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IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,780

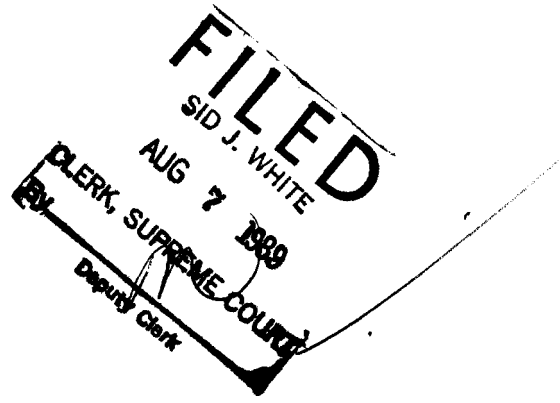
THE STATE OF **FLORIDA,**

Petitioner,

vs.

ROBERTO PASTOR,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW

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ANSWER BRIEF OF RESPONDENT

ROBERTO PASTOR
Respondent
DC# 181293
Glades Correctional Institution
500 Orange Avenue Circle
Belle Glade, FL 33430
B-80

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INTRODUCTION

The Respondent herein, pro se, recently sent a Declaration to the Clerk of this Honorable Court which dealt with general issues of the justice of his conviction in the trial court. The Respondent, ~~pro se,~~ is unschooled in the law and is therefore totally unaware of the procedures to be followed in this proceeding initiated by the State to obtain discretionary review. The Clerk has previously acknowledged receipt of such Declaration, and chose to treat same as the Respondent's Answer brief herein . Although the Respondent would ask this Honorable Court to consider the content of said Declaration and to enter any and all appropriate relief thereon, the Respondent, with the assistance of inmate law clerks does tender this, his Answer Brief.

Throughout this brief, the Petitioner, the State of Florida, will be referred to as the "State" and the Respondent, Roberto Pastor, will be referred to as "the Defendant", so as to maintain uniformity with the designation of parties utilized by the State in its Brief.

STATEMENT OF THE CASE AND OF THE FACTS

In the Petitioner's Statanent of the Case and the Facts the Petitioner incorporates primarily its Response to Order to Show Cause dated December 14, 1988 in the Third District Court of Appeals, Case no. 88-02515. In that certain inaccuracies are contained therein which have led to confusion and erronious statements of the crimes for which the Respondent was charged and convicted of, it is necessary for the Respondent to correct and clarify the same herein.

The Respondent was charged by Information dated August 12, 1986 with attempted first degree murder with a weapon, to wit: a knife, in violation of § 782.04(1), 777.04(1) and 775.087 Florida Statutes, (premeditated first degree murder, attempt statute, and aggravation and reclassification of felony statute for use of weapon in commission of charged felony, respectively), not attempted murder with a deadly weapon (the addition of "deadly" in the information is superfluous and unecessary under the statute charged), and not "unlawful possession of a deadly weapon" or "possession and display of a firearm" as was stated in the lower court's opinion in Pastor v. State, 536 So. 2d 356 (Fla. 3rd DCA 12/27/88). Simply put, the Respondent was charged and convicted of attempted first degree murder, a first degree felony under 5782.04(1) and 777.04(1) & (4), and unlawful display of of a weapon while committing a felony, a third degree felony under § 790.07 Fla. Stat. (1986). However, because the attempted first degree premeditated murder was found to have been committed by "stabbing" the victim with a weapon, to-wit: a knife, the first degree felony is aggravated and reclassified as a life felony pursuant to § 775.087(1) Fla. Stat. (1986). There is no question but that the dual convictions were obtained by a single act, that is, the stabbing of the victim with a knife on August 10, 1986.

