**IN THE SUPREME COURT OF FLORIDA**

**STATE OF FLORIDA,**

Petitioner,

v.

**FSC No.:SC07-573**
**L.T. No.: 2D05-2882**

**CHARLES KETTELL,**

Respondent.

_____/

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

# MERITS BRIEF OF PETITIONER


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## PRELIMINARY STATEMENT

The record on appeal is contained in five volumes. Three record volumes and two supplemental volumes. Volume I contains the court record and the transcript of the sentencing hearing. The pages in the record and sentencing transcript have stamped numbers on the lower center or right of the page. All number are consecutive. Reference to the record will use these numbers, and will be designated (R __).

The transcript of the trial is contained in Volumes II and III. The pages have printed numbers on the upper right of the page and will be referred to as (T__).

The supplemental volumes are not relevant to the issue on appeal.

## STATEMENT OF THE CASE AND FACTS

This appeal is from the Second District Court of Appeal decision Kettell v. State, 950 So. 2d 505 (Fla. 2d DCA 2007). The issue revolves around a jury instruction given, over objection, on Section 790.19. The actual instruction ultimately given said[1]:

> To prove the crime of Shooting at, within or into a Building, the State must prove the following three elements beyond a reasonable doubt:
>
> 1. CHARLES ALLAN KETTELL shot a firearm or hurled or projected a stone or other hard substance that would produce death or great bodily harm.
>
> 2. He did so at, within, or into a private building, occupied or unoccupied.
>
> 3. The act was done wantonly or maliciously.
>
> "Wantonly" means consciously and intentionally, with reckless indifference to consequences and with the knowledge that damage is likely to be done to some person.
>
> Maliciously" means wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage will or may be caused to another person or the property of another person.
>
> ...
>
> In order to sustain a conviction for wantonly or maliciously shooting at, within or into a building, the conduct must have been done with an intent to cause damage or injury. This intent element is fulfilled by a person who intentionally shoots at, within, or into a

[1] The description and definition of a firearm are left out, as not being relevant to this appeal.

> building for the primary purpose, or with the specific intent, of shooting at a person in or near the building, as well as by a person who shoots at, within, or into a building per se.
>
> Ownership of the building is no defense to the offense of maliciously or wantonly shooting at, within, or into a building.

(R 17-18, T 265-267)

The State filed a proposed jury instruction on the violation of 790.19, which was based upon Holtsclaw v. State, 542 So. 2d 437, 438-39 (Fla. 5th DCA 1989). (R 15) The trial court indicated it would give the standard instruction, saying:

> COURT: I'm not going to -- I'm not going to read these jury instructions that -- I'm not going to accept these ones you provided. I think the standard instructions are sufficient.
>
> STATE: Judge, I just don't want -- I'm going to ask that if defense counsel in the second part of his argument, which I don't have a chance to rebut, makes any reference to either of those two issues, that the instruction be given and we can reserve to that point. If defense counsel gets up and says, you know, well, this was fired inside his own home, which is one of the things that this Holtsclaw case addresses, certainly the jury would be entitled to the instruction that --
>
> COURT: Well, let's wait and see. I don't think he's gonna do that.
>
> DEFENSE: I'm not gonna do that.
>
> COURT: Yeah.
>
> STATE: Okay. Then we won't need it.
>
> COURT: But if something happens that it would change the instructions in some way, then we'll have an opportunity after final

> arguments to talk about it before the instructions are given.

(T. 237-38).

As part of his closing argument, the State went through the definitions of wanton and malicious. (T. 247-248) The prosecutor explained, "What is maliciously? It means wrongfully. Using your common sense, everybody here knows right from wrong. Was Mr. Kettel's conduct wrong, or are we all allowed to just take firearms and turn our apartment into a firing gallery?" (T. 248) Defense counsel's objection was overruled. The State explained they intended to argue Appellant had a firing gallery within five miles of his home. (T. 249) The State immediately clarified to the jury Appellant was not in a home with acreage. He was in an apartment complex with children outside. There was Bill Jackson's, a firing range, nearby. (T. 249-250)

During defense counsel's second closing argument, he argued to the jury there has been no proof as to whether someone was outside at the time of the shots, or any of the shots hitting the baseboard even had the ability to go anywhere else but the baseboard. (T. 256-257). He argued there was no proof damage was likely to be done to some person. (T. 257) He argued the law does not include the property of the person firing, only another's property. There was no proof Appellant thought damage was going to result to another's property being damaged. (T. 258) Defense continued to argue Appellant's actions weren't too brilliant or smart, but were

nevertheless not a crime under the criteria of the jury instructions. (T. 258)

After the arguments were completed, the State then asked the additional paragraph be included in the instructions. (T. 260) The court held:

> Mr. McDermott, in your argument you not only suggested that there was a necessity to show that somebody could be injured or somebody else's property could be damaged, but you also suggested that this was his apartment and didn't harm anything except his apartment. So in both instances I believe the State's requested jury instruction would be appropriate.
>
> I had suggested to you during the instruction conference that that would be the case if you raised those issues during your argument. You said you weren't going to, but then you went ahead and did so. So I feel compelled to go ahead and give the instructions and I'll have to amend these jury instructions in order to do that.

