

IN THE SUPREME COURT OF FLORIDA

CHARLES HAYWOOD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. _____

4th DCA CASE NO. 84-85

RESPONDENT'S BRIEF ON DISCRETIONARY JURISDICTION

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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 of Florida, Fourth District. Respondent was the Prosecution and the Appellee, respectively, in the lower courts. In this brief the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement of the Case and Facts.

POINT ON APPEAL

WHETHER, ALTHOUGH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE CONFLICTS WITH A PREVIOUS DECISION OF THE THIRD DISTRICT COURT OF APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFUSE TO REVIEW THIS DECISION AS THIS DECISION IS CORRECT IN ITS INTERPRETATION OF THE CONTROLLING STATUTE?

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal opinion, sub
judice, is a correct interpretation of the law of the case.
Although there is conflict with a decision of the Third District
Court of Appeal also interpreting the same statute, the Third
District's opinion has not been followed and clearly states
an erroneous interpretation of the law. Therefore the Supreme
Court of Florida should decline to review this cause.

ARGUMENT

ALTHOUGH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE CONFLICTS WITH A PREVIOUS DECISION OF THE THIRD DISTRICT COURT OF APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFUSE TO REVIEW THIS DECISION AS THIS DECISION IS CORRECT IN ITS INTERPRETATION OF THE CONTROLLING STATUTE.

The Respondent submits that although there is conflict between the opinion of the Fourth District Court of Appeal, in its opinion below, and the Third District Court of Appeal in Whitehead v. State, 450 So.2d 545 (Fla. 3rd DCA 1984), the Fourth District Court of Appeal has correctly interpreted the application of the controlling statute, Section 775.07, Florida Statutes (1983). Therefor this Honorable Court can and should decline to review this cause under Rule 9.030 (a)(2)(A)(iv), which implements Florida Constitution, Article V, Section III (b)(3).

The Whitehead, supra, opinion was, as stated in the opinion sub judice, the first case addressing the application of Section 775.087(1) and (2) to the same offense. The Third District Court of Appeal, with Judge Pearson dissenting on this issue, supported, against a cross appeal by the State, the trial court's failure to enhance a second degree felony for involvement of a firearm in the offense, while imposing a three year minimum sentence for possession of a firearm during commission of the felony.

Judge Pearson's dissent has also found support in both the First District and Second District Courts of Appeal.

Brown v. State, 460 So.2d 546 (Fla. 1st DCA 1984) 9 FLW 2602
13 Dec. 84; and Carter v. State, 464 So.2d 172 (Fla. 2nd DCA
1985) 10 FLW 242 (2DCA 23 Jan. 85).

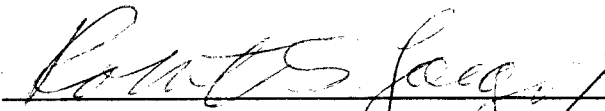
As the opinion of the Fourth District Court of Appeal
represents a correct interpretation of the law to the cause
sub judice it should be permitted to stand without further re-
view by this Honorable Court.

CONCLUSION

The decision of the Fourth District Court of Appeal in the instant case, although in conflict with a decision of the Third District Court of Appeal on the same point of law, correctly interprets the law of the case. This Honorable Court should refrain from exercising its discretionary jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been sent by courier to ALLEN J. DeWEESE, ESQUIRE, Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401 this 24th day of May, 1985.



Of Counsel