

IN THE SUPREME COURT OF FLORIDA

CASE NO.

PAUL RANDOLPH HAYDEN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

**FILED**

SID J. WHITE

JUL 13 1984

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Chief Deputy Clerk

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ON APPLICATION FOR DISCRETIONARY REVIEW

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BRIEF OF PETITIONER ON JURISDICTION

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BRIEF OF PETITIONER ON JURISDICTION

INTRODUCTION

The petitioner, Paul Randolph Hayden, was the defendant in the trial court, the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, and the appellant in the District Court of Appeal of Florida, Third District. The respondent, the State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal.

In this brief, the parties will be referred to as they stand before this Court. The symbol "A." will be utilized to designate the appendix to this brief, comprised of the decision of the court below.

### STATEMENT OF THE CASE

The petitioner was charged by information with, inter alia, murder in the second degree and on July 17, 1978, entered a negotiated plea of guilty to the offense of manslaughter with a firearm. On the same date, petitioner was sentenced to twenty-five years' imprisonment.

On September 29, 1983, petitioner filed a pro se motion for post-conviction relief, alleging that his sentence of twenty-five years was legally excessive. The trial court summarily denied relief on October 28, 1983.

A timely appeal was taken to the District Court of Appeal, which court issued its decision affirming the order of the lower court on June 5, 1984. (A. 1-2). A notice invoking the discretionary review jurisdiction of this Court was filed on July 2, 1984.

### QUESTION PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, WHICH HOLDS THAT THE RECLASSIFICATION PROVISION OF SECTION 775.087, FLORIDA STATUTES, APPLIES TO LESSER-INCLUDED OFFENSES OF THE OFFENSE CHARGED, IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISIONS IN SMITH v. STATE, 445 SO.2D 1050 (FLA. 1ST DCA 1984) (PENDING ON CERTIFIED QUESTION IN CASE NO. 65,157), AND CARROLL v. STATE, 412 SO.2D 972 (FLA. 1ST DCA 1982)?

### STATEMENT OF THE FACTS

On appeal, petitioner contended that the reclassification provision of Section 775.087, Florida Statutes (1977), only reclassifies the offense with which one is charged; accordingly, petitioner challenged the reclassification of his manslaughter conviction since it was a lesser-included offense of the crime

charged. The District Court of Appeal rejected this claim, expressly adopting the rationale of the District Court of Appeal of Florida, Fourth District, in Miller v. State, 438 So.2d 83 (Fla. 4th DCA 1983) (pending on review granted in Case No. 64,505), and explicitly rejecting the rationale of the District Court of Appeal of Florida, First District, in Smith v. State, 445 So.2d 1050 (Fla. 1st DCA 1984) (pending on certified question in Case No. 65,157), and Carroll v. State, 412 So.2d 972 (Fla. 1st DCA 1982):

We adopt the rationale of Miller v. State, 438 So.2d 83 (Fla. 4th DCA 1983) and hold that for the purpose of the reclassification statute, which enhances a felony by one degree where a firearm is used, a defendant charged with murder by use of a firearm is also charged with lesser included felonies of the murder charge. We accordingly reject both Smith v. State, 445 So.2d 1050 (Fla. 1st DCA 1984) and Carroll v. State, 412 So.2d 972 (Fla. 1st DCA 1982) which hold that the reclassification statute has no application where a defendant is not convicted of the felony specified in the charging document but is instead convicted of committing with a firearm any lesser included offense.

(A. 1-2) (emphasis in original, footnote omitted).

#### ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, WHICH HOLDS THAT THE RECLASSIFICATION PROVISION OF SECTION 775.087, FLORIDA STATUTES APPLIES TO LESSER-INCLUDED OFFENSES OF THE OFFENSE CHARGED, IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISIONS IN SMITH v. STATE, 445 SO.2D 1050 (FLA. 1ST DCA 1984) (PENDING ON CERTIFIED QUESTION IN CASE NO. 65,157), AND CARROLL v. STATE, 412 SO.2D 972 (FLA. 1ST DCA 1982).

The question of whether the reclassification provision of Section 775.087, Florida Statutes (1977), applies only to the

offense charged, and not to a lesser-included offense of which one ultimately is convicted, is presently pending before this Court. In Miller v. State, Case No. 64,505, this Court granted review of the decision of the Fourth District in Miller v. State, 438 So.2d 83 (Fla. 4th DCA 1983), which had held that lesser-included offenses are subject to reclassification. Review was sought due to the direct conflict between the Miller decision and the decision of the First District in Carroll v. State, 412 So.2d 972 (Fla. 1st DCA 1982), which latter decision had held reclassification restricted by the terms of the statute to the offense with which one is initially charged.

The identical issue is also pending before this Court in State v. Smith, Case No. 65,157. In Smith, the First District, adhering to its previous decision in Carroll v. State, supra, certified both the conflict with Miller v. State, supra, and the question as one of great public importance. Smith v. State, 445 So.2d 1050, 1051 (Fla. 1st DCA 1984).

In the case at bar, the Third District recognized the conflict between the holding in Miller and the holdings in Smith and Carroll and chose to align with the Fourth District precedent. (A. 1-2). Accordingly, the decision sought to be reviewed is in direct and express conflict with the decisions of the First District in Smith and Carroll.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests this Court to grant discretionary review in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Julie S. Thornton, Assistant Attorney General, 401 N.W. 2nd Avenue, Miami, Florida this 10th day of July, 1984.

By: Karen M. Gottlieb  
KAREN M. GOTTLIEB  
Assistant Public Defender