Similarly, the Petitioner has mistated the relief granted by the lower appellate court in its Statement of the Case and Facts where it is stated that the Third District Court of Appeal "reversed and remanded the Defendant's conviction

for attempted first degree murder with a deadly weapon and unlawful possession of a deadly weapon while engaged in a criminal offense". (emphasis supplied) Rather, in Pastor v. State, 536 So.2d 356 (Fla. 3rd DCA 12/27/88) the Third District merely reversed "the trial court's order denying relief (on the Defendant's Motion for Post-Conviction Relief) and remand with directions to vacate the conviction and sentence imposed for count two (possession and display of a firearm) and to recalculate the sentence pursuant to the guidelines." Id. (emphasis and parenthetical clarification supplied) Finally, it should be noted that the State virtually conceded the issue raised by the Defendant on appeal to the Third District, arguing only that even were the Defendant's conviction for Possession of a Weapon While Engaged in the Commission of a Criminal Offense illegal, that a recomputation of his guidelines scoresheet without inclusion of the lesser offense would not affect the recommended guidelines range.

ISSUE PRESENTED FOR REVIEW

DID THE LOWER COURT ERR IN APPLYING CARAWAN AND HALL RETROACTIVELY TO A CONVICTION FOR ATTEMPTED FIRST DEGREE MURDER WITH A WEAPON AND POSSESSION OF A WEAPON DURING THE COMMISSION OF A FELONY WHICH OCCURRED PRIOR TO CARAWAN?

SUMMARY OF THE ARGUMENT

The Third District Court of Appeals properly reversed the Defendant's conviction of the lesser offense of Possession of a Weapon in the Commission of a Felony. As the lower court held, such dual punishment for a single act involving the use of a knife constitutes a violation of the prohibition against double jeopardy under the state and federal constitutions under the authority of this Court's decision in Carawan and Hall. (Citations omitted) Under the emasculated construction of the federal Double Jeopardy Clause in Missouri v. Hunter, which this Court in Carawan held to be coextensive with Florida's Article I, Section 9, the Double Jeopardy Clause is a prohibition on multiple punishments arising out of a single act by the judiciary where not intended by the legislature, and is not a prohibition of legislative authorization of dual punishments where so intended. Under Carawan and Hall, this Court has held that the dual conviction sufferred by the Defendant was not intended by the legislature, and therefore is, by definition a violation of the Double Jeopardy prohibition. Such is a fundamental right which can and must be cured and corrected at any time under the authority of Bass v. State and Johnson v. State.

The State's argument that the recent legislative amendment to § 775.021 should be given retrospective application has already been rejected by this Court in State v. Smith, therefore, whatever impact such amendment shall have prospectively is irrelevant to consideration of the relief to which the Defendant herein is entitled under the continued vitality of Carawan and Hall for the preamendment case.

In any event, under any statutory construction, the offense of Possession of a Weapon in the Commission of a Felony is in fact a lesser included offense of the underlying felony of Attempted First Degree Murder with a Weapn, and the multiple convictions are therefore specifically unintended and prohibited by the legislature and the Double Jeopardy Clause. The ostensible authorization of such dual con- under this Court's decision in State v. Gibson is of no consequence in that Gibson

specifically overruled in Hall, was incorrectly decided under a mechanistic Blockberger analysis. The United States Supreme Court in Missouri v. Hunter, when faced with the question of whether multiple crimes indistinguishable from those herein were lesser included offenses under Blockberger, found that such were. Thus, this Court should properly reassert that Gibson was incorrectly decided and that the lesser conviction in the case sub judice is unauthorized as being an impermissable dual conviction of a necessarily included offense, and therefore a violation of double jeopardy under even the recent amendment to § 775.021 Fla. Stat.

ARGUMENT

THE LOWER COURT DID NOT ERR IN APPLYING CARAWAN AND HALL RETROACTIVELY TO A CONVICTION FOR ATTEMPTED FIRST DEGREE MURDER AND POSSESSION OF A WEAPON DURING THE COMMISSION OF A FELONY WHICH OCCURRED PRIOR TO CARAWAN

