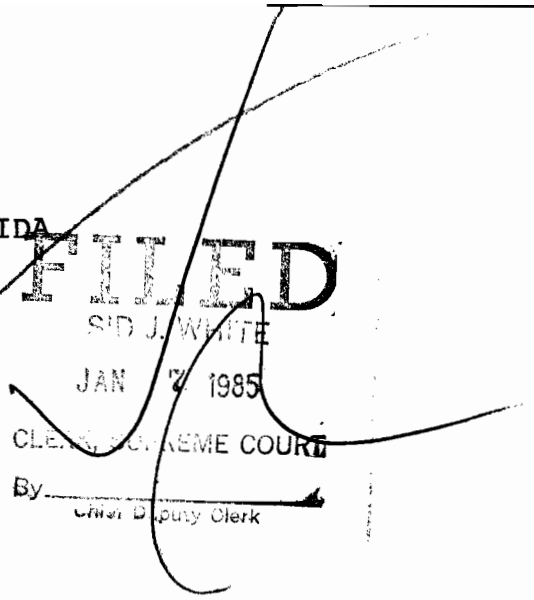
IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,576



PAUL RANDOLPH HAYDEN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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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 petitioner's brief on jurisdiction, comprised of the decision of the court below, the symbol "M." will be utilized to designate the motion for post-conviction relief, and the symbol "O." will be utilized to designate the order entered thereon. All emphasis is supplied unless otherwise indicated.

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. (M. 1-11). The trial court summarily denied relief on October 28, 1983. (O.).

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 discretinary review jurisdiction of this Court was filed on July 2, 1984. This Court accepted jurisdiction and dispensed with oral argument on December 13, 1984.

QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRONEOUSLY HELD THAT THE RECLASSIFICATION PROVISION OF SECTION 775.087, FLORIDA STATUTES, APPLIES TO LESSER-INCLUDED OFFENSES OF THE OFFENSE CHARGED?

STATEMENT OF THE FACTS

On appeal, petitioner contended that the lower court erred in denying his motion for post-conviction relief since 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):

> 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.

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

ARGUMENT

THE DISTRICT COURT ERRONEOUSLY HELD THAT THE RECLASSIFICATION PROVISION OF SECTION 775.087, FLORIDA STATUTES, APPLIES TO LESSER-INCLUDED OFFENSES OF THE OFFENSE CHARGED.

This Court has most recently held that the reclassification provision of Section 775.087 applies to lesser-included offenses of which one is ultimately convicted, as well as the actual offense of which one is initially charged. Miller v. State, ___ So.2d___ (Fla. 1984) (Case No. 64,505, Opinion filed 12/6/84). In so holding, this Court failed to address basic principles of statutory construction, and failed to consider another decision of the Fourth District which substantially conflicts with the

Miller holding. Petitioner respectfully requests this Court to reconsider the Miller decision in view of statutory construction tenets and the decision in Jones v. State, 356 So.2d 4 (Fla. 4th DCA 1977).

At the outset, one must focus upon the language utilized by the legislature in enacting the reclassification statute. Section 775.087(1), provides:

> (1) 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 reclassified 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.

The determinative question is whether the lesser-included offense of which one is ultimately convicted, also constitutes the felony with which the individual is initially charged, within the meaning of the statute. Basic strictures of statutory construction establish that it does not.

It is well established that the words employed by the legislature are to be construed in their "plain and ordinary sense", Reino v. State, 352 So.2d 853, 860 (Fla. 1977), for it must be assumed that the legislature utilized particular words for a specific purpose. Lee v. Gulf Oil Corp., 148 Fla. 612, 4 So.2d 868, 870 (1941). The legislature is presumed to know the

meaning of the words it utilizes and to have a working knowledge of the English language. Florida Racing Commission v. McLaughlin, 102 So.2d 574, 575 (Fla. 1958). Thus, the courts, in construing a statute, may not invade the province of the legislature by adding words which change the plain meaning of the statute. Metropolitan Dade County v. Bridges, 402 So.2d 411, 414 (Fla. 1981).

It is equally well established that a statute must be read in its entirety and in pari materia with other statutes on the same subject. State v. Hayles, 240 So.2d 1, 3 (Fla. 1970); Markham v. Blount, 175 So.2d 526, 528 (Fla. 1965); Sun Insurance Office v. Clay, 133 So.2d 735, 738 (Fla. 1961); Panama City Airport Board v. Laird, 90 So.2d 616, 619 (Fla. 1956). Where the legislature utilizes the identical words in different statutory provisions, it may be assumed that the words were intended to mean the same thing; contrariwise, where certain language is employed in one statutory provision and wholly different language employed in another provision, it must be presumed that different results were intended. Myers v. Hawkins, 362 So.2d 926, 929 (Fla. 1978); Mugge v. Warnell Lumber & Veneer Co., 58 Fla. 318, 321, 50 So. 645, 646 (1909); 30 Fla. Jur. Statutes § 96.

