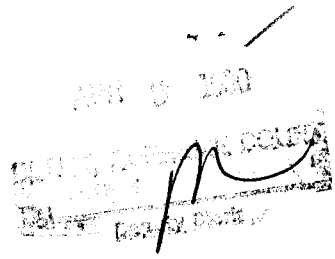
IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,831



STATE OF FLORIDA,

Petitioner,

vs.

CANDACE JEAN SCHUCK,

Respondent.

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BRIEF OF PETITIONER ON JURISDICTION

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PRELIMINARY STATEMENT

The State of Florida, the prosecuting authority and appellee below in Schuck v. State, 15 FLW D242 (Fla. 4th DCA January 24, 1990), motion for rehearing or motion for certifications and stay of mandate denied March 7, motion to withhold mandate stricken March 21, 1990, and the petitioner here, will be referred to as "the State." Candace Schuck, the criminal defendant and appellant below, and the respondent here, will be referred to as "respondent."

Pursuant to Fla.R.App.P. 9.120(d) and 9.220, conformed copies of the decision under review and the post-decisional paperwork are appended to this brief. No references to the record on appeal will be either necessary or appropriate. See e.g. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980) and Reaves v. State, 485 So.2d 829, 830 note 3 (Fla. 1986).

Any emphasis will be supplied by the State unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Those details relevant to a resolution of the threshold jurisdictional question are related the majority decision of the Fourth District Court of Appeal in Schuck v. State, which the State adopts as its statement of the case and facts. See e.g. Jenkins v. State and Reaves v. State.

STATEMENT OF JURISDICTION/SUMMARY OF ARGUMENT

The State contends that the Fourth District's majority decision in Schuck v. State expressly and directly conflicts with the decisions of the Second District Court of Appeal in Smith v. State and Miller v. State, infra, with the decision of this Honorable Court in Banda v. State, infra, and with the decision of the Third District Court of Appeal in Berry v. State, infra, on the same question of law. The State consequently respectfully seeks to invoke this Court's discretionary certiorari jurisdiction pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(A)(iv) to resolve this conflict in its favor.

ISSUE

THE FOURTH DISTRICT'S DECISION IN SCHUCK v. STATE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SECOND DISTRICT'S DECISIONS IN SMITH v. STATE AND MILLER v. STATE, WITH THIS COURT'S DECISION IN BANDA v. STATE, AND WITH THE THIRD DISTRICT'S DECISION IN BERRY v. STATE ON THE *SAME* QUESTION OF LAW

ARGUMENT

In Schuck v. State, 15 FLW D242, the decision over which review is sought, a split panel of the Fourth District ascertained that the trial judge's unobjected-to reading of the short "excusable homicide" instruction found at page 61 of the Florida Standard Jury Instructions in Criminal Cases, which mirrors the definition of excusable homicide codified by section 782.03, Fla. Stat., constituted "fundamental . . . error . . . because it suggest[ed] that an excusable homicide defense is unavailable if a dangerous weapon is used." In ordering respondent's adjudication for manslaughter reversed upon this basis, the Fourth District relied heavily upon Smith v. State, 539 So.2d 514 (Fla. 2nd DCA 1989), review granted, Case No. 73,822 (Fla. 1989). In fact, the Smith court actually "h[e]ld that there was in th[at] case no fundamental error from the failure to give the long form excusable homicide instruction even though [that] defendant had admittedly used a deadly weapon[,] thus calling into question the accuracy of the short form instruction.". Smith v. State, 539 So.2d 514, 516.

Smith therefore does not support the Fourth District's decision in Schuck; rather, it expressly and directly conflicts with this decision. Inevitably then, that majority line of cases

consistent with the Smith holding- e.g. Miller v. State, 549 So.2d 1106, 1110 (Fla. 2nd DCA 1989), Banda v. State, 536 So.2d 221, 223 (Fla. 1988), cert. denied, ___U.S.___, 103 L.Ed.2d 852 (1989), and Berry v. State, 547 So.2d 969, 971-972 (Fla. 3rd DCA 1989)- also expressly and directly conflict with the minority line of cases typified by Schuck, see e.g. Kingery v. State, 523 So.2d 1199, 1205-1206 (Fla. 1st DCA 1988).

It follows that the State has established a basis for this Court's assumption of conflict certiorari jurisdiction to review Schuck. The Committee Note to Fla.R.App.P. 9.120(d) provides that in a jurisdictional brief, a "petitioner may wish to include a very short statement of why th[is] Court should exercise its discretion and entertain the case on the merits if it finds it does have certiorari jurisdiction." The State can do no better than rely upon the cogent dissent of Judge Anstead below for this purpose:

> I cannot agree that fundamental error was committed. The trial transcript reflects that the issue in this case was clearly drawn and presented to the jury. The State asserted that the [petitioner] was guilty of manslaughter by culpable negligence in pointing a loaded weapon at the deceased and pulling the trigger. And, contrary to the State's claim of recklessness, [petitioner] claimed that the shooting was an accident involving simple negligence at most. The State did not contend that because a dangerous weapon was involved, the [petitioner] could not claim excusable homicide. The jury resolved the reckless versus accident issue against [petitioner]. I fail to see how the jury instruction in question constituted fundamental error.

Schuck v. State, 15 FLW D242 (Anstead, J., dissenting). Compare generally Rojas v. State, 552 So.2d 914, 916 note 3 (Fla. 1989).

The State in conclusion submits that, for the reasons expressed above, the Fourth District's decision in Schuck constitutes, under Acensio v. State, 497 So.2d 640, 641 (Fla. 1986) and Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520, 521 (Fla. 1980), a "misapplication of [the] law" as enunciated in Smith, Miller, Banda and Berry which is both reviewable and reversible lest the error of the Fourth District, which derived in part from an identical error earlier committed by the First District in Kingery v. State, see Schuck v. State, 15 FLW D242, be perpetuated ad infinitim.

CONCLUSION

WHEREFORE petitioner, the State of Florida, respectfully submits that this Honorable Court should GRANT its petition for writ of conflict certiorari review and then, following briefing on the merits, REVERSE the Fourth District's decision in Schuck v. State and REMAND this cause with directions that the judgment and sentence entered by the trial court be APPROVED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Brief of Petitioner on Jurisdiction" has been forwarded by courier to: MARCY ALLEN, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, 9th Floor, West Palm Beach, Florida 33401 this 5 day of April, 1990.

John Tiedemann

Of Counsel

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