The issue presented herein concerning the appropriateness of dual convictions for different criminal offenses arising out of a single criminal act in light of this Court's seminal decisions in Carawan v. State, 515 So.2d 161 (Fla. 1987) and Hall v. State, 517 So.2d 678 (Fla. 1988) juxtaposed with the legislature's recent amendment to § 775.021 Fla. Stat., specifically held to overrule Carawan and Hall prospectively only in State v. Smith, 14 FLW 308 (Fla. 6/22/89), is one which amplifies the comment of the lower court in Hall that the law on double jeopardy in Florida has became "curiouser and curiouser" full circle to curiousest. Nevertheless, the Third District Court of Appeals below has specifically held that under the principles set forth in Carawan and Hall the multiple convictions suffered by the Defendant herein violate the prohibition against double jeopardy under the Fifth Amendment to the United States Constitution as well as Art. I, § 9 of the Florida Constitution, and that such conviction for the lesser offense may be challenged and set aside via a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. The Defendant herein contends that his conviction of the lesser offense herein was by definition a violation of the prohibition against double jeopardy and is therefore a fundamental right which must be cognizable on post-conviction relief.

In Carawan, this Court embraced an expansive interpretation of the meaning of the double jeopardy clause in the area of dual punishments, stating that there exists no difference in intent between two trials for the same offense and two or more punishments for the same offense. 515 So.2d at 164 That is, Carawan taught that the double jeopardy clause is intended to prohibit multiple pun-

ishments for a single offense as a retrial for the same offense, following the United States Supreme Court in Ex Parte Lange, 85 U.S. (18Wall) 163, 173, 21 L.Ed 872 (1983) The Carawan court additionally noted that the power to define and punish crimes is a legislative function, subject to constitutional limitations. Id. Nevertheless, the crucial inquiry of the reviewing Court in a dual punshment case is to determine legislative intent, and to presume that the legislature did not intend to punish the same act under two or more criminal offenses, since it could have as easily increased the penalty for the primary offense. Id. Since expressions of legislative intent are rarely set forth with unambiguous crystal clarity, courts have resorted to the Blockberger test set forth in Blockberger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and which has been codified by the Florida legislature at § 775.021(4) Fla. Stat. (1985), as follows:

> "Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are seperate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial."

§ 775.021(4) Fla. Stat. (1985)

The court in Carawan was careful to point out, however, that the application of the mechanistic Blockberger test was only a first step, and that even if the test results in a finding of seperate criminal offenses, such is not to be held conclusive where such would lead to a result contrary to common sense as to what the legislature intended, citing with approval the comments of Judge Cowart in Bing v. State, 492 So.2d 833, 834-37 (Fla. 5th DCA 1986) that often the mechanistic application of Blockberger "falsely indicate a substantive difference between offenses when there is actually only a difference between degrees of one substantive offense." Id. at 167. Thus, this Court in Carawan embraced various rules of statutory construction

which went beyond the strict Blockberger approach in order to hold that even where Blockberger is satisfied, where one act may violate two seperate criminal offenses, the legislature did not intend dual punishments where the two offenses address the same evil, applying the "rule of lenity" to construction of ambiguous statements of legislative intent. Id. at 168. Having so held, the Court went on to re-evaluate and modify or overule a plethora of previous decisions which prohibited dual punishment notwithstanding satisfaction of the Blockberger seperate offense analysis.

Subsequently, this Court expanded Carawan in Hall v. State, 517 So.2d 678 (Fla. 1988). Hall reiterated the vitality of Carawan in reversing dual convictions for Armed Robbery pursuant to 812.13(1) and (2) as well as Displaying or Carrying a Firearm pursuant to § 790.07(2), which crimes had been previously and specifically held to be seperate offenses and seperately punishable in State V. Gibson, 452 So.2d 553 (Fla. 1984) The Fourth District Court of Appeals below had reluctantly affirmed the dual convictions as a result of being bound by Gibson, however, had critisized severely the logic expressed in Gibson from a Blockberger analysis so as to reach the conclusion that the latter was not a lesser included offense of the former, that is, a distinction without a difference similar to that warned against by Judge Cowart in Bing, supra. Noting that because the defendent therein received a harsher punishment as a result of carrying a firearm in the course of the robbery, the Court applied the Carawan analysis to conclude that the legislature did not intend to punish twice for the single act of carrying a firearm in the commission of a criminal offense, noting that to otherwise hold would be to result in every offense of Armed Robbery involving a firearm also constituting the offense of displaying a firearm. Id. at 680. Thus, this Court specifically overuled Gibson without re-evaluating whether Gibson was correctly decided under a Blockberger analysis, but rather under the Carawan analysis applying the rule of lenity to multiple punishments for a single act for criminal offenses which prohibit the same evil. Id.

