IN THE SUPREME COURT OF FLORIDA

JOEY LUIS ROJAS,

Petitioner,

vs. CASE NO. 73,622

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

PAULA C. COFFMAN
ASSISTANT ATTORNEY GENERAL
Fl Bar #390712
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

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SUMMARY OF ARGUMENT

This court is without jurisdiction predicated upon alleged direct and express conflict to review the decision of the appellate court in Rojas v. State, **14** FLW **29** (Fla. 5th DCA December 22, **1988).** While the decisions alleged to be in conflict may at first blush appear to articulate a conflicting rule of law based upon the disparate results obtained, the instant case is compatible with prior precedent, whether the same or a different rule of law is determined to have been applied, in view of the disparate factual scenarios which distinguish the cases.

POINT ON APPEAL

THIS COURT IS WITHOUT JURISDICTION PREDICATED UPON ALLEGED DIRECT AND EXPRESS CONFLICT TO REVIEW THE DECISION OF THE APPELLATE COURT IN ROJAS V. STATE, 14 F.L.W. *29* (FLA. 5th DCA December 22, 1988).

Petitioner contends that the decision of the appellate court in the instant case conflicts expressly and directly with Alejo v. State, 483 So.2d 117 (Fla. 2d DCA 1986), Ortaqus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987), Walker v. State, 520 So.2d 606 (Fla. 1st DCA 1987), and Spaziano v. State, 522 So.2d 525 (Fla. 2d DCA 1988). However, a careful comparison of those decisions with the decision sought to be reviewed reveals factual distinctions which justify the disparate results obtained and render the instant case wholly compatible with the cases alleged to be in direct and express conflict.

In Alejo v. State, supra, it was held that the trial court's failure to render a complete manslaughter instruction, including definitions of justifiable and excusable homicide and culpable negligence, constituted fundamental reversible error in an instance where such an omission effectively neqated the defendant's theory of defense to a charqe of second deqree murder. The defendant in Alejo had been convicted as charged. Similarly, in Ortaqus v. State, supra, the trial court's failure to give a complete jury instruction on manslaughter, the offense for which the defendant was on trial, was held to constitute reversible error in an instance where the defendant's theory of

defense at trial "was that the conduct of the deceased provoked and instigated the confrontation, and that the killing of the deceased was done as an act of self-defense." Ortagus v. State, 300 So.2d at 1369. The manslaughter instruction, which failed to address all material elements of the offense for which defendant Ortagus was in fact convicted, was determined to be "necessarily misleading and prejudicial." Ortagus v. State, 500 So.2d at 1370.

Relying upon its prior precedent in Ortaqus, supra, the First District Court of Appeal in Walker v. State, supra, held that it was reversible error to fail to give a full instruction on excusable and justifiable homicide contemporaneously with the instruction on manslaughter in an instance where the defendant's theory of defense to a charge of second degree murder was that the victim had either been fatally stabbed accidentally or in self-defense. The defendant in Walker had been convicted as charged. Similarly, relying on its prior precedent in Alejo, supra, the Second District Court of Appeal in Spaziano, supra, held that it was reversible error to fail to give a full and accurate instruction on excusable homicide in an instance where the defendant's theory of defense to a charge of first degree murder was that the homicide was excusable:

> This court has found that th[e] same abbreviated jury instruction language defining excusable homicide constituted reversible error in **Blitch** [**v. State**, 427 So.2d 785 (Fla. 2d DCA 1983] where there was a similar contention and supporting evidence that the shooting was accidental and the

> state of mind of the defendant was in issue.
>
> Trial counsel's failure [to object to the abbreviated manslaughter instruction] thus was an unreasonable omission which severely prejudiced his client's case inasmuch as the error complained of negated the only defense put forth by trial counsel.

Spaziano v. State, 522 So.2d at 526-527 (emphasis supplied). The defendant in Spaziano had also been convicted as charged.

As acknowledged in the decision sought to be reviewed, the holding is Spaziano, supra, has been limited by the recent decision of Tobey v. State, 13 F.L.W. 2541 (Fla. 2d DCA November 18, 1988). Tobey, supra, which expressly recedes from dicta found in Spaziano, holds that the failure to instruct the jury on defenses only constitutes fundamental error in those instances where evidence pertaining to such defenses is offered at trial:

> We adhere to that part of Spaziano [v. State, 522 So.2d 525 (Fla. 2d DCA 1988] which holds that Spaziano's trial counsel was ineffective for failing to object to an erroneous instruction on the defense of justifiable and excusable homicide where evidence was presented to support that defense.
>
> . . . .
>
> The failure to qive an instruction on a defense encompassed within the evidence is fundamental error and reversible notwithstanding the absence of a requested instruction or an objection.

Tobey v. State, 13 F.L.W. at 2541 (emphasis supplied). The Tobey decision goes on to point out that the decisive aspect of the holding in Spaziano was that a complete instruction on justifiable and excusable homicide was "essential to permit the jury to pass upon Spaziano's only defense" at trial. Tobey v. State, 13 F.L.W. at 2542.

In sharp contrast to the foregoing, in the case presently sought to be reviewed "no evidence was produced...which would have supported a finding that [petitioner] was entitled to use deadly force against [the decedent]." Rojas v. State, 14 F.L.W. 29, 30 (Fla. 5th DCA December 22, 1988). As a consequence, the omitted instructions would not have availed petitioner in any event and any defect in the instructions as given did not prejudice the petitioner under the facts presented:

> Here [petitioner] presented no evidence which could have supported a self-defense instruction. As in Garcia [v. State, 13 FLW 2350 (Fla. 3d DCA October 28, 1988], the jury's conviction of [petitioner] of second degree murder required it to find the killing was by an act "imminently dangerous to another" and "evinced [sic] a depraved mind regardless of human life" [footnote omitted]. These findings reject any possibility the killing was justifiable or excusable.

Id.

As articulated in Mancini v. State, 312 So.2d 732, 733 (Fla. 1975), in order to invoke this court's conflict jurisdiction, a petitioner must either demonstrate the announcement of a new rule of law which conflicts with a rule previously announced by this

court or another district or demonstrate the application of the same rule of law to produce a different result in a subsequent case which involves substantially the same facts as a prior decision. In the latter instance, facts are of paramount importance. Petitioner can demonstrate no conflict between the decision sought to be reviewed and Alejo, supra, Ortaqus, supra, Walker, supra, and Spaziano, supra, as modified by Tobey, supra, under either theory. While the aforementioned decisions may at first blush appear to be in conflict with the decision sought to be reviewed, these decisions either articulate a different but compatible rule of law based upon the disparate facts presented or address the application of the same principle of law to widely disparate factual scenarios. In either event, this court should decline to exercise its discretionary jurisdiction to resolve what represents nothing more than an illusory conflict.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court decline to exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

PAULA C. COFFMAN
ASSISTANT ATTORNEY GENERAL
Fl Bar #390712
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction has been furnished by mail to: Brynn Newton, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014, on this 13th day of February, 1989.

PAULA C. COFFMAN
Of Counsel