(T. 262)

## JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another District Court of Appeal on the same point of law. Fla. R. App. P. 9.030(a)(2)(A)(iv).

## SUMMARY OF THE ARGUMENT

Petitioner, State of Florida, alleges conflict between the holding in the instant case and the court's decision in Holtsclaw v. State, 542 So. 2d 437, 438-39 (Fla. 5th DCA 1989). According to Holtsclaw, the statute does not require an intent to harm or shoot anyone. The mere shooting in the building, if done with the requisite wantonness or maliciousness, is enough to violate section 790.19. Holtsclaw does not eliminate the wanton or malicious element of the statute.

Further, the modification of the standard instruction was warranted when, contrary to his representation, Appellant's counsel interjected concepts not comporting with the law, as he had been warned not to do.

## ARGUMENT

**THE DECISION OF THE SECOND DISTRICT IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIFTH DISTRICT IN HOLTSCLAW V. STATE, 542 SO. 2D 437, 438-39 (FLA. 5TH DCA 1989)**

The issue presented here is whether, in the face of an unrebuttable closing argument, the trial court abused its discretion and erred in modifying the instruction which was agreed upon to counter the statements made in closing.

The Second District's majority opinion states, instructions taken in their totality must be clear, citing Maynard[2].

> The problem with the instructions is not that a portion of the instructions is unclear when viewed in isolation from the remainder of the instructions but clear when viewed in context. On the contrary, when the instructions here are considered in full context, the best that can be said of them is that they are contradictory and therefore confusing and misleading. "[T]aken as a whole, the instructions . . . given are [not] clear, comprehensive, and correct." Maynard v. State, 660 So. 2d 293, 297 (Fla. 2d DCA 1995).

Petitioner asserts that a correct interpretation of the instruction given must be viewed in the full context of the case, as the dissent points out.

The instruction cannot be viewed without an understanding of the facts presented to the jury, which the dissent set forth.

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[2] Maynard v. State, 660 So. 2d 293, 297 (Fla. 2d DCA 1995).

> A recitation of the underlying facts places the instruction in context. Neighbors heard shots coming from Mr. Kettell's apartment. They called the police. Upon searching the apartment, the police found four .38 caliber bullet holes in the floor boards of the apartment. Additionally, the police discovered a dismantled .38 caliber revolver, a 9 1/2 wooden dowel, gun-cleaning brushes, a leather holster, a bottle of powder solvent, and a pouch of ammunition. Fortunately, no one was hurt. Apparently, Mr. Kettell was not shooting at anyone. Our record doesnot suggest, however, that he fired the shots accidentally.

Kettell, 950 So.2d at 508

The statute in question prohibits the wanton or malicious shooting at, within, or into any public or private building. The standard jury instruction requires the State prove Defendant shot a firearm, within a public or private building, and the act was done wantonly or maliciously.

Wantonly means consciously and intentionally with reckless indifference to consequences and with the knowledge damage is likely to be done to some person. Maliciously means wrongfully, intentionally, without legal justification or excuse, and with the knowledge injury or damage will or may be caused to another person or the property of another person.

The modified jury instruction used here, after the rebuttal closing by Defendant’s trial counsel, and as a result of what he said was taken from Holtsclaw.

> Holtsclaw's attorney argues this statute did not apply because Holtsclaw owned the trailer and either (1) the shots were made

> without an intent to injure anyone; or (2) the shots were not directed at anyone. None of these reasons constitute defenses to section 790.19, by its own language, nor does case law so construe it. As we said in Skinner v. State, 450 So. 2d 595, 596 (Fla. 5th DCA 1984), rev. denied, 470 So. 2d 702 (Fla. 1985):
>
> > [We] hold that section 790.19...is violated by a person who intentionally shoots at, within, or into a building for the primary purpose, or with the specific intent, of shooting at a person in or near the building, as well as by a person who shoots at, within, or into a building per se. (emphasis added)

Holtsclaw, 542 So. 2d at 438-439

Prior to Holtsclaw, the Fifth District also approved this same holding.

