

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

AUG 31 1998

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

DARYELL CALLIAR,
Petitioner,

CASE NO. 93,592

v.

STATE OF FLORIDA,
Respondent.

JURISDICTIONAL BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

✓ JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

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TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	* ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
 <u>ISSUE I</u>	
IS THERE EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND <u>HIERRO v. STATE?</u> (Restated)	4
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Ansin v. Thurston</u> , 101 So. 2d 808 (Fla. 1958)	5
<u>Calliar v. State</u> , 23 Fla. L. Weekly D1674 (Fla. 1st DCA July 15, 1998).	2,3,6
<u>Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc.</u> , 498 So. 2d 888 (Fla. 1986)	4
<u>Hierro v. State</u> , 608 So. 2d 912 (Fla. 3d DCA 1992).	3,5
<u>Jenkins v. State</u> , 385 So. 2d 1356 (Fla. 1980)	4
<u>Reaves v. State</u> , 485 So. 2d 829 (Fla. 1986)	2,4

OTHER

Article V, § 3(b)(3), Fla. Const.	4
Fla. R. App. P. 9.030(a)(2)(A)(iv)	4

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Daryell Calliar, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The relevant history and facts are set out in the decision of the lower tribunal, Calliar v. State, 23 Fla. L. Weekly D1674 (Fla. 1st DCA July 15, 1998), which is attached as an Appendix to this brief. Those facts are found, in part, on pages one and two of Petitioner's Jurisdictional Brief. The portion of the dissenting opinion found on page three of Petitioner's Jurisdictional Brief, however, is irrelevant for the purpose of determining this Court's jurisdiction over this case and must be disregarded. Reaves, supra.

SUMMARY OF ARGUMENT

The State acknowledges that there appears to be conflict between Hierro v. State, 608 So. 2d 912 (Fla. 3d DCA 1992), and the decision of the lower tribunal in the case at bar. More specifically, the First District stated:

We agree, however, with the state's contention that *Hierro* was wrongly decided, and that the underlying facts in this case support appellant's conviction. *Hierro* appears to hold that a person who intends to utilize tools to perpetrate a theft during the commission of a burglary cannot be convicted of possession of burglary tools. See *Hierro, supra* at 915. The analysis in *Hierro* ignores the fact that the intent to commit the theft at the time of the illegal entry is an element of the crime of burglary. The two charges should not be treated as separate incidents, but rather as one criminal episode with a unified intent.

Calliar v. State, 23 Fla. L. Weekly D1674, 1674-1675 (Fla. 1st DCA July 15, 1998).

ARGUMENT

ISSUE I

IS THERE EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND HIERRO v. STATE? (Restated)

Jurisdictional Criteria.

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986) (rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra; Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980) ("regardless of whether they are accompanied by a dissenting or concurring opinion"). In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359.

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

The Case at Bar.

It should be noted that there is a significant distinction between Hierro v. State, 608 So. 2d 912 (Fla. 3d DCA 1992), and the case at bar. In Hierro, although the defendant was charged with possession of burglary tools, he was not charged with burglary. Instead, he was charged and convicted of stealing a car. For that reason, Hierro's conviction for possession of burglary tools was somewhat suspect because there was no evidence of a burglary or even the intent to commit a burglary. In the case at bar, on the other hand, Petitioner was charged and convicted for burglary as well as for possession of burglary tools.

The State acknowledges, however, that there appears to be conflict between Hierro v. State and the decision of the lower

tribunal in the case at bar. More specifically, the First District stated:

We agree, however, with the state's contention that *Hierro* was wrongly decided, and that the underlying facts in this case support appellant's conviction. *Hierro* appears to hold that a person who intends to utilize tools to perpetrate a theft during the commission of a burglary cannot be convicted of possession of burglary tools. See *Hierro, supra* at 915. The analysis in *Hierro* ignores the fact that the intent to commit the theft at the time of the illegal entry is an element of the crime of burglary. The two charges should not be treated as separate incidents, but rather as one criminal episode with a unified intent.

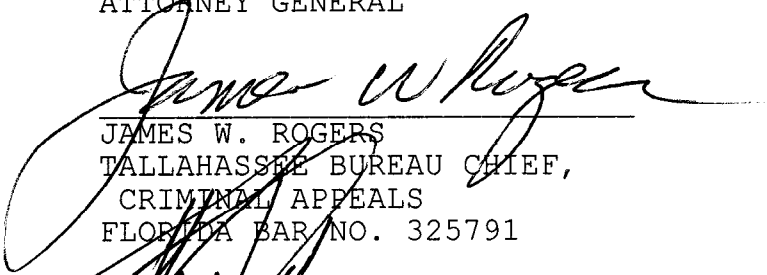
Calliar v. State, 23 Fla. L. Weekly D1674, 1674-1675 (Fla. 1st DCA July 15, 1998).

CONCLUSION

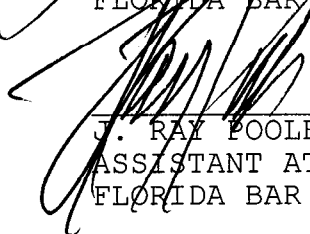
Based on the foregoing reasons, the State acknowledges that this Honorable Court appears to have discretionary jurisdiction over this matter.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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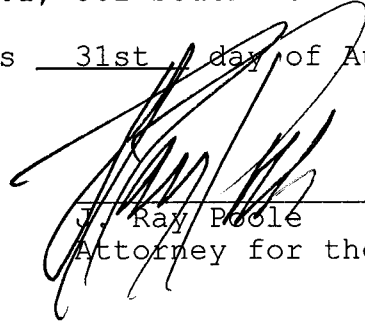
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF RESPONDENT has been furnished by U.S. Mail to Mark E. Walker, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 31st day of August, 1998.



J. Ray Poole
Attorney for the State of Florida

[A:\CALIARBJ.WPD --- 8/31/98,3:11 pm]