

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
SECOND DISTRICT, P. O. BOX 327, LAKELAND, FL 33802-0327

APPELLANT,

Vs.

STATE OF FLORIDA,  
APPELLEE.

**APPELLANT'S INITIAL BRIEF**

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**TABLE OF CONTENTS**

	Page
Table of Contents.....	i - ii
Table of Citations.....	iii
Preliminary Statement.....	1
Statement of the Case and the Facts.....	2-8
Summary of Argument.....	9-21

Argument

I. THE COURT SHOULD HAVE GRANTED THE DEFENSE MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT I OF THE INFORMATION BASED ON THE STATE’S FAILURE TO PROVE A PRIMA FACIE CASE IN THAT NO INTENT TO HARM WAS SHOWN BUT THAT THE DEFENDANT FIRED A WEAPON AND THE SHOTS ENTERED AN INNOCENT PERSON’S HOME, ACCORDING TO THE SUPREME COURT’S RULING IN STATE V. KETTELL, 980 SO. 2d 1061 (Fla. 2008).

II. THE COURT SHOULD HAVE GRANTED A NEW TRIAL BASED UPON THE VERDICT BEING CONTRARY TO THE LAW OR THE WEIGHT OF THE EVIDENCE AS THE EVIDENCE WAS NOT SUFFICIENT TO SUSTAIN A GUILTY VERDICT AS TO COUNT I OF THE INFORMATION.

III. THE COURT SHOULD HAVE GRANTED A JUDGMENT OF ACQUITTAL AS TO COUNT III OF THE INFORMATION DEFENDANT DID NOT COMMIT AN ASSAULT ON A LAW ENFORCEMENT OFFICER AS IT WAS NOT SHOWN THAT HE INTENTIONALLY THREATENED BY WORD OR ACT TO DO VIOLENCE TO A LAW ENFORCEMENT OFFICER.

IV. THE COURT SHOULD HAVE GRANTED A NEW TRIAL  
BASED UPON THE VERDICT AS BEING CONTRARY TO THE LAW  
OR THE WEIGHT OF THE EVIDENCE AS THE EVIDENCE WAS NOT  
SUFFICIENT TO SUSTAIN A GUILTY VERDICT AS TO COUNT III OF  
THE INFORMATION.

Conclusion.....22

Certificate of Service.....22

## TABLE OF CITATIONS

<u>Authority</u>	<u>Page</u>
<u>State v. Kettell</u> , 980 So. 2d 1061 (Fla. 2008).....	9 - 14, 17
<u>Kettell v. State</u> , 950 So. 2d 505 (Fla. 2d DCA 1007).....	10, 12, 15,
<u>Holtsclaw v. State</u> , 542 So. 2d 437 (Fla. 5 <sup>th</sup> DCA 1989).....	10 - 13
<u>Florida Statute</u> 790.19.....	11
<u>Golden v. State</u> , 120 So. 2d 651 (Fla. 1 <sup>st</sup> DCA 1960).....	11
<u>Johnson v. State</u> , 436 So. 2d 248 (Fla. 5 <sup>th</sup> DCA 1983).....	11
<u>Ballard v. State</u> , 447 So. 2d 1040 (Fla. 2 <sup>nd</sup> DCA 1984).....	11
<u>Skinner v. State</u> , 450 So. 2d 595 (Fla. 5 <sup>th</sup> DCA 1984).....	11 - 12
<u>Polite v. State</u> , 454 So. 2d 769 (Fla. 1 <sup>st</sup> DCA 1984).....	12
<u>Carter v. State</u> , 469 So. 2d 775 (Fla. 1 <sup>st</sup> DCA 1984).....	12
<u>Florida Rule of Criminal Procedure</u> 3.600 (a)(2).....	17, 21
<u>Florida Statute</u> 784.011.....	18
<u>Swift v. State</u> , 973 So. 2d 1196 (Fla. 2 <sup>nd</sup> DCA 2008).....	18, 20 - 21
<u>Benitez v. State</u> , 901 So. 2d 935, 937 (Fla. 4 <sup>th</sup> DCA 1981)...	18, 20
<u>Viveros v. State</u> 699 So. 2d 822, 825 (Fla. 4 <sup>th</sup> DCA 1997)....	18
<u>State v. Shorette</u> , 404 So. 2d 816, 817 (Fla. 2d DCA 1981)...	18
<u>Lavin v. State</u> , 754 So. 2d 784, 787 (Fla. 3 <sup>rd</sup> DCA 2000).....	18

## **PRELIMINARY STATEMENT**

Appellant is the Defendant in the lower court and will be referred to as Appellant or Defendant. Appellee is the State of Florida in the lower court and will be referred to as the State or Prosecutor. The Record on Appeal will be referred to by the use of the abbreviation R. References to the Transcript of Proceedings of February 12, 2008, February 13, 2008, and April 14, 2008, will be to Tr., followed by the page number and line numbers.

## **STATEMENT OF THE FACTS AND OF THE CASE**

On December 23, 2006, members of the Q family, ADDRESS, Florida, heard what they described as two “popping sounds.” Tr-p.133, lines 21-25; p. 134, lines 4-8. Family members thought the sounds might be balloons popping. After hearing the popping sounds, one family member observed what she believed might be bullet holes in her porch screen and that her neighbor’s sliding glass door was shattered. The neighbor’s home was that of the defendant, MK, ADDRESS, TS, Florida. Believing that bullets may be entering the home, family members relocated to the garage and called 911 from a cell phone. Tr. p. 134, lines 9-25.

However, Sgt. TH of the TS police, the shift supervisor on duty at the time, testified at MK’s trial that, “We were responding to a dispatched call of a suicidal person who had a gun that was inside a residence who had threatened to shoot himself,” when asked why police responded to the defendant’s home. Tr. page 155, lines 12-14.

When police arrived, the defendant MK, a person known to the police as having had mental health issues, was inside. Six police officers eventually stationed themselves outside the home of the defendant and the defendant was ordered over a loudspeaker to come out of the house but to leave the gun inside. He came out carrying the gun, but not aiming it or

pointing it at any of the police officers. Tr. p. 209, lines 1-8. Instead, the gun was “pointed down.” Tr. p. 209, lines 7-8. Importantly, Corporal JS, the police officer who the defendant was convicted of assaulting with a deadly weapon, testified thusly at the trial:

Q: Okay, if he had pointed the gun at you, you would have shot him, correct?

A: Yes, ma’am. I would have used deadly force.

Q: And you did not see him pointing a gun at anyone, correct?

A: No, ma’am, I didn’t.

Q: And the gun was pointed down, correct?

A: Yes, ma’am.

Tr. p. 209, lines 1-8.

After being ordered to come out of the house, the defendant did come out the front door holding a gun in his hand. Tr-p. 176, lines 14-16. Sgt. Hill then fired three shots from a shotgun loaded with less-than-lethal ammunition, also known as beanbags, which struck the defendant in the chest area. Tr. p. 176, lines 8-25, p. 177, lines 1-10. After being struck with the third shot, the defendant tossed the gun away, “threw it away from him,” onto the ground, and he was arrested. Tr. p. 177, lines 9-25; Tr. p. 178, lines 1-11.

After he was handcuffed, JH and other officers testified that the defendant looked “intoxicated.” Tr. p. 178, line 18.

TS Police Officer KB testified that she responded to the call at the MK residence and eventually took the defendant to the police station, where she questioned him. She testified that MK appeared intoxicated, and she based this conclusion on the fact that he had slurred speech, smelled of an alcoholic beverage, his eyes were glassy and watery and he stumbled a little bit when you (sic) walked. Tr. p. 243, lines 1-5. B testified that after arriving at the police station, MK “behaves normally, other than he was intoxicated.” Tr. p. 244, lines 8-9. B testified she read MK his rights from a card thusly:

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him or present if you are being questioned. . . . If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights I’ve explained to you?

Tr. p. 245, lines 11-23.

The Defendant stated he understood the warning and then answered questions posed by B. She testified that he told her he was depressed and he didn’t know why. Tr. p. 248, lines 1-4. B then testified that she asked MK why he had “shot the rounds out the back of his house,” and he said that “he thought police officers were in his back yard and we were violating his civil

rights, so he wanted to kill us.” Tr. p. 248, lines 6-10. However, no police officers were present when the Q’s heard the “popping sounds,” and the state did not allege that MK fired a gun at any other time.

No witnesses said they observed MK fire a weapon, and when MK testified in his defense, he denied doing so. Tr. p. 346, lines 3-6.

Furthermore, the only shots fired while police were at the house were fired by the police from the less than lethal shotgun. Officer B testified that the shots she heard were fired by Officer H’s shotgun. She also testified that there was no evidence that fired any shots while police officers were present. Tr. p. 258-259.

DQ, who lived at the house where the bullets were later found, testified that the defendant had been her neighbor for about nine years and that she never once had a dispute with the man, and in fact, only talked to him one time. Tr. p. 287, lines 18-22; Tr. p. 288, lines 14-19.

MK’s mental health issues were well known to the judge and jury. Officer B testified that she had been at the defendant’s home earlier in the day. She said she had to deal with him because he was intoxicated and had urinated on himself. She said she escorted him back into his house but did not Baker Act him. Tr. p. 255, lines 7-19. B said that the defendant’s

mother was “there and offered to take care of him and laid him on the couch. So I felt he had the care necessary.” Tr. p. 256, lines 1-5.

Psychiatrist RM testified that he has been a psychiatrist for 20 years and treated the defendant for nine years. Tr. p. 320-321. RM testified that MK has been diagnosed as a paranoid schizophrenic.

Q: What does that mean in layman’s terms?

A: Well, it’s a serious brain disorder where the person at times cannot tell what is real and what’s not real and at times can have delusions of persecution, thinking people are out to get them and talking about them and planning things. Other times he may hear things that no one else can hear. . . .

Q: What caused him to have the diagnosis?

A: When he presented to me, he was disheveled and unkempt and haggard appearance. His motor behavior demonstrated severe anxiety, restlessness and almost constant distress. His speech was very soft. His thought processes was rambling and circumstantial and, in his own words, very jumbled thinking much of the time. His thought content was ruminating, obsessional, depressive.

He gave me numerous examples of where he had paranoid ideation, such as thinking that people were talking about him and strong paranoid feelings that something bad was going to happen, somebody would do things to him. He also has a lot of somatic complaints that appear also delusional at times.

Perceptuals, perceptually he explained to me that he had a long history of auditory hallucinations, people snickering at him, rushing water, and his mood also is suspicious and worried and at times very flat and detached, depressive.

Tr. p. 322-323.

Dr. RM testified that at his last visit in 2006, the defendant was on Effexor, Elavil and Dilantin, anti-depressants and antiepileptic medications. Tr. p. 324, lines 11-25; p. 325, lines 1-13.

The defendant took the stand in his own defense. He testified that he was diagnosed with paranoid schizophrenia at age 21 and has been treated for that disorder ever since. Tr. p. 337, lines 11-21. He testified that the disorder “creates, basically, a real gigantic distortion of my mind.” Tr. p. 337, lines 22-23. He testified that he did not remember threatening anybody or shooting a gun. Tr. p. 341, lines 12-15.

The defense argued for a judgment of acquittal on count three of the indictment, that the defendant committed an aggravated assault on a law enforcement officer based upon the fact that the threat posed by the Defendant was not imminent. Tr. p. 291 lines 3-4; and for counts, which was denied.

The defense also moved for a judgment of acquittal on counts one and two of the indictment, shooting at, into or within a building, and using a firearm while under the influence of alcohol, based upon the state’s failure to prove a prima facie case, which were both denied. Tr. p. 302, lines 6-9. Defense renewed her motion for a judgment of acquittal on all three counts at the close of all the evidence, which was denied. Tr. p. 367, lines 15-21.

In her closing argument, defense counsel referred to the state's argument that the defendant made a statement to the effect that he shot through a window of his house at police officers. She stated, "If what they are saying is true then they are proving the insanity defense because he is hallucinating that he is seeing things out there that aren't out there and that definitely goes to the insanity defense." Tr. p. 413, lines 1-7.

The court gave the standard jury instructions as the crimes charged, and a standard instruction on insanity, but not the special insanity instruction on hallucinations.

On her closing argument, defense counsel argued that the jury should find the defendant not guilty by reason of insanity. Tr. p. 421, line 20.

The jury found the defendant guilty on all counts. T. p. 455-456. The court adjudicated the defendant guilty and sentenced him to twelve (12) years in the custody of the Department of Corrections. Tr. of April 14, 2008, p. 19, lines 6-12.

## **SUMMARY OF ARGUMENT**

The Court should have granted a judgment of acquittal on Count I of the information, shooting at, into or within a building because there was no evidence that the Defendant intended to harm anyone inside or near the building and therefore the intent element of the crime was not met under State v. Kettell, 980 So. 2d 1061 (Fla. 2008). Also, the Court should have granted a judgment of acquittal on Count III of the information, aggravated assault on a law enforcement officer, as it was not shown that the defendant had the requisite intent to commit the offense.

## ARGUMENT I

**THE COURT SHOULD HAVE GRANTED THE DEFENSE MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT I OF THE INFORMATION BASED ON THE STATE'S FAILURE TO PROVE A PRIMA FACIE CASE IN THAT NO INTENT TO HARM WAS SHOWN BUT THAT THE DEFENDANT FIRED A WEAPON AND THE SHOTS ENTERED AN INNOCENT PERSON'S HOME, ACCORDING TO THE SUPREME COURT'S RULING IN STATE V. KETTELL, 980 SO. 2d 1061 (Fla. 2008). THIS ARGUMENT IS BASED UPON AN INSUFFICIENCY OF THE EVIDENCE CLAIM AND IS THEREFORE REVIEWABLE DENOVO.**

The Florida Supreme Court stated in State v. Kettell, 980 So. 2d 1061, as follows: "In this case we decide whether the crime of wantonly or maliciously shooting into a building can be established solely by proof of the shooting itself." And later, the Court stated, "Applying the elementary principle that performing an act "wantonly or maliciously" requires more than merely performing the act, we hold that proof of the shooting alone is insufficient to prove the crime." State v. Kettell, 980 So. 2d 1061.

In Kettell, the Supreme Court stated the issue was "whether one can 'wantonly or maliciously' shoot at, into, or within a building by 'shooting at, within or into a building per se.'" We hold that the answer must be 'no.'" Kettell, 980 So. 2d 1061.

The Kettell decision approved the Second District Court of Appeal's ruling in Kettell v. State, 950 So. 2d 505 (Fla. 2d DCA 1007), and overruled Holtsclaw v. State, 542 So. 2d 437 (Fla. 5<sup>th</sup> DCA 1989).

In Holtsclaw, the 5<sup>th</sup> District Court added a "per se" clause to its decision, which, in effect, did away with the need to prove specific intent, and the Second District, In Kettell, found that by removing the intent element, the Holtsclaw decision was flawed.

The Supreme Court explained its reasoning this way: "As we have explained, we cannot accept the view that the language at issue constitutes a correct and clear statement of the law. The Holtsclaw court undoubtedly sought to express the view that an offense under section 790.19 may be established without showing that the defendant shot at someone. In other words, a defendant who shoots into a building can do so wantonly or maliciously even though he does not shoot at someone. Unfortunately, the language employed in Holtsclaw suggests that the intent element is fulfilled simply by showing that someone shot into a building without proving that the shooting was done wantonly or maliciously. Kettell, 980 So. 2d 1061.

In Kettell, the Supreme Court related a substantial history of the intent element necessary to prove a violation of section Florida Statute 790.19, starting with Golden v. State, 120 So. 2d 651 (Fla. 1<sup>st</sup> DCA 1960), and

evolving in Johnson v. State, 436 So. 2d 248 (Fla. 5<sup>th</sup> DCA 1983), Ballard v. State, 447 So. 2d 1040 (Fla. 2<sup>nd</sup> DCA 1984), Skinner v. State, 450 So. 2d 595 (Fla. 5<sup>th</sup> DCA 1984), Polite v. State, 454 So. 2d 769 (Fla. 1<sup>st</sup> DCA 1984), Carter v. State, 469 So. 2d 775 (Fla. 1<sup>st</sup> DCA 1984).

The Supreme Court stated that the Holtsclaw court misinterpreted the decision in Skinner and wrongly eliminated the intent element entirely when considering whether a violation of 790.19 occurred. Kettell, 980 So. 2d 1061.

The Supreme Court, in approving the Second District's Kettell ruling, stated, "As the Second District noted, "the [first] instruction thus indicates that shooting at, within, or into a building is an act that 'standing alone'— that is, without reference to the intent to cause damage or injury—is sufficient to satisfy the intent element of this offense" and held "[t]his is not a correct statement of the law." Kettell, 980 So. 2d 1061 quoting Kettell, 950 So. 2d at 506-507.

"Proof that an accused fired a shot at, within, or into a building does not establish malicious or wanton intent. The state must prove this element in according with the definitions of those terms, including the defendant's knowledge that his act may injure someone or damage someone else's property." Kettell, 980 So. 2d 1061.

The evidence adduced at the defendant's trial did not establish that the defendant intended to harm anyone inside the building at which the shots were fired. In fact, the contrary is true. The defendant hardly knew the people inside the building, having met them only once in the past nine years that they were neighbors.

The evidence adduced at the defendant's trial was that the defendant was under the care of a psychiatrist and taking various medications at the time of the offense. The treating psychiatrist testified that MK suffers from paranoid schizophrenia and delusional thinking. Police had been to his house on the morning of the offense because he had urinated on himself. Police responding to the call about the shooting were called because a man was inside with a gun threatening to commit suicide.

Then, the woman who lived in the home where bullets were found said he had been her neighbor for nine years and never had a dispute with the man, and in fact spoke to him only once. Clearly, there was no animosity between the defendant and the "victim" of the crime charged.

The state argued that "wantonly and maliciously" meant recklessly, while defense counsel argued on her closing that the defendant "certainly" did not intentionally shoot into the victim's home.

The question squarely before the court in Kettell and the case which was reversed by Kettell, Holtsclow, was intent, and specific intent to harm the occupants therein. With that measure, the defendant herein could hardly have been proven beyond a reasonable doubt to have had any intent at all to hurt anyone within the residence in question.

When questioned by police, although the questioning occurred many hours afterward, the police said the defendant responded that he “thought there were police officers in his yard violating his civil rights and he wanted to kill them.”

Defense counsel argued during her closing argument that if the jury believed that explanation, then the state would have proven her insanity defense because at the time the shots were fired, there were no police officers anywhere near the defendant’s residence and no way for him to have been shooting at police officers.

According to all the testimony adduced at trial, the defendant herein had been drinking and taking psychotropic medication at the same time and these substances had clearly impaired his thinking to the point that there is no way he could have formed the specific intent required under Kettell to commit the crime charged in Count I, wantonly or maliciously shooting into a building.

Now Kettell was published in April 2008, while the defendant herein was tried in February 2008, so that it may be argued that the trial court did not have access to the Supreme Court's ruling. However, the Supreme Court was upholding the Second District's ruling in Kettell v. State, 950 So. 2d 505 (Fla. 2d DCA 2007), and the court herein surely had access to the law pronounced in that case.

Therefore, the court should have been aware that the intent element required to convict a person under the statute had not been established by any measure and the judgment of acquittal should have been granted at the close of the state's evidence and again at the close of all the evidence.

The state did not even argue that the defendant meant to hurt anybody in the home of the victim, but was actually shooting at the imagined police officers in the backyard of the defendant. In fact, it was clear from the state's own witnesses the defendant did not mean to hurt anybody inside the residence.

If a theory may be put forward concerning "transferred intent," whereby it might be said that the intent was to hurt police officers in the backyard and this intent should be transferred to the people inside the house, it must be remembered that the police officers were merely imaginary, non-existent people. The defendant may have been under a delusion that police

officers were in his backyard, but no such persons existed except in the deluded mind of the defendant.

Therefore, unless the court is inclined to transfer intent from imaginary persons to real ones, no theory of transferred intent should be considered.

## **ARGUMENT II**

**THE COURT SHOULD HAVE GRANTED A NEW TRIAL BASED UPON THE VERDICT BEING CONTRARY TO THE LAW OR THE WEIGHT OF THE EVIDENCE AS THE EVIDENCE WAS NOT SUFFICIENT TO SUSTAIN A GUILTY VERDICT AS TO COUNT I OF THE INFORMATION.**

The Court should have known of the specific intent required to convict a person under Kettell. The court had denied motions for judgment of acquittal based upon the state's failure to prove a prima facie case twice.

After the verdict was returned, the court could have granted a new trial under Florida Rule of Criminal Procedure 3.600 (a)(2), as the verdict convicting the defendant of shooting into a building wantonly or maliciously was contrary to the law or the weight of the evidence.

### **ARGUMENT III**

**THE COURT SHOULD HAVE GRANTED A JUDGMENT OF ACQUITTAL AS TO COUNT III OF THE INFORMATION DEFENDANT DID NOT COMMIT AN ASSAULT ON A LAW ENFORCEMENT OFFICER AS IT WAS NOT SHOWN THAT HE INTENTIONALLY THREATENED BY WORD OR ACT TO DO VIOLENCE TO A LAW ENFORCEMENT OFFICER. THIS ARGUMENT IS BASED UPON AN INSUFFICIENCY OF THE EVIDENCE CLAIM AND IS THEREFORE REVIEWABLE DENOVO.**

Florida Statute 784.011 defines assault as “an intentional unlawful threat by word or act to do violence to the person or another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.” The first element of the offense is “an intentional, unlawful threat.”