> We agree with Ballard v. State, 447 So. 2d 1040 (Fla. 2d DCA 1984), and hereby express direct conflict with Golden v. State, 120 So. 2d 651 (Fla. 1st DCA 1960), and now expressly hold that section 790.19, Florida Statutes (1983), is violated by a person who intentionally shoots at, within, or into a building for the primary purpose, or with the specific intent, of shooting at a person in or near the building, as well as by a person who shoots at, within, or into the building per se. See Johnson v. State, 436 So.2d 248 (Fla. 5th DCA 1983).

Skinner, 450 So.2d at 595-596

Trial counsel had notice if he violated his agreement as to closing, the trial court would revisit the jury instruction involved.

During the charge conference, the following argument was had:

> COURT: I'm not going to -- I'm not going to read these jury instructions that -- I'm not

> going to accept these ones you provided. I think the standard instructions are sufficient.
>
> STATE: Judge, I just don't want -- I'm going to ask that if defense counsel in the second part of his argument, which I don't have a chance to rebut, makes any reference to either of those two issues, that the instruction be given and we can reserve to that point. If defense counsel gets up and says, you know, well, this was fired inside his own home, which is one of the things that this Holtsclaw case addresses, certainly the jury would be entitled to the instruction that --
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> COURT: Well, let's wait and see. I don't think he's gonna do that.
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> DEFENSE: I'm not gonna do that.
>
> COURT: Yeah.
>
> STATE: Okay. Then we won't need it.
>
> COURT: But if something happens that it would change the instructions in some way, then we'll have an opportunity after final arguments to talk about it before the instructions are given.

(T. 237-38)

At the end of the charge conference (T 228-238), the trial court had determined to give the standard jury instructions for 790.19. Respondent agreed to them. (T 238)

During defense counsel's rebuttal closing argument, he argued there has been no proof as to whether someone was outside at the time of the shots or any of the shots hitting the baseboard or even had the ability to go anywhere else but the base-board. (T. 256-257). He argued there was no proof of knowledge

damage was likely to be done. (T. 257) He argued the law does not include the person firing's on their own property, only another's property. There was no proof Appellant thought damage was going to result to another's property. (T. 258) Defense continued to argue Appellant's actions weren't too brilliant or smart, but were nevertheless not a crime under the criteria of the jury instructions. (T. 258)

After the arguments were completed, the State then asked the additional paragraph, adopting the language of Holtsclaw, be included in the instructions. (T. 260) The court held:

> Mr. McDermott, in your argument you not only suggested that there was a necessity to show that somebody could be injured or somebody else's property could be damaged, but you also suggested that this was his apartment and didn't harm anything except his apartment. So in both instances I believe the State's requested jury instruction would be appropriate.
>
> I had suggested to you during the instruction conference that that would be the case if you raised those issues during your argument. You said you weren't going to, but then you went ahead and did so. So I feel compelled to go ahead and give the instructions and I'll have to amend these jury instructions in order to do that.

(T 262)

Petitioner asserts the court did not abuse its discretion in giving the modified instruction in order to even the playing field after the Respondent's counsel, on his rebuttal, did what he said he would not do. Respondent's counsel was specifically

warned what would happen if he violated his own agreement.

To let the case go to the jury with the original agreed upon instructions after Respondent had put in the mind of the jury factors not part of the case or the law would have substantially prejudiced the State. Since this was done in the final, rebuttal portion of the argument by Respondent's counsel, the State could not respond. For the trial judge to not modify the instructions based on Holtsclaw would have rewarded Respondent's counsel for violating his own representations to the court at the time the instructions were being finalized, during which, the instruction he wanted was granted, as he wanted it, rather than the State's requested instruction.

Trial practice should not be reduced to a game of "gotcha" where counsel is allowed to represent one thing and then, when there can be no rebuttal, do another. If nothing else, on the specific facts of this case, based upon Respondent's counsel's conduct, the ruling of the Second District should be reversed and the jury verdict reinstated.

This Court does not have to approve the modification of the standard instruction, as done here, to reverse. Some flexibility is required to guarantee both sides receive a fair trial and the jury understands the law to be applied to the facts and reasonable conclusions to be drawn from them. In fact, the case law gives the trial court give discretion in formulating instructions applicable to what occurred during the trial.

## CONCLUSION

In light of the foregoing facts, arguments, and authorities, Petitioner respectfully requests this Honorable Court exercise its discretionary jurisdiction under Art. V, Section 3(b)(3), Fla. Const. to resolve the conflict outlined above.

Respectfully Submitted

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY a true and correct copy of the foregoing Merits Brief of Petitioner has been furnished by U.S. mail to Bruce P. Taylor, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000 this 27th day of July 2007.

_____

**COUNSEL FOR PETITIONER**

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____

**COUNSEL FOR PETITIONER**