IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

STANLEY B. ELLISON,

Respondent.

CASE NO. 74,532

AMENDED JURISDICTIONAL ANSWER BRIEF OF RESPONDENT

APPEAL FROM THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

LOUIS O. FROST, JR.
PUBLIC DEFENDER

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES CITED: PAGE NO,

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

Petitioner, the State of Florida, Appellee below, prosecuted Respondent, Stanley B. Ellison, Appellant below, in the Circuit Court. References to the Record on Appeal will be noted by "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts with the following addition: On August 15, 1989, the First District Court of Appeal. withdrew its original opinion and substituted a new opinion in its place (attached as kppendix I). The August 15, 1989, opinion was identical to the first opinion except for the following certification to this Court on the issue of 'juvenile furlough status" as "legal status at the time of the offense:" Pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, we certify that this decision expressly and directly conflicts with a decision of another District Court of Appeal on the same question of law. See Butler v. State, 14 FLW 1244 (Fla. 2d DCA May 19, 1989).

SUMMARY OF ARGUMENT

Respondent agrees that the instant case conflicts with Butler v. State, 543 So.2d 432 (Fla. 2d DCA 1989). The decision of the First District does not conflict with other cases on the issue of second degree murder. The instant opinion did not decide the factual issue of intent based on conflicting evidence - the First District simply decided there was no proof of facts from which a rational jury could infer that Respondent acted with ill-will, spite or malice. Therefore, there is no conflict with other cases on the same point of law.

ARGUMENT

ISSUE ONE

THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT ON THE SAME POINT OF LAW.

Respondent agrees the decision in this case expressly conflicts with Butler v. State, 543 So.2d 432 (Fla. 2d DCA 1989). However, this case does not expressly and directly conflict with Espinosa v. State, 496 So.2d 236 (Fla. 3d DCA 1986) on the same point of law. Espinosa v. State, supra, involved juvenile community control under the guidelines. This case involves juvenile furlough status, not community control. Community control is defined as a part of legal status under Rule 3.701, Fla.R.Crim.P. Juvenile furlough status is not included in Rule 3.701(D)(6). Consequently, no express conflict exists with Espinosa.

ISSUE TWO

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL.

The decision in this case does not expressly and directly conflict with other decisions on the same point of law concerning second-degree murder. None of the cases cited by Petitioner involve similar facts to the instant case. There is no express conflict with those cases.

The First District decided in this case that:

> "There is no view of the facts herein from which the jury could properly conclude that the instant homicide constituted second-degree murder, in that there is no evidence that Ellison's actions were done "from ill- will, hatred, spite or evil intent."

Petitioner's assertion that this case conflicts with Tibbs v. State, 397 So.2d 1120 (Fla. 1981) is without merit. In Tibbs, this Court decided whether an appellate court should consider the legal sufficiency as well as evidentiary weight of the evidence produced at trial. The Court decided legal sufficiency was the only proper concern of an appellate court. The issue on appeal was "after all conflicts in the evidence and all reasonable inferences therefrom have been rendered in favor of the verdict on

appeal, [is] there substantial, competent evidence to support the verdict and judgment." 397 So.2d at 1123. The First District simply decided there was not substantial, competent evidence to support a second-degree murder verdict.

The cases cited by Petitioner on specific intent are irrelevant to this case. The First District did not decide that second-degree murder requires a specific intent, it decided there was no proof Respondent committed his acts of reckless driving with ill-will, hatred or spite. The fact that Respondent did not direct his actions towards a specific person(s) simply underscores the lack of proof of ill-will or malice. Such lack of proof is not an element of proof for specific intent. Petitioner is correct in contending that second-degree murder is a general intent crime. However, Petitioner misstates this principle - there is no need to prove a specific intent to kill. Gentry v. State, 437 So.2d 1097 (Fla. 1983). There is still a general intent to do the prohibited act with ill-will, spite or malice. Therefore, there is no express conflict with the cases cited by Petitioner on this issue.

There is no conflict with State v. Hacker, 510 So.2d 304 (Fla. 4th DCA 1986). Hacker involved proof of a felony - first degree murder charge. The precise issue was whether the trial court erred in granting a Motion to Dismiss. The factual and legal differences between Hacker and the instant case negate any possible conflicts. Lastly, there is no conflict with the cases on the question of intent being a jury issue. The First District did not decide the issue of intent; it simply decided there was no

proof of acts by Respondent from which a jury could infer ill-will, spite or malice. Therefore, the instant case does not conflict with Jones v. State, 192 So.2d 285 (Fla. 3d DCA 1966) and Lincoln v. State, 459 So.2d 1030 (Fla. 1984). These cases hold that if there is some evidence from which a jury could infer the requisite intent, the ultimate resolution of that issue is for the trier of fact, not an appellate court. The opinion in this case did not depart from this principle - it decided there was a complete lack of proof of facts from which the jury could infer general intent for second-degree murder.

CONCLUSION

Respondent agrees the opinion of the First District expressly conflicts with Butler v. State, 543 So.2d 432 (Fla. 2d DCA 1989). However, the other grounds suggested by Petitioner are not express and direct conflicts under Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the abcve and foregoing has been furnished, by mail, to the Office of the Attorney General, Capitol Building, Tallahassee, FL 32399-1050, this 22nd day of August, A.D., 1989.

JAMES T. MILLER
ASSISTANT PUBLIC DEFENDER