IN THE SUPREME COURT OF THE STATE OF FLORIDA

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70784

STATE OF FLORIDA,

Petitioner/Appellee,

vs.

CASE NO.:
CASE NO.: 5DCA 86-1016

JAMES HENDERSON,

Respondent/Appellant.
_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE AND OF THE FACTS

The Respondent, James Henderson, agrees to the facts stated in the first paragraph of the Petitioner's Statement of the Case and of the Facts.

The Respondent takes exception to the second and third paragraphs of the Statement of the Case and of the Facts, as they fail to mention important facts that were brought out at the trial. These facts include the alleged victim possessing an eight inch butcher knife during his approach of the Respondent, the alleged victim's "cocaine intoxication" at the time of his death, and numerous witnesses testifying in support of the Respondent's self-defense assertion. In light of these facts neglected by the Petitioner, Respondent would ask this Court to adopt the facts of the trial found by the Fifth District Court of Appeal in its opinion of this case.

The Respondent has no objection to the facts stated in paragraphs four, five and six. In addition to the six paragraphs which make up Petitioner's Statement of the Case and of the Facts, the Respondent would add the following:

Petitioner failed to move to stay the Mandate of the Fifth District Court of Appeal. On June 11, 1987, the Mandate in case number CR85-2054 was filed with the Orange County Circuit Court's Clerk. Pursuant to this Mandate, on June 15, 1987, the Honorable Rom Powell, Circuit Judge, issued an order entitled, "Order Correcting Sentence on Count

III". A copy of this Order is attached as Appendix #1. In the Order, Judge Powell discharged the Defendant/Respondent as to Count I, Murder in the Second Degree and Count II, Possession of a Firearm During the Commission of a Felony. As a result of this Order, the Respondent was released from the Department of Corrections.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's opinion in the case sub judice is consistent with this Court's decisions in Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961) and Welfare v. Seaboard Coastline Railroad Company, 373 So.2d 886 (Fla. 1979). The Fifth District Court of Appeal applied the principals set forth in the above-noted decisions and held that the State of Florida failed to present sufficient evidence to prove the Respondent/Defendant's guilt beyond a reasonable doubt.

The Fifth District Court of Appeal held that a witness' statement claiming that, "No. I didn't see," was insufficient, in light of the fact that the prosecutor failed to ascertain the surrounding circumstances as to the witness' ability to see, was insufficient to overcome positive testimony to the contrary. This, in light of Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affm'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) is permissible. In applying Tyus, supra, and Welfare, supra, the Fifth District Court of Appeal did not expressly and directly conflict with it.

Finally, subsequent to the Mandate issued by the Fifth District Court of Appeal, the Respondent/Defendant was discharged from the offenses which comprise the opinion by the Fifth District Court of Appeal. As such, double jeopardy has attached and it would be a waste of judicial resources to accept jurisdiction on this strictly academic issue.

ARGUMENT

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION IN THE CASE SUB JUDICE AND Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961) AND Welfare v. Seaboard Coastline Railroad Company, 373 So.2d 886 (Fla. 1979)

The Fifth District Court of Appeal in Henderson v. State, 12 FLW 990 (Fla. 5th DCA, April 9, 1987), decided the issue of whether the trial court erred in denying a defense motion for judgment of acquittal at the conclusion of the evidence, based upon an assertion of self-defense. The court decided that the evidence adduced at trial was legally insufficient to support a conviction.

The crucial issue at trial regarding the claim of self-defense was who renewed the confrontation between the alleged victim and the Respondent/Defendant. The prosecutor had only one witness to support their theory of the case. When asked by the prosecutor if the alleged victim ever approached the Respondent/Defendant, the witness stated, "No. I didn't see." As the Fifth District Court of Appeal stated:

> The prosecutor fails to ascertain, by any further questioning, whether the words, 'I didn't see' refers to the fact that Brisbane's view was obscured by the Bronco, or that she had already turned away to flee home, or that she was looking at the combatants and positively saw that Edwards (the alleged victim) made no aggressive moves with a knife toward Henderson immediately prior to being shot.

The court continued:

> Such negative testimony as that given by Brisbane has consistently been held

> insufficient to create a factual issue in the face of positive testimony.

The court then cited to Welfare v. Seaboard Coastline Railroad Company, 373 So.2d 886 (Fla. 1979); Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961); Powell v. Gary, 146 Fla. 334, 200 So. 854 (1941); and Seaboard Air Line Railroad Company v. Myrick, 91 Fla. 918, 109 So. 193 (1926).

The Petitioner believes that the Fifth District Court held that "negative" testimony is insufficient to create a factual issue in the face of positive testimony. The language of the Fifth District Court of Appeal, however, is "such negative testimony as that given by Brisbane...." (Emphasis added) The Fifth District Court of Appeal was clearly speaking not only to the phrase by the witness, "No. I didn't see.", but also the fact that the circumstances surrounding her failure to see would not give rise to sufficient evidence to support a verdict for second degree murder. As this Court stated in Seaboard Air Line Railroad Company v. Myrick, supra, at 195, and reiterated in Tyus v. Apalachicola Northern Railroad Company, supra (hereinafter Tyus) at 584:

> When negative testimony is relied upon to contradict positive evidence it should appear that the negative statements were made by persons whose attention was directed to the fact that they were looking, watching and listening for the fact. Not only that the opportunity for observing the fact existed, but that their attention was directed to the fact.

The Fifth District Court of Appeal in the case sub judice, merely determined as it is permitted, pursuant to Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affm'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982), that there was insufficient evidence presented by the State of Florida to disprove the claim of self-defense beyond a reasonable doubt. The holding of the Fifth District Court of Appeal does not expressly and directly conflict with this Court's opinion in Tyus and Welfare, supra.

In its attempt to find a conflict between the opinion in Tyus and Welfare and the case sub judice, the Petitioner presents a number of false issues. These include the Petitioner explaining that "in essence" the court concluded the witnesses' testmony to be incompetent; and that it "plainly reweighed the evidence contrary to Tibbs." These assertions are merely the Petitioner's personal beliefs and are refuted explicitly in the opinion by the Fifth District Court of Appeal.

In addition to there being no express and direct conflict, this Court should deny the Petitioner for Writ of Certiorari based upon the fact that the Respondent has already been discharged by the trial court for the offenses that comprise the Fifth District Court of Appeal's opinion. As such double jeopardy has attached. Granting the Petition would be a waste of judicial time, as any decision affecting the Fifth District Court of Appeal's opinion would be moot.

CONCLUSION

Based upon the Petitioner's failure to show an express and direct conflict with prior decisions of this Court and the fact that Respondent has been discharged based upon the opinion in the case sub judice, the Respondent respectfully requests this Court deny the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to JOSEPH N. D'ACHILLE, JR., OF COUNSEL, Office of the Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, FL 32014, this 10 day of July, 1987, by U.S. MAIL.

Respectfully submitted,

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