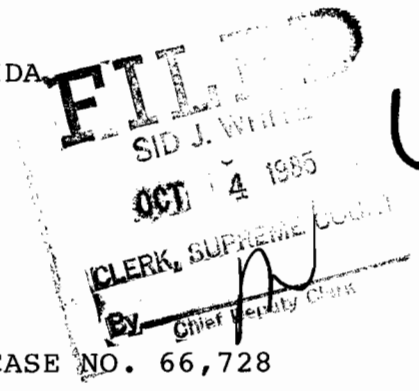
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 66,728
	)	
DAVID G. JACKSON, JR.,	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR RESPONDENT

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RESPONDENT'S BRIEF ON THE MERITS

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, 463 So.2d 372 (Fla. 5th DCA 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. (R 96-98) Wandell radioed for assistance "to catch the vehicle," and two other officers, Borges and Brewster, followed Jackson in their patrol cars with lights flashing. (R102-103, 122, 172) At one point the defendant stopped, but then drove off again. The officers pursued with sirens

sounding. (R128-132, 178-180) Finally, Brewster pulled in front of Jackson and their automobiles collided in front of Jackson's house. (R 134, 154, 181, 502) 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. Jackson v. State, supra. 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. (R 293-326)

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.

Jackson v. State, supra. 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.

SUMMARY OF ARGUMENT

The requested defense instruction that it is lawful to defend oneself against unlawful or excessive force, even when being arrested is a correct statement of the law. The trial court's denial of the requested instruction and the giving of the objectionable instruction actually removed the self-defense issue from the jury's province. Since evidence of excessive force was present and since the state's witnesses testifed that the defendant fought the police officers, the rquested instruction was supported by the evidence. The district court was correct in finding reversible error.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THE INSTANT CASE CORRECTLY SETS FORTH THE EXISTING LAW CONCERNING THE ISSUE OF DEFENDING ONESELF AGAINST UNLAWFUL AND EXCESSIVE FORCE DURING AN ARREST, AND, SINCE THE ISSUE WAS SUPPORTED BY THE EVIDENCE, THE DISTRICT COURT CORRECTLY REQUIRED AN INSTRUCTION ON THE ISSUE IN CONFORMITY WITH THAT LAW.

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. Jackson v. State, 463 So.2d 372 (Fla. 5th DCA 1985). 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.

The instant decision is not in conflict with Lowery v. State, 356 So.2d 1325 (Fla. 4th DCA 1978). In fact, Lowery v. State, supra, relied on by the state in its jurisdictional brief 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.[1] The Jackson decision correctly follows the cases which have addressed the issue. Allen v. State, supra; Ivester v. State, supra. In Ivester, the court ruled that pursuant to Section 776.012, Florida Statutes (1983), self-defense is a plausible defense to a charge of resisting arrest with violence. Allen, supra, held that pursuant to this ruling it was error to instruct the jury that self-defense was never a defense to resisting arrest. Shannon v. State, 463 So.2d 589 (Fla. 4th DCA 1985), cited by the petitioner, supports this proposition by ruling that Florida Standard Jury Instruction (Crim.) 3.04(d) (that a person is never justified in the use of any force to resist an arrest) should not

[1] It should be noted that the petitioner has in its merit brief seemingly abandoned arguing the cases on which it relied to establish conflict and obtain jurisdiction in this Court. The petitoner mentions Lowery only in passing and the other "conflict" cases only in its statement of the case. This Court should therefore reject the arguments of the petitioner's merit brief (which differ from those made to establish this Court's conflict jurisdiction) and discharge its discretionary review as improvidently granted. See State v. Hegstrom, 401 So.2d 1343, 1344 (Fla. 1981).

be given where there is some evidence of unlawful force in effectuating the arrest. Instead, a special instruction is appropriate telling the jury that self-defense may be used to repel the unlawful or excessive force. Shannon, supra at 590. The instant decision of Jackson v. State, supra, thus correctly follows th law on the issue.

The petitioner claims that although there existed some evidence of excessive force of the police which the jury could have believed, the defendent cannot have the self-defense instruction since the defendant did not present evidence of his fighting the officers. However, this argument ignores the fact that there was evidence of the defendant fighting with the officers presented in the state's case. The district court found that there was evidence of excessive force and of the defendant acting in self-defense. 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.

Jackson v. State, supra. Therefore, there was evidence presented to support the giving of the requested instruction. Pursuant to Ivester, Allen, and Shannon, where there is some proof of unlawful or excessive force in effectuating the arrest the requested instruction should have been given and the standard instruction deleted since it was inappropriate.

The Petitioner also claims **for the first time** in its merit brief that the defendant did not follow the proper procedure for preserving the issue of the jury instructions for appeal by failing to adequately argue the basis for the requested instruction. (Petitioner's Brief on the Merits, pp. 6-8) This issue was never presented to the district court of appeal and was not argued as a basis for this Court's jurisdiction. It is improper for this issue to be raised for the first time in a discretionary review proceeding in this Court and should therefore not be considered. See Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1983). Moreover, the petitioner's contention in this regard is without merit since there was an extensive discussion on the basis for the requested instruction and there was an objection to the given instruction; nowhere in the transcript of the charge conference does the defendant request the objectionable portion of the given instruction. (R 293-326)

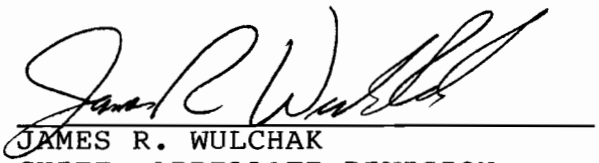
It was harmful error for the trial court to refuse to instruct the jury that it is lawful to defend oneself against unlawful or excessive force, even when being arrested and to instead instruct the jury that the defendant may not be acquitted on the basis of self-defense if the arrest was lawful where there is evidence of excessive force in effectuating the arrest. The ruling of the District Court of Appeal was correct and should be affirmed.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the respondent requests that this Honorable Court affirm the decision of the District Court of Appeal, Fifth District, vacate the judgments and sentences, and remand for an new trial.

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 3rd day of October, 1985.

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER