IN THE SUPREME COURT OF FLORIDA

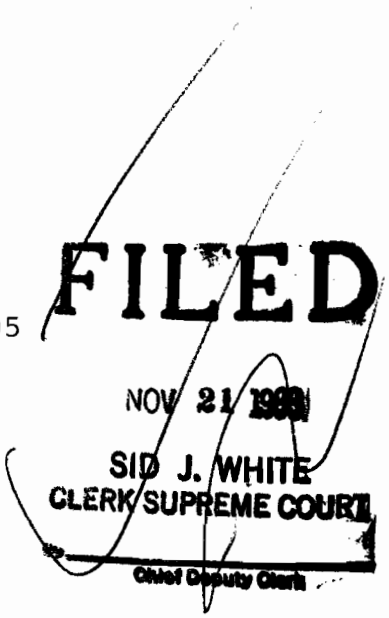
MORRIS LEE MILLER,)

Petitioner,)

vs.) CASE NO. 54,505

STATE OF FLORIDA,)

Respondent.)



PETITIONER'S BRIEF ON JURISDICTION

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the Appellant in the District Court of Appeal, Fourth District. Respondent was the Prosecution and Appellee in the lower courts. In the brief the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Petitioner was informed against for second degree murder with a handgun. He was tried by jury which the same day returned a verdict of guilt as to the lesser included offense of attempted second degree murder. Petitioner was immediately adjudged guilty of that offense and sentenced to a term of twenty (20) years in prison with a mandatory three (3) year minimum and credit for time served, based on the State's argument that the offense was re-classified to a first degree felony because of the use of a firearm.

On appeal to the District Court of Appeal, Fourth District, Petitioner's sentence was upheld in an opinion filed September 7, 1983. Rehearing was denied October 12, 1983, and Petitioner thereupon noticed his intention to invoke the discretionary jurisdiction of this Court on November 9, 1983.

This jurisdictional brief follows.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL SUB JUDICE DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF THE FIRST DISTRICT COURT OF APPEAL AND THIS COURT ON THE QUESTION OF WHETHER A LESSER INCLUDED OFFENSE MAY BE RE-CLASSIFIED UNDER SECTION §775.087(1), FLORIDA STATUTES, EVEN THOUGH IT IS NOT THE "OFFENSE CHARGED."

Section 775.087(1), Florida Statutes (1981), provides:

> Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be re-classified as follows:
>
> a) In the case of a felony of the first degree, to a life felony.
> b) In the case of a felony of the second degree, to a felony of the first degree.
> c) In the case of a felony of the third degree, to a felony of the second degree. (Emphasis added.)

In Carroll v. State, 412 So.2d 972 (Fla. 1st DCA 1982), the defendant had been charged with first degree murder, but pled guilty to second degree murder, a first degree felony. The First District Court of Appeal held that the lesser included offense could not be re-classified to a life felony. In so holding, it observed:

> "Carroll correctly asserts that enhancement and re-classification of felonies pursuant to Section 775.087(1), Florida Statutes (1979), is proper only against the crime charged, rather than the crime for which he was ultimately convicted." Id. at 973, (Emphasis in original.)

In the present case, Petitioner was charged with second degree

murder, but convicted of attempted second degree murder, a second degree felony. In rejecting Petitioner's contention that Petitioner's twenty (20) year sentence for his conviction was the result of the trial court's improper re-classification of the attempted second degree murder to a first degree felony, the Fourth District Court of Appeal specifically addressed Carroll v. State, supra, and rejected it:

> "Most respectfully, we disagree with [Carroll's] hyper-technical construction of the term "charged," because it effectively subverts the legislative policy embodied in the re-classification statute." Miller v. State, ___So.2d___ (Fla. 4th DCA opinion filed September 7, 1983) (Case No. 82-962), slip opinion at page 2 (See Appendix).

The Fourth District Court's decision in the present case thus expressly and directly conflicts with Carroll v. State, supra, in its construction of Section 775.087(1), Florida Statutes.

The Fourth District Court of Appeal's disposition of the instant case is likewise in direct conflict with this Court's own recent decision in Palmer v. State, __So.2d__ (Fla. opinion filed September 1, 1983) (Case No. 62,449) [8 F.L.W. S.C.O. 324], which construed Fla.Stat. §775.087(2). That statute provides that any person who has a firearm in his possession during commission of a felony must be sentenced to a mandatory minimum three (3) year term. Applying what it called the "fundamental rule of statutory construction" that criminal statutes should be construed strictly in favor of the person against whom the penalty is to be applied, this Court held that where multiple convictions are returned as a result of acts occurring during the

course of a single criminal episode, the mandatory minimum penalties may not be stacked. That is, a defendant may receive no more than a single mandatory minimum penalty rather than being required to serve several such terms imposed consecutively. This ruling was based on the Court's failure to find, in any portion of Section 775.087, Florida Statutes, and express authority for the imposition of more than one mandatory minimum term as the result of a single criminal episode.

By its decision in Palmer, then, this Court has mandated that Section 775.087, Florida Statutes, by strictly construed. Despite its recognition of the harm the legislature sought to prevent by the operation of the statute, this Court found that the requirement of narrow construction in criminal cases necessitated an express legislative statement of the offenses to which the statute was to apply, rather than allowing any expansion of those offenses based on an assessment of the legislature's intentions in promulgating the law. Because the Fourth District Court of Appeal engaged in precisely the kind of speculation as to supposed legislative intent, without regard to the express provisions of the statute, Section 775.087(1), condemned in Palmer, supra, the instant case also directly and expressly conflicts with this Court's own analysis of a different section of the same statute.

The instant case unquestionably presents for this Court's consideration an issue of great importance. The statute providing for re-classification of felonies where a firearm is used has a direct and profound impact on the sentence ultimately served.

by a criminal defendant. Its proper interpretation is a matter with which the trial courts of this state must constantly deal. Whether re-classification is proper where conviction is entered for a lesser included offense is a question for which two (2) diametrically opposed answers have been given by two (2) different courts of appeal. This Court should therefore exercise its discretion and accept jurisdiction of this cause.

CONCLUSION

Based upon the forgoing Argument and the authorities cited therein, Petitioner respectfully requests this Honorable Court to accept jurisdiction of this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERITFY that a copy hereof has been furnished to SHARON LEE STEDMAN, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 17th day of NOVEMBER, L983.

Of Counsel