IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 72,503

WEBSTER F. McKINNON,

Respondent.

_____/

JURISDICTIONAL BRIEF OF RESPONDENT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

David P. Gauldin
Special Assistant Public
Defender-Fl. Bar #261580
Post Office Box 142
Tallahassee, Florida 32302
(904) 222-5774

Attorney for Respondent

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2-5
ISSUE (restated)	
THIS COURT SHOULD ACCEPT JURISDICTION TO STRAIGHTEN OUT THE MESS CREATED BELOW AND TO GIVE THE DEFENDANT A FAIR SHAKE.	
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

CASES	Page
Blackwelder v. State, 476 So.2d 280 (Fla. 2nd DCA 1985)	1,4, 5
Blockburger v. United States 284 U.S. 299 (1932)	4
Carawan v. State , 515 So. 2d 161 (Fla. 1987)	3
Hall v. State, 517 So.2d 678 (Fla. 1988)	3, 4
State v. Gibson, 452 So.2d 553 (Fla. 1984)	4

STATUTES

Section 790.07(1), Florida Statutes	2

PRELIMINARY STATEMENT

Webster McKinnon was the Defendant in the trial court, the Appellant in the Florida First District Court of Appeal and the Respondent in this Court. He will be referred to as "the Defendant."

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts as found in the District Court of Appeal's opinion is accepted.

SUMMARY OF THE ARGUMENT

The Defendant does believe that this Court has jurisdiction but for a different reason than the State. The Defendant believes that the Florida First District Court of Appeal's opinion expressly and directly conflicts with Blackwelder v. State, 476 So.2d 280 (Fla. 2nd DCA 1985).

ISSUE (Restated)

THIS COURT SHOULD ACCEPT JURISDICTION TO STRAIGHTEN OUT THE MESS CREATED BELOW AND TO GIVE THE DEFENDANT A FAIR SHAKE.

The Defendant does believe this Court has jurisdiction to hear this issue but on a different basis than the State has proposed, and as such, in order to preserve his rights, has filed a notice to invoke ceritiorari jurisdiction simultaneously with the filing of this brief (but there is no need for additional briefs, as defendant is filing this brief in answer to the State's jurisdictional brief).

In order for this Court to understand the basis by which it may exercise jurisdiction, the following is submitted:

The Defendant was convicted of manslaughter, a second degree felony. In the course of sentencing the Defendant, the Court treated his conviction for "simple" manslaughter (as opposed to manslaughter with a firearm) as the primary offense and enhanced this second degree felony to a first degree felony because he was also convicted of the use or display of a firearm in violation of Section 790.07(1), Florida Statutes. (See Appellate Court Record at 15 and the DCA's opinion). The judgment, however, continued to list the primary offense as a second degree felony (which, as pointed out below, it is). (R-17 & DCA opinion).

As noted by the DCA opinion, trial counsel objected to this sentencing but was overruled by the trial court on the basis that Defendant's conviction for use or display of a firearm during the course of a felony constituted a conclusion

by the jury that the Defendant committed manslaughter with a firearm.

The First District Court of Appeal, in its opinion, then concluded that the trial court was correct in increasing the Defendant's conviction for manslaughter from a second degree felony to a first degree felony but that the judgment should be made to conform to the sentencing of the Defendant for a first degree felony.

Starting with this premise as correct (which is where the First District Court of Appeal went wrong), the DCA then realized it had a problem: to punish appellant twice for the same activity (display of a firearm) would violate this Court's opinions (Carawan v. State, 515 So.2d 161 (Fla. 1987) and Hall v. State, 517 So.2d 678 (Fla. 1988)). Its solution was to strike the Defendant's conviction for use or display of a firearm during the course of a felony (which, even though stricken, was used to enhance the manslaughter charge).

