IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CANDICE JEAN SHUCK,

Respondent.

CASE NO.75,831
DCA No.89-0618

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent, Candice Schuck, will refer to Petitioner, the State of Florida, as Petitioner and Respondent as respondent. Respondent will refer to Petitioner's Brief on Jurisdiction as PB.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts as set forth in Petitioner's Brief on Jurisdiction with the following clarifications and additions:

1. Respondent was chargedwith and convicted of manslaughter. She maintained that the death of her ex-boyfriend was the result of an accidental shooting. Schuck v. State, 15 F.L.W. D242 (Fla. 4th DCA Jan. 24, 1990).

2. Petitioner's motion for rehearing; motion for certifications and stay of mandate which asserted conflict with Smith v. State, 539 So.2d 514 (Fla. 2d DCA 1989) review aranted, Case No.73,822 (Fla. 1989) was rejected by the Fourth District Court of Appeal on March 7, 1990.

3. Petitioner's motion to withhold mandate which again claimed conflict with Smith was stricken by The Fourth District Court of Appeal on March 21, 1990.

SUMMARY OI THE ARGUMENT

As the decision of The Fourth District Court of Appeal in Schuck v. State addresses a distinct legal issue from that resolved in Banda v. State; Berry v. State; Smith v. State and Miller v. State, no conflict express or otherwise exists amongst these cases. To the extent Smith v. State recognizes the inherently misleading nature of the short form excusable homicide instruction it is wholly consistent with the decision sub judice and in keeping with well settled legal precedent. Thus, this Court should not accept the instant cause for review based upon an artificial claim of express and direct conflict.

ARGUMENT

NO CONFLICT, EXPRESS OR OTHERWISE, EXISTS BETWEEN THE DECISION IN SCHUCK V. STATE AND SMITH V. STATE; MILLER V. STATE; BANDA V. STATE AND BERRY V. STATE.

This Court does not have conflict jurisdiction over the decision of The Fourth District Court of Appeal in Schuck v. State, 15 F.L.W. D242 (Fla. 4th DCA Jan. 24, 1990). The instant decision resolves a different question of law from that raised in Smith v. State, 539 So.2d 514 (Fla.2d DCA 1989) review aranted, Case No.73,822 (Fla. 1989). To the limited extent of any overlap in issues between the two cases, they are in harmony with one another. Likewise, no conflict exists between the decision sub judice and those of Banda v. State, 536 So.2d 221 (Fla. 1988), cert. denied, ___ U.S. ___, 103 L.Ed.2d 852 (1989); Berry v. State, 547 So.2d 969, (Fla. 3d DCA 1989) and Miller v. State, 549 So.2d 1106 (Fla. 2d DCA 1989) for the latter series review an entirely different question of law from that at bar. A careful reading of the cases establishes this conclusion with utmost clarity.

At bar, respondent was charged with and convicted of manslaughter for the shooting death of her former boyfriend. Her defense was accidental firing of the gun. On appeal, the Fourth District resolved the narrow question of whether the giving of the following instruction on excusable homicide was fundamental error in respondent's case:

> **EXCUSABLE HOMICIDE**
>
> The killing of a human being is excusable, and therefore lawful, when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or by accident

> or misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

(emphasis added). Florida Standard Jury Instructions in Criminal Cases at page 61. The district court agreed that the above instruction is "inherently misleading because it suggests that a killing committed with a deadly weapon is never excusable". 15 F.L.W. at D242. The instruction effectively negates the defense of excusable homicide whenever death is caused by a deadly weapon. The Fourth District Court of Appeal concluded that in respondent's trial for manslaughter by use of a dangerous weapon to wit: a firearm, the reading of the misleading instruction was fundamental error.

It must be emphasized that the decision of district court of appeal in Schuck in no way touched upon the separate legal question of the failure to give the long form instruction on excusable homicide. By contrast, each of the decisions cited by petitioner in support of its claim of conflict resolve that entirely distinct issue: whether the failure to give the long form excusable homicide instruction set forth in Florida Standard Jury Instructions in Criminal Cases at page 76 constitutes fundamental error.

In Banda v. State, 536 So.2d at 223 this Court held that the failure to give the long form excusable homicide instruction was not fundamental error in the defendant's trial for first degree murder where the court instructed on first degree murder, second degree murder and manslaughter and no evidence was presented which would have supported such instruction. This Court found that the

instruction on the offenses were not incomplete. 536 So.2d at 223. This Court did not consider whether the short form excusable homicide instruction was misleading.

Similarly, in Berry v. State, 547 So.2d at 971 the third district rejected the defendant's argument that the failure to give the long form excusable homicide instruction rendered the charge fundamentally incomplete where no view of the evidence would support a finding of excusable homicide. Again, the opinion did not address the separate issue resolved in Schuck: the misleading nature of the short form excusable homicide as fundamental error in a manslaughter/accidental shooting case.

