State, 10 FLW 223 (Fla. 5th DCA January 17, 1985).

The instant decision does not even deal with that issue, though. The Jackson decision deals not with the issue of unlawful **arrest** (which the district court apparently ruled

lawful), but rather with the issue of unlawful **force** during the course of the arrest. Id. It is the petitioner's confusion of these two distinct issues which causes the state to believe that conflict exists, when in reality it does not. The holding in the instant case was that, pursuant to Section 776.012, Florida Statutes (1983), any excessive force accompanying an arrest may be forcefully defended against. In so ruling, the district court relied on the cases of Allen v. State, 424 So.2d 101 (Fla. 1st DCA 1983), **review denied**, 436 So. 2d 97 (Fla. 1983); and Ivester v. State, 398 So.2d 926 (Fla. 1st DCA 1981), **review denied**, 412 So.2d 470 (Fla. 1982). The district court quoted at length from Ivester, supra at 930, wherein the court had analyzed the correlation between self-defense and the use of force by an arresting officer, and had explained the different concepts of resisting an arrest and resisting unlawful force:

> Sections 776.012 and 776.051, Florida Statutes (1974), were both enacted as a part of the same act. See Laws of Florida, Chapter 74-383. Statutes that are a part of a single act must be read **in pari materia.** Major v. State, 180 So.2d 335, 337 n.1 (Fla. 1965). The effect of reading these statutes **in pari materia** is to permit an individual to defend himself against unlawful or excessive force, even when being arrested. This view is consistent with the position taken by other jurisdictions that have been confronted with questions relating to statutes similar to Sections 776.012, 776.051, and 843.01, Florida Statutes. [citations omitted]
>
> Chapter 776, Florida Statutes, recognizes principles set forth in the case law of other jurisdictions

> in that the right of self-defense against the use of excessive force is a concept entirely different from resistance to an arrest, lawful or unlawful, by methods of self-help. [citations omitted] The former concept is grounded on the view that a citizen should be able to exercise reasonable resistance to protect life and limb; which cannot be repaired in the courtroom. The latter view is based on the principle that a self-help form of resistance promotes intolerable disorder. Any damage done by an improper arrest can be repaired through the legal processes.

Jackson v. State, supra.

In fact, Lowery v. State, supra, relied on by the state for conflict, expressly distinguishes the instant issue and specifically leaves open the question of an arrestee's right to use force in self-defense:

> Thus, after July 1, 1975, Section 843.01 must be read in **pari materia** with Section 776.051; the end result being that the use of force in resisting an arrest by a person reasonably known to be a law enforcement officer is unlawful notwithstanding the technical illegality of the arrest. [citations omitted] And since it has not been alleged that the officer in this case used unlawful force in effectuating the arrest, it has not been necessary for us to consider the question of a defendant's right to use force in defense of his person under Section 776.012.

Lowery v. State, supra at 1326.

Thus the instant decision is not at all in conflict with the decision in Lowery, supra. The Jackson decision follows

the cases which have addressed the issue. Allen v. State, supra; Ivester v. State, supra.

Similarly, the decision of the district court does not conflict with the case of Griffin v. State, supra. As noted by the petitioner, Griffin stands for the proposition that a trial court should not give a jury charge absent an appropriate factual basis in the record. As specifically noted by the district court in the instant case, there did exist a factual basis for the charge, there being significant differences in several witnesses versions of the struggle, some of whose versions provided "evidence of excessive force which the jury could have believed." Jackson v. State, supra. In fact, the district court quotes from the state's own brief filed in that court for support for this finding. There, the assistant attorney general admitted:

> Whether the police were using unlawful or excessive force was dependent on which version of the facts the jury believed.

Id. There is no conflict with the case of Griffin, supra.

In the petitioner's brief on jurisdiction, the state fails to argue how the instant decision conflicts with this Court's publishing of the standard jury instructions in In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981). Although the instant decision disapproves of a standard jury instruction contained therein, the respondent does not believe that this Court's publishing of the standard jury instructions

amounts to "a decision . . . of the Supreme Court on the same question of law" so as to cause express and direct conflict. Fla.R.App.P. 9.030(a)(2)(A)(iv). In fact, it appears that this Court's publishing of the jury instructions does not even amount to an approval of the substance of the instructions contained therein. **Compare, e.g.,** State v. Hicks, 421 So.2d 510 (Fla. 1982) with the standard jury instruction on the offense of burglary, Fla.Std.Jur.Inst.(Crim.), p. 135 (the former holding that consent is an affirmative defense; the latter stating that lack of consent is an element of the offense).

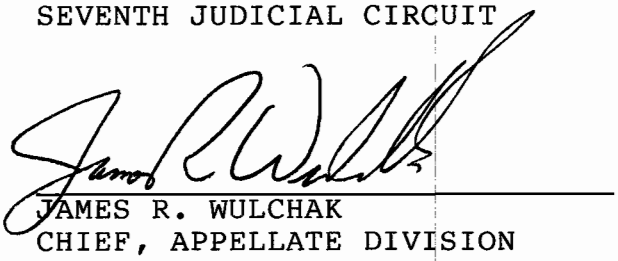
No express and direct conflict exists between the opinion of the District Court of Appeal, Fifth District, in the instant case and the cases cited by the petitioner. This Court should decline to exercise its discretionary jurisdiction.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the respondent requests that this Honorable Court deny its discretionary review in the instant case.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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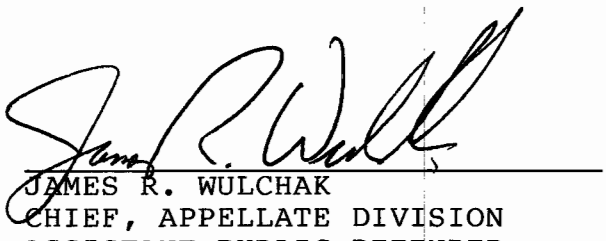
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014; and the respondent, David G. Jackson, Jr., Inmate No. 327279, P.O. Box 747, Starke, Florida 32091, on this 1st day of April, 1985.



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