The First District Court of Appeal correctly characterized the Defendant's position:

> The assistant public defender, asserting in his supplemental brief that he has rethought his original position "until his head hurt," argues that section 775.087(1)(b) does not permit the trial court to reclassify the manslaughter offense, because conviction on one count in an information may not be used to enhance the punishment for conviction on another count. In other words, [Defendant's] counsel contends that [Defendant] may be convicted on both counts, but that the manslaughter offense may not be reclassified to a first degree felony. [Opinion at 3].

Counsel for the Defendant has taken this position because (insofar as sentencing is concerned) the Defendant is better off being sentenced for conviction of a second degree and a

third degree felony than being sentenced ("just") for a first degree felony and because it is the law.

THE FIRST DISTRICT COURT OF APPEAL's OPINION DIRECTLY AND EXPRESSLY CONFLICTS WITH Blackwelder v. State, 476 So.2d 280-281 (Fla. 2nd DCA 1985). ["The allegation used in the robbery count that [the defendant] used a weapon cannot be used to supplement the count for attempted first degree murder."] In other words, conviction in one count may NOT be used to enhance the conviction in another count. This should be the basis of the Court's jurisdiction in this case.

The Defendant disagrees with the State's analysis in its jurisdictional brief and does not for one minute believe that Blockburger v. United States, 294 U.S. 299, __S.Ct.___, 76 L.Ed. 306 (1932) or any other case allows multiple punishments for the same act.* Moreover, whatever the Florida Legislature has done after the Defendant was sentenced cannot be used in an ex post facto manner against the Defendant, even assuming that whatever amendment it has passed is constitutional.

As the undersigned reads Hall, it prohibits multiple punishments for the same act (but not the same transaction). The same "act" involved in this case is the use of the firearm. No better proof of this conclusion is the fact that Hall overruled State v. Gibson, 452 So.2d 553 (Fla. 1984), where the defendant was punished for both armed robbery with a firearm and use of a firearm during the course of that robbery. Clearly, the act multiply punished in Gibson was the use of a firearm, so Hall (given this Court's reasoning) explicitly overruled Gibson.

---

*Under the circumstances here.

Here, two separate crimes were committed: 1)manslaughter and 2) use or display of a firearm during the course of a felony. The State can punish the Defendant for manslaughter (one time) and for use of a firearm used in the manslaughter (one time) but cannot enhance his punishment for manslaughter because he used a firearm and then (again) punish the Defendant for use or display of a firearm during the course of the manslaughter as the draconian State would have this Court believe.

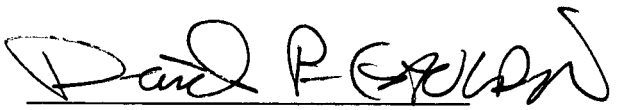
The Defendant was convicted of manslaughter, a second degree felony. He should be punished for a second degree felony. He was convicted of display or use of a firearm during the course of a felony, a separate crime which is a third degree felony. He should be punished for a third degree felony. If the State wanted the Defendant convicted of a first degree felony the verdict form should have read: _____Guilty _____Not Guilty Manslaughter with a firearm.

Clearly, the Defendant should not be sentenced for use or display of a firearm during the course of a felony and then be sentenced for a first degree felony for the same act in a different count. [Even the First District Court of Appeal realized that was wrong].

CONCLUSION

This Court should accept jurisdiction for conflict based on Blackwelder v. State, 476 So.2d 280 (Fla. 4th DCA 1985) and correct the Defendant's sentence as requested in this brief and the supplemental brief filed on his behalf below. It should reject jurisdiction based on the State's reasoning.

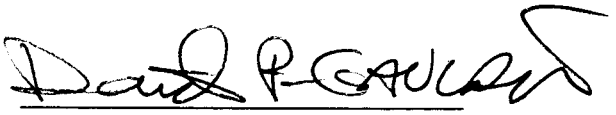
Respectfully submitted,



David P. Gauldin
Special Assistant Public Defender
Second Judicial Circuit
P.O. Box 142
Tallahassee, Florida 32302
(904) 222-5774

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail/hand delivery to Edward C. Hill, Jr., Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 this 16th day of June, 1988.



David P. Gauldin