OA 9-6-89

IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 73,496

ROOSEVELT GLENN,

Respondent.

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA
CERTIFIED CONFLICT

# ANSWER BRIEF OF RESPONDENT

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# BRIEF OF RESPONDENT

## I PRELIMINARY STATEMENT

Respondent was the defendant below, and will be referred to as respondent in this brief. A one volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses.

## II SUMMARY OF ARGUMENT

The decision of the Second District Court of Appeals, ,allowing the respondent to raise a double jeopardy claim based on Carawan v. State, 515 So.2d 161 (Fla. **1987)** in a motion for post-conviction relief, should be affirmed. Looking to the language of Carawan, supra, and Hall v. State, 517 So.2d **678** (Fla. **1988)** it is apparent that these decisions were clarification in the analysis to be used for determining legislative intent. These cases were not "changes" in the law. Thus, the question of retroactive application, as discussed by the petitioner, is inapplicable to this issue. The decision of the First District Court of Appeal, which was certified as being in conflict with the decision in the instant case, misinterpreted Carawan and Hall as changes in the law and wrongly determined that those decisions should not apply retroactively.

## III ARGUMENT

DOUBLE JEOPARDY CLAIMS BASED ON CARAWAN V. STATE, 515 So. 2d 161 (Fla. 1987) MAY PROPERLY BE RAISED IN A MOTION FOR POST-CONVICTION RELIEF.

In its decision below, the Second District Court of Appeal held that the respondent may properly raise the legality of his dual convictions for trafficking and delivery of the same controlled substance within one criminal act by way of a motion for post-conviction relief, pursuant to rule 3.850, Florida Rules of Criminal Procedure. Glenn v. State, 537 So.2d 611 (Fla. 2d DCA 1988). The court remanded the case to the trial court with instructions to vacate the convictions on the counts alleging delivery.

The Second District Court certified conflict with Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988), review denied, No. 71,999 (Fla. Oct. 12, 1988). In Harris the First District Court of Appeal held that Hall v. State, 517 So.2d 678 (Fla. 1988), should not be applied retroactively. Hall, based on Carawan v. State, supra, held that the legislature did not intended dual convictions for a single criminal act of possession of a firearm during the commission of a felony and armed robbery. Harris characterized the decision in Hall as having "changed the substantive law as it relates to convictions both for armed robbery...and for possession of a firearm during the commission of a felony" and affirmed the denial of the defendant's motion for post-conviction relief. Harris, 520 So.2d at 640.

The First District Court cited this Court's original opinion in Bass v. State, 12 F.L.W. 289 (Fla. June 11, 1987) and certified a question of great public importance as to whether the defendant was entitled to post-conviction relief under that decision. Harris, 520 So.2d at 640. However, this Court then withdrew its opinion in Bass and issued a new opinion, Bass v. State, 530 So.2d 282 (Fla. 1988). This Court subsequently denied review of Harris. The petitioner characterizes this denial as an affirmance of the decision in Harris. This reasoning is questionable since the certified question in Harris is no longer viable, having been based on a withdrawn opinion.

Harris misinterpreted this Court's decisions in Carawan and Hall as "changes" in the law. Rather those decisions were clarifications of the law. Thus, the principles of retroactivity discussed by the petitioner are not applicable to this issue.

The strongest and best evidence of this Court's intent to clarify, rather than change, the law is the language of Carawan and Hall. In Carawan this Court stated:

> We accept jurisdiction to elaborate the constitutional and statutory rational upon which our prior decisions are grounded.
>
> * * *
>
> The present confusion in the law results from the perception that courts are inconsistently applying these rules of construction, or perhaps, on occasion, failing to apply any rule at all. We believe, that despite some lack of clarity

> in the past, the position of this Court can be defined and our prior decisions harmonized.
>
> * * *
>
> Finding no evidence that the leaislature intended multiple punishments under the circumstances at hand. we must concluded that it is most reasonable to believe that no such intent existed.

Id., 515 So.2d at **163, 164,** 170 (Emphasis added).

In Carawan this Court reaffirmed a number of its decisions under the analysis set out in that opinion. This Court also receded from two cases, stating that the analysis set out in Carawan had been improperly applied. As the trial judge in the instant case stated, this Court held in Carawan that when it decided Rotenberry v. State, **468** So.2d 971 (Fla. **1985),** "we made an incorrect analysis of what the legislative intent is and now we're correcting that erroneous interpretation" (R 130).

In Hall this Court stated:

> We hold that the legislature had no intent of punishing a defendant twice for the single act of displaying a firearm or carrying a firearm while committing a robbery.
>
> * * *
>
> In accordance with Carawan, we find that this would constitute a dual punishment for one single act, and would be contrary to the legislative intent under the principles set forth in our holdings in Carawan, Mills, Houser, and Boivin. For the reasons expressed above, and to harmonize our decision, we overrule State v. Gibson, **452** So.2d **533 (Fla. 1984).** Gibson was predicated largely on a lesser included

> offense theory, and the theory addressed in Carawan was not discussed.

Id., 517 So.2d at 680.

Thus, since the Carawan decision was only a clarification of the correct procedure for determining legislative intent, it was not a "change" in the law. Once this Court determined that the analysis used in Rotenberry was incorrect and lead to an incorrect result, it receded from that decision, thereby harmonizing Rotenberry with the other cases decided by this Court on the same issue. The analysis outlined in Carawan was the analysis which should have been initially applied in Rotenberry. The appellant should not be precluded from raising this double jeopardy issue simply because he had the misfortune of being sentenced before Rotenberry was corrected.

The respondent in the instant case filed a timely motion for post-conviction relief. Rule 3.850, Florida Rules of Criminal Procedure is directed toward claims that the judgement was entered or that the sentence was imposed in violation of the Constitution or Laws of the United States, or of the State of Florida. The respondent argued that his convictions for both trafficking and delivery of the same controlled substances were in violation the prohibition against double jeopardy, since the legislature did not intend dual convictions for these offense occurring within one criminal act.

This claim is properly raised in a motion for post-conviction relief. This issue could not have been raised at trial or on direct appeal. Rule 3.850 (f). At that time

this Court's opinion in Rotenberry controlled the issue. However, after the clarification in Carawan, it becomes clear that the dual convictions were in violation of the double jeopardy clause of the United States and Florida Constitutions and of Florida Statutes, section 775.021(4)(a), 1987.[1]

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[1]The amendment to this section, chapter 88-131, section 7, overrules Carawan, but is not retroactive. State v. Smith, No. 72,633 (Fla. June 22, 1989).

## IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court affirm the decision of the Second District Court of Appeal.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Respondent has been furnished by U.S. Mail to, David R. Gemmer, Assistant Attorney General, **1313** Tampa Street, Suite **804**, Park Trammell Building, Tampa, Florida, **33602**, and a copy has been mailed to respondent Roosevelt Glenn, **006690**, Marion Correctional Institution, Post Office Box **158-334**, Lowell, Florida, **32663**, this 20th day of June, **1989**.

NANCY L. SHOWALTER