To the extent that any ambiguity exists in the Florida Criminal Code, Section 775.021, Florida Statutes (1977), entitled "Rules of Construction", requires a strict construction; "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." This proviso merely codifies the well-recognized rule that "criminal statutes are to

be construed strictly in favor of the person against whom a penalty is to be imposed." Reino v. State, supra at 860; Bell v. United States, 349 U.S. 81 83-84 (1955); State v. Llopis, 257 So.2d 17, 18 (Fla. 1971); Watson v. Stone, 148 Fla. 516, 4 So.2d 700, 702 (1941).

Application of these basic rules of statutory construction require the conclusion that the offense "charged", as utilized in the reclassification statute, is not synonymous with the offense of which one is "convicted". That a criminal charge is not to be equated with a criminal conviction is patent. A plain reading of the statute thus evinces that the legislature intended for a reclassification of certain felony offenses to occur at the time a charge is brought. Certainly if the intent of the legislature was for reclassification to occur at the subsequent point of conviction, subsection one of the statute would be directed to convictions, and not charges.

Moreover, if any ambiguity exists as to the legislative intent, it is resolved by a reading of the statute in pari materia. While the legislature repeatedly speaks in terms of the offense "charged" for the reclassification of offenses provision of subsection one, the minimum-mandatory sentencing provision of subsection two of the same statute is directed to offenses of which one stands "convicted".[1] It must be assumed that this

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1 Subsection two provides:

> (2) Any person who is convicted of:
> (a) Any murder, sexual battery, robbery, burglary, arson, aggravated assault,

(Cont.)

language differentiation was intentional. See Myers v. Hawkins, supra.[2] Accordingly, subsection one must be strictly construed as implementing a reclassification of the offense charged, and not of the offense for which one ultimately is convicted.

Moreover, it should be noted that the decision of the Fourth District in Jones v. State, 356 So.2d at 5, which decision construes subsection two of Section 775.087, see note 1, supra, is at total odds with this Court's, and the District Court's, decision in Miller v. State, supra. In Jones, the issue to be resolved was whether subsection two of Section 775.087, the three-year minimum-mandatory sentencing provision, was applicable to a conviction for the offense of manslaughter. The court concluded that it was not, since the statute specified the pertinent offenses, and included "any murder" but not "any

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> aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy, or any attempt to commit the aforementioned crimes; or
> (b) Any battery upon a law enforcement officer or firefighter while the officer or firefighter is engaged in the lawful performance of his duties and who had in his possession a "firearm," as defined in s. 790.001(6), or "destructive device," as defined in s. 790.001(4), shall be sentenced to a minimum term of imprisonment of 3 calendar years. Notwithstanding the provisions of s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall the defendant be eligible for parole or statutory gain-time under s. 944.27 or s. 944.29, prior to serving such minimum sentence.

2 It should be noted that all of the penalty provisions of Chapter 775 refer to the term "conviction", as opposed to the term "charge", in prescribing the appropriate sentencing options.

manslaughter". Id. at 5. In so holding, the court rejected the argument that the legislature intended that manslaughter be included since manslaughter is a lesser-included crime of murder. Ibid.

On rehearing, the state contended that the controlling statutorily-enumerated offense was not the greater offense of murder, but rather, the necessarily-lesser-included offense of aggravated assault. Id. at 6. Since the defendant had been adjudged guilty of manslaughter, the state argued, he was necessarily guilty of the lesser included, and statutorily-specified, offense of aggravated assault; accordingly, the three-year mandatory sentence should be applicable to the manslaughter conviction.

The Fourth District rejected this argument, reasoning that "it would have been a simple matter" for the legislature to have included manslaughter in the enumerated list of offenses and "at the very least the statute is ambiguous and as such must be construed most favorably to the accused." Ibid. This holding has been consistently followed. Strahorn v. State, 436 So.2d 447, 449 (Fla. 2d DCA 1983); Akins v. State, 366 So.2d 1262 (Fla. 4th DCA 1979); Arnold v. State, 421 So.2d 192 (Fla. 4th DCA 1982); Cooper v. State, 360 So.2d 1130 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1364 (Fla. 1979); Rozier v. State, 353 So.2d 193 (Fla. 3d DCA 1977); Biles v. State, 349 So.2d 662 (Fla. 4th DCA 1977).

Similarly, with regard to the statutory provision under scrutiny in this case, a plain and literal construction of the

language employed by the legislature dictates that reclassification of offenses is to occur at the time that charges are brought and effects only the offense charged. If further resort to principles of statutory construction is deemed necessary to divine legislative intent, those rules of construction support only the conclusion that the legislature utilized the term "charged" for a purpose, to be distinguished from the term "convicted", and that the ultimate resolution must be in favor of the petitioner.

CONCLUSION

Based upon the foregoing, the petitioner respectfully requests this Court to reconsider the decision in Miller v. State, supra, and to quash the decision of the district court which affirmed the denial of the motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, JIM SMITH, 401 Northwest Second Avenue, Miami, Florida 33128 this 2nd day of January, 1985.

Karen M. Gottlieb
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Assistant Public Defender