“The threat element of the offense addresses the defendant’s intent, not the person perceiving the word or act,” Swift v. State, 973 So. 2d 1196 (Fla. 2<sup>nd</sup> DCA 2008), quoting Benitez v. State, 901 So. 2d 935, 937 (Fla. 4<sup>th</sup> DCA 1981) citing Viveros v. State 699 So. 2d 822, 825 (Fla. 4<sup>th</sup> DCA 1997).

In order to establish an aggravated assault, the state must prove that the defendant had a specific intent to do violence to the person of another. Swift v. State, 973 So. 2d 1196, citing State v. Shorette, 404 So. 2d 816, 817 (Fla. 2d DCA 1981; Lavin v. State, 754 So. 2d 784, 787 (Fla. 3<sup>rd</sup> DCA 2000).

In this case, Officer Spatz testified he was in fear of imminent violence when he observed the defendant coming out of the house holding a gun, however, he testified that the defendant never raised the gun or pointed it at him and in fact, that the gun was always pointed down toward the ground.

According to the testimony at trial, police were called to the house because somebody inside had threatened to commit suicide. Furthermore, officers knew the defendant and that he had exhibited mental health problems in the past.

Officer Spatz testified that he first took up a position behind a tree, but that he approached the defendant as he was coming out of his house on a walkway.

The defendant, in doing what the police told him to do, was coming out of his house, walking slowly down a walkway, not running or waving the firearm at anybody. Because he did not immediately put the gun down, he was hit with three shots from a “less lethal” shotgun and then tossed the gun on the ground.

The alleged victim, Officer Spatz, testified that had the defendant raised the gun or brought the gun to a position to fire at him, he would have used his service weapon to kill the defendant.

There, by the police officer's own testimony, he could not have been in imminent fear of being hurt by the defendant because if he had been, he would have shot and killed the defendant on the spot.

But even if the evidence were sufficient to prove that Officer Spatz was in fear of being shot, the "threat" element addresses the defendant's intent, not the reaction of the person perceiving the word or act." Swift, 973 So. 2d 1196, citing Benitez, 901 So. 2d 935, 937 (Fla. 4<sup>th</sup> DCA 1981).

The defendant did not exhibit any intention to hurt anybody when he walked out of the house and faced six police officers, one of whom shot him with a shotgun from close range. And if he had exhibited any such intention, all the testimony at trial was to the effect that he would have been killed.

Therefore, there was insufficient evidence to convict the defendant and a judgment of acquittal should have been granted.

## **ARGUMENT IV**

**THE COURT SHOULD HAVE GRANTED A NEW TRIAL BASED UPON THE VERDICT AS BEING CONTRARY TO THE LAW OR THE WEIGHT OF THE EVIDENCE AS THE EVIDENCE WAS NOT SUFFICIENT TO SUSTAIN A GUILTY VERDICT AS TO COUNT III OF THE INFORMATION.**

The Court should have known of the specific intent required to convict a person under Swift. The court had denied motions for judgment of acquittal based upon the state's failure to prove a prima facie case twice.

After the verdict was returned, the court could have granted a new trial under Florida Rule of Criminal Procedure 3.600 (a)(2), as the verdict convicting the defendant of shooting into a building wantonly or maliciously was contrary to the law or the weight of the evidence.

## **CONCLUSION**

The appeal court should reverse the ruling of the trial court because a judgment of acquittal should have been granted as to Count I and Count III of the information as the intent element of neither crime was proved beyond a reasonable doubt.

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## **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished via regular U. S. Mail to the Office of Bill McCollum, Office of the Attorney General, Concourse Center #4, 3507 Frontage Road, Suite 200, Tampa, Florida 33607

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Joseph J. Registrato, Esquire

## **CERTIFICATE OF COMPLIANCE**

**I HEREBY CERTIFY** that this Appellant's Initial Brief complies with the font requirements of Florida Rules of Appellate Procedure, Rule 9.210(a)(2).

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Joseph J. Registrato, Esquire