Although the crimes which were held to be illegal in Hall were for Armed Robbery and Unlawful Display of a Firearm, there is conceptually no difference to those for which the Defendant herein was convicted. That is, the Defendant herein was found guilty of attempted premeditated murder, a first degree felony, but which is reclassified as a life felony because a weapon was carried, displayed, used or threatened to be used. pursuant to § 775.087 Fla. Stat. (1986). Further, the Defendant was convicted of unlawful display of a weapon for displaying, using, or threatening to use a weapon in the commission of a felony, i.e., the attempted first degree murder. Clearly, therefore, the convictions complained of fall within the prohibition of Hall, as was specifically held by the Third District Court of Appeals in Perez v. State, 528 So.2d 129 (Fla 3d DCA 1988) and by the First District in Burgess v. State, 524 So.2d 1132 (Fla. 1st DCA 1988).[1] The question remains, therefore, as to whether such improper convictions under Carawan and Hall may be properly challenged as violative of the double jeopardy clause or otherwise in a motion for post-conviction relief.

Since Article I, Section 9 of the Florida Constitution was intended to mirror the federal prohibition against double jeopardy under the Fifth Amendment of the United States Constitution, Carawan, supra, at 164, it is necessary to briefly mention and discuss the leading case of the United States Supreme Court in Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), which dealt with the issue of dual punishments for seperate crimes arising out of a single transaction under the Double Jeopardy Clause. Therein, the defendant challenged his convictions for first degree robbery' which required proof of a robbery and was aggravated in punishment where perpetrated with a deadly weapon, and armed criminal action, which

[1] Although the offenses in Perez and Burgess involved a firearm, as opposed to a weapon, it should be noted that the aggravation statute, § 775.087(1) Fla. Stat. (1986) reclassifies for use of a weapon or firearm in the commission of a felony, and the Unlawful Possession statute, § 790.07 uses identical language in prohibiting the use of a weapon under subsection (1) as prohibiting in respect to a firearm under subsection (2), third and second degree felonies, respectively.

required proof of the underlying felony and that a deadly weapon was used or aided the commission of the felony. Unlike the statutes presented before this Court in Carawan, or, for that matter, presently, the Missouri legislature had clearly and unequivocably stated its intent to punish the latter crime in addition to any penalty provided for violation of the underlying felony. After noting that the two offenses were in fact the same offense under a Blockberger analyisis, Id. at 679, the majority held that the Double Jeopardy Clause prohibits courts from multiple punishments for seperate offenses only where the legislature did not intend same, that is the Double Jeopardy Clause restricts the judiciary, not the legislature, from providing for multiple punishments for a single offense.

Although the Defendant herein finds the majority opinion flawed as such virtually ignores the long line of precedents commencing with Ex Parte Lange, supra, holding that the Double Jeopardy Clause equally prohibits multiple punishments for the same offense as it does successive trials therefor, such is the law, although there exists strong support for a less restrictive interpretation wherein the legisature is similarly restricted. See, e.g. dissenting opinions of J. Marshall and Stevens, Missouri v. Hunter, 103 S.Ct. at 679; Carawan, supra, at 163-164; opinion of Justice Barkett, concurring in part and dissenting in part in Smith v. State, 14 FLW 308, 311 (Fla. 6/22/89) and specially concurring opinion of J. Cowart in Brown v. State, 14 FLW 407 (Fla. 5th DCA 2/9/89). Irregardless, the present state of the law is that the Double Jeopardy Clause is violated when multiple punishments are imposed for multiple offenses which are in fact the same offense and the legislature has not intended such multiple punishments.