Respondent also urges this Court to find conflict with Smith v. State, 539 So.2d at 514. Once again, as in Banda and Berry Smith focuses on the long form instruction. To the extent it refers to the short form instruction, it is in harmony with the decision of The Fourth District Court of Appeal at bar. Rather than engage in a thorough analysis of Smith which leads to this inevitable conclusion, petitioner chose to reference this Court to a single bracketed quotation and thereby obscure the true issues resolved in Smith. PB 4. The unedited portion of the opinion cited by petitioner reads as follows:

> As to context (a), we hold that there was in this case no fundamental error from the failure to give the long form excusable homicide instruction even though defendant had admittedly used a dangerous weapon thus calling into question the accuracy of the short form instruction as referred to above.

(emphasis added). 539 So.2d at 516. The Smith court considered whether the failure to give the long form excusable homicide

instruction was fundamental error in two situations:

> (a) when a defense--in this case, excusable homicide--is presented on behalf of defendant by the offering of evidence in support thereof, and (b) when there is an alleged failure by the trial court to instruct accurately on the definition of an offense--in this case, on excusable homicide as a part of the definition of the lesser included offense of manslaughter.

539 So.2d at **516.** In the (a) defense context, the second district concluded fundamental error did not result from the lack of the long form instruction because it was the responsibility of defense counsel as a matter of trial tactics and strategy to request a theory of defense instruction. However in the (b) context where the error relates to the definition of the lesser offense, manslaughter, the failure to give an accurate and complete instruction is error for it forecloses the jury's exercise of its pardon power. Miller v. State, **549** So.2d **1106** (Fla. 2d DCA **1989).** Ancillary to its discussion of these issues in Smith, the Second District recognized that the short form instruction is inherently misleading because it eliminates the possibilitythat a homicide is excusable when a dangerous weapon is used. **539** So.2d at **516.** It was upon this language that the Fourth District relied in issuing its Schuck opinion. **As** Smith and Schuck address distinct points of law and can easily be harmonized with one another, no conflict exists upon which to base this court's jurisdiction. See e.g. Marrero v. Department of Professional Regulation, Florida State Board of Medicine, **545** So.2d **1360** (Fla. **1989).**

Finally, petitioner's emphasized reference to the dissenting opinion sub iudice places undue weight upon closing argument to the

exclusion of the evidence before the jury and the instruction on the law. As the majority opinion detailed, respondent was charged with manslaughter in the shooting death of her former boyfriend. She maintained it was an accident. The misleading instruction went to the very core of the issue before the jury which was duty bound to follow the law read to them by the court. The decision of the Fourth District properly held in this circumstance that reading the inherently misleading instruction which negated the legal excuse of accident because a dangerous weapon was used was fundamental error.

The ruling of the Fourth District is based upon sound and established legal precedent. As the First District recognized in Kingery v. State, 523 So.2d 1199, 1206 (Fla. 1st DCA 1988):

> It is well settled that "[j]ury instructions must relate to issues concerning evidence received at trial (citations omitted), [and] the court should not give instructions which are confusing, contradicting, or misleading." Butler v. State, 493 So.2d 451 (Fla. 1986). Furthermore, a jury instruction must not suggest that the excusable homicide defense is unavailable if a dangerous weapon was used. Young v. State, 509 So.2d 1339 (Fla. 1st DCA 1987); Ortagus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987); Clark v. State, 461 So.2d 131 (Fla. 1st DCA 1984); Bowes v. State, 500 So.2d 290 (Fla. 3d DCA 1986), review denied, 506 So.2d 1043 (Fla. 1987); Parker V. State, 495 So.2d 1204 (Fla. 3d DCA 1986) review denied, 504 So.2d 768 (Fla. 1987); Blitch v. State, 427 So.2d 785 (Fla. 2d DCA 1983).

As the above illustrates, the instant decision of The Fourth District Court of Appeal does not present a "minority" position but is in keeping with the "well settled" state of law. See also Rojas v. State, 552 So.2d 914 (Fla. 1989) (where a defendant was convicted of second degree murder, the failure to contemporaneously

define justifiable and excusable homicide as part of the instruction on manslaughter is fundamental error); Armstrong v. State, 15 F.L.W. D653 (Fla. 5th DCA March 8, 1990) (when defining manslaughter the giving of an incomplete instruction is fundamental error). Thus, the finality of the decision of the Fourth District Court of Appeal in Schuck should not be disturbed based upon an artificial claim of conflict.

CONCLUSION

As the foregoing arguments and authorities demonstrate that no conflict exists between the instant decision of The Fourth District Court of Appeal and those cited by petitioner, responded respectfully requests this Honorable Court to decline discretionary jurisdiction over the cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to John Tiedemann, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401 this 25th day of April, 1990.

Of counsel