IN THE SUPREME COURT OF FLORIDA

DANIEL R. BUTLER,

PETITIONER,

-VS-

CASE NO. 68,021

STATE OF FLORIDA,

RESPONDENT.

RESPONDENT'S JURISDICTIONAL BRIEF

JIM SMITH
ATTORNEY GENERAL

ANDREA SMITH HILLYER
ASSISTANT ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent does not accept the statement of the facts and case as stated on pages one through four because it contains "facts" found only in the dissenting opinion and that may not form the predicate for conflict jurisdiction.

The facts of this case as developed at trial are not in dispute nor are they complex. Petitioner contended that he shot Mr. Jones in self-defense because the latter came out of his bedroom still half asleep allegedly toting a shotgun and he (petitioner) shot Mr. Jones before Mr. Jones could shoot him. The State's witnesses testified that Mr. Jones was not armed when he came out of the bedroom in his home after being awakened by his son at approximately 4:00 a.m. due to the disturbance caused by petitioner's presence in Jones' home.

The trial judge's instructions pertaining to self-defense were as follows:

> There has been raised as a defense that Daniel R. Butler was justified in the use of force likely to cause death or great bodily harm against William E. Jones. Daniel R. Butler was justified in the use of that force if he reasonably believed that its use was necessary to prevent imminent death or great bodily harm to himself or another at the hands of William E. Jones.
>
> In deciding whether the defendant was justified in the use of force likely to cause death or great bodily harm, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing the defendant need not have been actual; however, to justify the use of force likely to cause death or great bodily harm, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force based upon appearances the defendant must have actually believed that the danger was real.
>
> The defendant cannot justify his use of force likely to cause death or great bodily harm unless he used every reasonable means whether his power and consistent with his own safety to avoid the danger before resorting to that force. The fact that the defendant was wrongfully attacked can justify his use of force likely to cause death or great bodily harm if by retreating he could have avoided the need to use that force; however, if the defendant was placed in the position of imminent death or great bodily harm and it would have increased his own danger to retreat, then his use of force likely to cause death or great bodily harm was justifiable.
>
> If a person is attacked in his own home or on his own premises, he has no duty to retreat and has a lawful right to stand his 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 death or great bodily harm to himself or another.
>
> If you find that the defendant, who because of threats or prior difficulties with the victim had reasonable grounds to believe that he was in danger of death or great bodily harm at the hands of the victim, then the defendant had the right to arm himself; however, the defendant cannot justify the use of force likely

> to cause death or great bodily harm if after having armed himself he renewed his difficulty with the victim when he could have avoided the difficulty.
>
> If in your consideration of the issue of self-defense you have a reasonable doubt on the question of whether or not the defendant was justified in the use of force, you should find the defendant not guilty; however, if from the evidence you are convinced that the defendant was not justified in the use of force, then you should find him guilty if all the elements of the charge have been proved.

(R 453-454).

The majority opinion concluded that under either scenario the defense of home instruction, as modified, was irrelevant, and thus legally erroneous. The majority, however, concluded a "review of the record and of the totality of the instructions given satisfies us that, although the instruction was not proper, it was harmless error in this case." (Opinion at p. 3).

SUMMARY OF ARGUMENT

Petitioner has totally failed to demonstrate the decision rendered by the lower tribunal is in express and direct conflict with the decision of another tribunal on the same point of law and has not demonstrated this Court has jurisdiction to review the decision complained of.

ISSUE

IS THE DECISION OF THE DISTRICT COURT IN THE INSTANT CASE IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF ANOTHER APPELLATE COURT ON THE SAME POINT OF LAW.

ARGUMENT

Petitioner's statement of the question presented is pregnant with the assumption that the instruction complained of was confusing and contradictory when in fact it was not.

The State does not agree that the instruction quoted on page three of the opinion was irrelevant because the victim did not assert the defense of self-defense and because the victim was not on trial. More importantly, however, the instruction, as modified was an accurate statement of the law for a person, whether he be a defendant or a victim--which is only determined by the verdict--has no duty to retreat from his home when confronted by a hostile aggressor. The privilege of defending one's home applies to non-defendants as well as defendants. To suggest it was irrelevant for the jury to understand Mr. Jones' rights and duties when the dispute involved him is incredible.

Be that as it may, if the instruction was irrelevant to the issues, it could not have mislead the jury which is essential to a determination of prejudice which is exactly why the majority correctly held the error was harmless.

If the jury believed the State's witnesses, then Jones was not armed and the self-defense theory was correctly rejected. If, on the other hand, the jury believed the defendant, the instruction would not mislead them for it merely informs the jury that "if a person is attacked in his own home . . . he has no duty to retreat." Petitioner contended he was attacked by Jones and there was no testimony from him that he was attacking Jones. The instruction was not contradictory or confusing as opined by Judge Ervin and petitioner. It was an accurate statement of the law that, at best, was not really material to the ultimate issue.

The cases cited by petitioner, to-wit: **Finch v. State,** 116 Fla. 437, 156 So. 489 (1934); **Shannon v. State,** 463 So.2d 589 (Fla.4th DCA 1985); **Blitch v. State,** 427 So.2d 785 (Fla.2d DCA 1983); **Stripling v. State,** 349 So.2d 187 (Fla.3rd DCA 1977); **Swindle v. State,** 254 So.2d 811 (Fla.2d DCA 1971) and **Wilson v. State,** 171 So.2d 903 (Fla.2d DCA 1965) all involved incorrect statements of law which related to the issue to be decided by the jury and thus possessed a likelihood that the jury was misled. Under such circumstances harmless error could not be found by the appellate court.

In a land where even a federal constitutional error may be deemed harmless, **Harrington v. California,** 395 U.S. 520 (1969) the State submits that it is probably legally impossible for two decisions applying a harmless error analysis reaching different results in always differing contexts to legally conflict

under the Florida Constitution. "Obviously, two cases cannot be in conflict if they can be validly distinguished." **Morningstar v. State,** 405 So.2d 778, 783 (Fla.4th DCA 1981), Anstead, J., concurring. This perhaps explains why petitioner attempts to cast the issue as a jury instruction ruling rather than a harmless error disposition. He, of course, wishes to have this Court re-review the entire record to simply determine the district court's assessment of his individual case was "correct". That has never been the proper use of conflict certiorari, **Ansin v. Thurston,** 101 So.2d 808 (Fla.1958) and it is not proper under Article V, Fla.Const., in its amended form. **Jenkins v. State,** 385 So.2d 1356 (Fla.1980).

CONCLUSION

Petitioner has failed to demonstrate the requisite conflict essential to this Court's jurisdiction and therefore respondent requests that the petition for discretionary review be denied.

Respectfully submitted,

JIM SMITH
Attorney General

ANDREA SMITH HILLYER
Assistant Attorney General
The Capitol
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been forwarded to Mr. Michael J. Minerva, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 3rd day of January 1986.

Andrea Smith Hillyer
Assistant Attorney General