

IN THE SUPREME COURT OF FLORIDA

CHARLES W. FERGUSON, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CASE NO. 72,102  
(DCA #87-0714)

PETITIONER'S REPLY BRIEF ON THE MERITS

RICHARD L. JORANDBY  
Public Defender

MARGARET GOOD  
Assistant Public Defender  
15th Judicial Circuit  
9th Floor Governmental Center  
301 North Olive Avenue  
West Palm Beach, Florida 33401  
(305) 820-2150

Counsel for Petitioner.

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ARGUMENT

POINT I

WHETHER THE DISTRICT COURT ERRED IN AFFIRMING PETITIONER'S CONVICTION FOR KIDNAPPING WHERE CONFINEMENT IN AN UNLOCKED BATHROOM WAS SLIGHT, INCONSEQUENTIAL AND DID NOT SUBSTANTIALLY LESSEN THE RISK OF DETECTION.

Petitioner will rely on the arguments presented in his Initial Brief on the Merits.

POINT II

PETITIONER'S CONVICTION FOR USE OF A FIREARM IN  
COMMISSION OF A FELONY MUST BE VACATED.

Respondent asserts this Court "must refrain" from determining the second point presented in petitioner's brief but then cites two cases which clearly recognize this Court's jurisdiction to consider ancillary issues (Respondent's Brief at page 15). Once this Court has jurisdiction, it may consider any item that may affect the case if necessary. Trushin v. State, 425 So.2d 1126 (Fla. 1983).

There is no problem here with retroactive application of Hall v. State, 517 So.2d 678 (Fla. 1988), because this issue is not being raised on collateral attack, ie., this case is still in the appellate "pipeline." Therefore, Witt v. State, 387 So.2d 922 (Fla. 1980), does not require that this Court let stand appellant's invalid and improper conviction for the second degree felony of use of a firearm during commission of a felony.

CONCLUSION

Based on the foregoing reasons and for the reasons advanced in petitioner's initial brief, petitioner requests this Court to vacate his convictions for kidnapping and use of a firearm in commission of a felony.

Respectfully submitted,

RICHARD L. JORANDBY  
Public Defender

Margaret Good

MARGARET GOOD  
Assistant Public Defender  
15th Judicial Circuit of Florida  
The Governmental Center/9th Floor  
301 North Olive Avenue  
West Palm Beach, Florida 33401  
(305) 820-2150

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to MARDI COHEN, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 10<sup>th</sup> day of August, 1988.

Margaret Good

MARGARET GOOD  
Assistant Public Defender