IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs.

CHARLES KETTELL, : Case No. SC07-573

Respondent. :

_____

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR RESPONDENT

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STATEMENT REGARDING TYPE

Respondent's Brief on Jurisdiction is prepared in Courier New 12 point type.

STATEMENT OF THE FACTS AND OF THE CASE

Respondent accepts, for determining jurisdiction, the factual and procedural summary provided by Petitioner.

ISSUE

Does the Second District's Opinion in Kettell v. State, Case No. 2D05-2882 (Fla. 2nd DCA March 30, 2007) expressly conflict with a decision of another district?

SUMMARY OF ARGUMENT

In order for an express conflict to exist between two opinions, there can not be factual distinctions. Since the facts of the case with which an express conflict is alleged by Petitioner to exist are not known, it can not be said there is an "express" conflict. This Court should decline to take jurisdiction of this matter.

ARGUMENT

Fla.R.A.P. 9.030(a)(2)A(iv) provides for the discretionary review by this Court of any decision of a district court that “expressly and directly” conflicts with a decision of another district court. In order for a decision of one district court to "expressly and directly" conflict with the decision of another district court, the two decisions must be irreconcilable, Aravena v. Miami-Dade County, 928 So. 2nd 1163 (Fla. 2006). In order for two decisions to be irreconcilable, there can not be factual distinctions between the two cases. Factual distinctions result in a determination that the opinions are not “expressly and directly” in conflict, Wilson v. Southern Bell, 327 So. 2nd 220 (Fla. 1976).

Petitioner argues that the opinion of the Second District in this cause, “expressly and directly” conflicts with that in Holtsclaw v. State, 542 So. 2nd 437 (Fla. 5th DCA 1989). It would be idle to deny the Second District was critical of Holtsclaw, or that it declined to allow the jury instruction approved in Holtsclaw to be utilized under the facts of the instant case. However, we do not know the facts in the Holtsclaw case that caused the Fifth district to approve the jury instruction. Indeed, it seems to undersigned counsel the issue in Holtsclaw was whether the defendant knew the building in question was occupied, and the court was simply trying to tell the jury that knowledge, or lack

thereof, of the occupancy of the building was not relevant, not whether any discharge of a weapon in a building known to be occupied was "per se" a violation of Sec. 790.19 Fla. Stat. (2005). Put another way, it seems to undersigned counsel the issue the Court in Holtsclaw was grappling with, was not, as here, whether "wanton and malicious intent" was an element of the offense, but whether knowledge of the buildings occupancy was an element of the offense. If that is a correct interpretation of Holtsclaw, there is no express or direct conflict with the decision of the Second District in the instant case, because the jury instruction in question was applied to two different factual situations. Even if undersigned counsel's interpretation of the holding in Holtsclaw is not correct, there is still an insufficient discussion of the facts in Holtsclaw to support a finding there is an express and direct conflict with the decision in this case.

CONCLUSION

This Court should decline to review the decision of the
Second District because no "express and direct" conflict exists with the opinion of the Fifth District in Holtsclaw v. State, 542 So. 2nd 437 (Fla. 5th DCA 1989).

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the Office of the Attorney General at 3507 East Frontage Rd. Ste. 200 Tampa, Fl. 33607 on this the _____ day of April, 2007 by regular U.S. Mail.

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CC: Respondent