In State v. Smith, supra, this Court considered whether multiple convictions of crimes which were held to be impermissable in Carawan were permissable in light of the recent statutory amendment to § 775.021(4) Fla. Stat., Ch. 88-131 § 7 Laws of Florida, and where such crimes were committed prior to the effective date of the amendment. After holding that without question such amendment was intended to overule Car-

awan to the extent of clarifying the legislature's intent to punish seperately multiple criminal offenses arising out of a single act unless such offenses require identical elements of proof, are degrees of the same offense, or which are lesser offenses the statutory elements of which are subsumed by the greater offense. Id. at 309. However, the Court held equally as clear that the amendment was not to be and could not be applied retroactively, so as to nullify the validity of Carawan and its progeny to all pre-amendment cases. Thus, under Heath v. State, 532 So.2d 9 (1988), the statement of the law in Carawan and its progeny was a statement of the judiciary as to what the law was at that time and as such is controlling.

Simply put, although the legislature may have been free to authorize multiple convictions in the Defendant's case under Missouri v. Hunter, supra, this Court has clearly held that it did not so intend in Carawan and Hall and insofar as the Double Jeopardy Clause is construed as a judicial prohibition against multiple punishments for the same offense, to permit the Defendant's convictions to now stand would by definition constitute Double Jeopardy as construed by this Court, the ultimate abitrator of what the law of the State of Florida is. Smith, supra.

Clearly, a violation of the prohibition against double jeopardy is properly remedied via a motion for post-conviction relief pursuant to F.R.Crim.P. 3.850. State v. Johnson, 483 So.2d 420 (Fla. 1986); Menna v. New York, 423 US 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) Accordingly, various district courts of appeals have specifically ruled that a "Carawan" violation is properly remedied by post-conviction relief pursuant to F.R.Crim.Proc. 3.850.

The lower court herein expressly ruled that the Defendant's dual convitions violated the double jeopardy clauses of the state and federal constitution. Pastor v. State, 536 So.2d 356 (Fla. 3d DCA 12/27/88) Similarly, the Second District ruled when confronted with a motion for post-conviction relief for multiple convictions for various drug offenses which were invalidated in Carawan that such was a proper basis for relief in Glenn v. State, 537 So.2d 611 (Fla 2d DCA 11/30/88).

In **Glenn**, the Second District specifically disapproved the opinion of the First District in Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988), discussed infra and relied upon by the State herein. In refusing to follow Harris, the Second District relied upon Kraus v. State, 491 So.2d 1278 (Fla. 2nd DCA 1986), in which a motion for post-conviction relief asserting a double jeopardy violation for dual convictions for manslaughter by an intoxicated driver and manslaughter by culpable negligence in violation of Houser v. State, 474 So.2d 1193 (Fla. 1985) was held viable, relying upon Cantrell v. State, 405 So.2d 986 (Fla. 1st DCA 1981). Cf. Etlinger v. State, 538 So.2d 1354 (Fla. 2nd DCA 2/22/89); Jensen v. State, 538 So.2d 541 (Fla. 2d DCA 2/17/89)

This Court has accepted jurisdiction to resolve the conflict between the various District Courts which has developed concerning the applicablility of a motion for post-conviction relief to remedy sentences illegally imposed pursuant to the Carawan and Hall decisions. The State relies almost exclusively on Harrisv. State, 520 So.2d 639 (Fla. 5th DCA 1988) in its argument that Carawan and Hall should not be given retroactive application. Although Harris without question refused to apply Carawan retroactively so as to permit relief for a **Hall** violation on a motion for post-conviction relief, the court relied, however almost exclusively in Harris upon this Court's opinion in Bass v. State, 530 So.2d 282 (Fla. 1988) which was non-final and in which a petition for rehearing was pending at the time of the decision. The original Bass decision had permitted a retroative application of Palmer v. State, 438 So.2d 1 (Fla. 1983), in which this Court held illegal the stacking of minimum firearm mandatories based upon a single transaction, pursuant to a mtion for post-conviction relief on the theory that the Palmer decision was not a change in the law, but rather a case of initial interpretation of the statute. Harris, supra, at 639. However, the Bass opinion relied upon as the sole basis for its decision not to afford retroactive relief in Harris was replaced and supplanted by this Court's opinion in Bass, supra, which totally abandoned

the rationale relied upon in Harris in favor of a simple ruling that:

> "In Palmer this Court held that the three-year minimum mandatory sentences . . . could not be imposed consecutively for seperate offenses arising from a single criminal transaction or episode. At that time we did not state whether our ruling would have retrospective application. Upon consideration, we have now conluded as a matter of policy that the principle of Palmer should be applied retroactively. We believe that it would be manifestly unfair for prisoners such as Bass, who received consecutive minimum mandatory sentences prior to Palmer, to be treated differently from those who had the good fortune to be sentenced for similar conduct after that decision was rendered."

Bass, supra, at 283. Thus, the entire foundation upon which Harris was decided was not the law or rationale ultimately expressed in Bass. Rather, the ultimate Bass opinion favors the Defendant herein. Specifically, in Carawan and its progeny this Court reviewed the pre-existing decisions and § 775.021 Fla. Stat. to conclude that the legislature did not intend dual convictions for offenses identical to that which the Defendant was convicted of less than one (1) month prior to Carawan. The reasoning of this court and statement of the law has been specifically held to have established a fundamental constitutional right. Etlinger, supra. That is, the right to be free from double jeopardy is a fundamental constitutional right. State v. Johnson, 483 So.2d 420 (Fla. 1986) Unlike the issue in ~~Bass~~, ~~supra~~, the issue here is that of a basic and fundamental constitutional right, not merely that of construction of a state criminal statute. If Carawan and Hall were wrongly decided, than of course the Defendant's right to rely upon these opinions is vitiated, however, as pointed out in the dissenting opinions of Justices Shaw and McDonald in Smith, this Court has expressly decided that the Carawan and Hall principles were rightly decided and do represent the law prior to the recent amendment to § 775.021 Fla. Stat. As in Bass, to leave uncorrected a violation of the double jeopardy clause in the Defendant's case because of his misfortune of not having been sentenced one mnth later than he was is fundamentally unfair.

The State additionally relies upon Clark v. State, 530 So.2d 519 (Fla.

5th DCA 9/8/88) which refused to apply Carawan retroactively on the basis that the legislature's amendment to § 775.021(4) clarified legislative intent and therefore should be applied retroactively to bar relief of a clear Carawan type violation. Thus, the Fifth Circuit appeared to apply the amendment retroactively prior to its effective date, which has been expressly found to be improper in State v. smith, 14 FLW 308 (Fla. 6/22/89). Thus, the Fifth District interpolation of legislative intent as expressed in passage of the amendment to legislative intent existing prior thereto is erronious and contrary to the holdings of this Court.

Finally, the State relies upon the decision in Love v. State, 532 So.2d 1133 (Fla. 4th DCA 10/26/88) in support of its argument that Carawan should not be applied retroactively in permitting relief in a motion for post-conviction relief. Although Love does in fact so hold, the terse opinion merely follows Harris, supra, which for the reasons expressed above, was wrongly decided. Further, the Fourth District Court in Love failed to discuss the applicability of Glenn, supra, to the issue before it.

Thus, this Court must now decide whether to give retroactive application to Hall and Carawan. As argued above and as expressly ruled in the Third District below, the Defendant's conviction for unlawful display offends the prohibition against double jeopardy. While the Defendant would assert that this case is controlled by Bass, supra, the State argues in its brief that the retroactive application of Carawan is governed by Witt v. State, 387 So.2d 922 (Fla. 1980) In any event, the Defendant would show that under the Witt test, Carawan, Hall, and their progeny should and must be applied retroactively so as to encompass a motion for post-conviction relief. As argued supra, the purpose behind the new rule of law is to prevent not perceived, but actual, violation of the prohibition against double jeopardy, held to be a fundamental right in, inter alia, Johnson, supra. The State cavalierly asserts that "(r)etroactive application would vastly

increase the already overwhelming burden on the judicial system." This bald assertion, without more, is scarely the type of quantitative analysis this Court would require in order to decide this case, one of rather far-reaching effect and import. Rather, as noted initially, in the present case the only effect would be for the Defendant's conviction for Unlawful Possession of a Weapon, a third degree felony, to be reversed, and would still leave him within the same recommended guidlines range. Surely, most of the prisoners still incarcerated for crimes held violative of Carawan, Hall and their progeny who have or will file similar motions for post-conviction relief will be merely attempting to vacate a relatively minor lesser included offense and will not ultimately receive a reduction in sentence. Further, it must be recalled that the administration of justice under our constitution can not and must not be governed by mere considerations of economics, as the price of justice and a free society often is necessarily dear.

The State's argument that the recent amendment to F.S. 775.021 served to clarify the legislature's intention to allow seperate convictions for the Defendant's crimes is specious for the reasons set forth in State v. Smith, ~~supra~~. See, particularly, the opinion of Justice Barkett, concurring in part and dissenting in part at **311**. It is obvious that the legislature passing the recent amendment in **1988** is a far different body than existed in **1983**, and to presuppose that the present legislature's attitude is persuasive to construe the former is tantamount to ascribing the intent of the pre-Thirteenth Amendment Congress to what the Congress intended in passing the Civil Rights Act of 1964.

Although the Defendant believes that this Court should properly make a broad ruling applicable to all "Carawan" type violations, the Defendant is nevertheless entitled to the relief granted by the Third District below on a narrower ground. Specifically, even under the recent amendment to § 775.021(4) Fla. Stat. **88-131** § 7, Laws of Florida, the legislature does not intend dual convictions where the Blockberger test is not satisfied and/or where "(o)ffenses which are lesser offen-

the statutory elements of which are subsumed by the greater offense." Gibson, supra, already overuled in Hall, was improperly decided in the first instance to the extent that it found the applicable offenses therein not to be the same offense under a Blockberger analysis. As pointed out in Hall, every conviction for Armed Robbery must necessarily entail conviction for either Unlawful Possession of a Weapon or Firearm in the Commission of a Felony. 517 So.2d at 680. In Missouri v. Hunter, supra, the United States Supreme Court held that the offenses involved therein, a virtually identical statutory provision to those involved in Gibson, were in fact necessarily lesser offenses under Blockberger, although in that case the Missouri legislature had expressly and irrefutably overidden the Blockberger presumption with a statement of intention to punish the lesser offense in addition to any penalty for the greater. Thus, Gibson must be re-examined in light of the above as well as Burgess v. State, 524 So.2d 1132 (Fla. 1st DCA 1988). See also, Hall v. State, 470 So.2d 796 (Fla. 4th DCA 1985) In conclusion, under any analysis, the Defendant's conviction for Unlawful Display of a Weapon in the Commission of a Felony offends the prohibition against Double Jeopary under the Fifth Amendment to the United States Constitution and Article I, § 9 of the Florida Constitution.

CONCLUSION

This Court should properly hold and rule that violations of Carawan, Hall, and their progeny are in fact violations of the prohibition against double jeopardy and as such are violations of fundamental rights which are properly attacked via a motion for post-conviction relief. If a blanket ruling is not felt appropriate, the COurt at the very least must affirm the opinion of the Third District below on the grounds that on the facts of the Defendant's case, the lesser offense of Possession of a Weapon in the Commission of a Felony was a necessarily included offense of Attempted First Degree Murder With a Weapon, and overrule Gibson once again as wrongly decided under a Blockberger analysis.

Respectfully submitted,

Roberto Pastor. U.S

ROBERTO PASTOR
Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer brief of the Respondent was furnished by United States mail to Giselle D. Lylen, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, FL 33128 this 14" day of August, 1989.

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