IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 73,821

DCA CASE NO. 88-266

ANTHONY F. PAYNE,

Respondent.

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# PETITIONER'S JURISDICTIONAL BRIEF

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. _____

CASE NO. 88-

ANTHONY F. PAYNE,

Respondent.

_____

PETITIONER'S JURISDICTIONAL BRIEF

PRELIMINARY STATEMENT

Respondent, Anthony F. Payne, was the defendant in the trial court and the Appellant, will be referred to herein as "Respondent." Petitioner, the State of Florida, will be referred to herein as "the State." References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

## STATEMENT OF THE CASE AND FACTS

Respondent was convicted after a jury trial of armed robbery, "armed" kidnapping[1], use of a firearm in the commission of a robbery, use of a firearm in the commission of a kidnapping and aggravated assault.

On appeal the District Court upheld the conviction on the armed robbery, and "armed kidnapping" and reversed the other three convictions.

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[1] In Chapter 787 the Legislature created no offense which could be called armed kidnapping.

## SUMMARY OF ARGUMENT

The District Court's opinion is in express and direct conflict with opinions of this Court: (1) in its use of the term armed kidnapping found in the pleadings, rather than the statutory language in conducting its multiple punishment analysis; (2) in its resurrection of the long discredited single transaction rule; (3) in its determination that it the District Court says what the law is on questions of multiple punishments; (4) in its determination that on questions of legislative intent, applications of a subsequent statute would involve an unconstitutional ex post facto application of a new law.

## ARGUMENT

### ISSUE

THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL CONFLICTS WITH VARIOUS MULTIPLE PUNISHMENT DECISIONS OF THIS COURT.

The opinion of the First District court of Appeal is in direct and express conflict with several opinions of this Court.

**ARMED KIDNAPPING**

Kidnapping is defined in Chapter 787, Florida Statutes. The District Court of Appeal made the classic mistake in multiple punishment cases and its opinion is in express and direct conflict with the opinions of this Court in State v. Carpenter, 417 So.2d 986 (Fla. 1986) and Strickland v. State, 437 So.2d 150 (Fla. 1983). The First District Court of Appeal created the conflict by looking to the pleadings and not to the statutory definitions when conducting a multiple punishment analysis. Unlike armed robbery, the statute does not contain, as an element or as an aggravation of penalty, the use of a weapon or a firearm.

Thus, there is simply no such offense as "armed kidnapping". By looking to the pleading instead of the statutes, the court's opinion is in express and direct conflict with Carpenter, supra, and Strickland, supra.

Because of its faulty analysis, the First District Court of Appeal incorrectly applied Carawan v. State, 515 So.2d 161 (Fla. 1987), to the facts in the instant case and its opinion directly conflicts with Carawan itself.

The proper Carawan analysis is:

> ... if each offense indeed requires proof of a fact that the other does not, the court then must find that the offenses in question are separate, and multiple punishments are presumed to be authorized in the absence of a contrary legislative intent or a reasonable basis for concluding that a contrary intent existed.

Carawan, supra at 168. Thus, because armed kidnapping and use of a firearm contain no identical elements, multiple penalties are presumed to be authorized by a Carawan analysis because under this analysis the offenses are separate and there is no basis to conclude the legislature intended a contrary result.

Further, the First District court of Appeal improperly applied the rule of lenity when it invoked the rule of lenity without an analysis of the legislative intent behind these offenses. In Carawan, this Court stated the rule for the application of the rule of lenity when it said:

> ... where there is a basis for concluding that the legislature intended a result contrary to that achieved by the **Blockburger** test, **a conflict arises that requires resort to the third rule of construction applicable to this problem**, the rule of lenity. (Emphasis supplied).

Carawan, supra at 168.

The First District Court of Appeal applied the rule of lenity without finding any basis upon which the legislature intended a result contrary to Blockburger, 284 U.S. 299, 76 L.Ed. 306 (1932). This was improper and thus the opinion is in direct and express conflict with Carawan. The First District failed to conduct the mandatory statutory analysis exemplified by the cases of Carawan, supra, and Hall v. State, 517 So.2d 678 (Fla. 1988), in which the statutory elements are compared. The court failed to conduct any analysis of legislative intent with regard to the armed kidnapping either, assuming it has as an element the use of a firearm and it does not.

It is clear that the offense of kidnapping is aimed at punishing criminal for confining citizens. Carawan recognizes that the use of a firearm statute was designed to punish for committing crimes with guns. In fact the District Court committed the exact same error in the instant case as it did in McKinnon v. State, 523 So.2d 1238 (Fla. 1st DCA 1988), in the matter of its application of Carawan. This Court accepted jurisdiction in McKinnon and reversed. State v. McKinnon, (Slip Opinion March 14, 1989, Case Nos. 72,503; 72,601; 72,218).

Since the District Court's opinion conflicts with the above cited cases, this Court should take jurisdiction to resolve the conflict.

**SINGLE TRANSACTION**

The Court's opinion also directly conflicts with the case of Faison v. State, 426 So.2d 963 (Fla. 1988) and Ferguson v. State, 519 So.2d 747 (Fla. 4th DCA 1988), approved 533 So.2d 763 (Fla. 1988). In Faison and Ferguson the court adopted and applied a three part test to determine whether the confinement or movement of victims during the commission of another crime is sufficient to support a kidnapping charge. The test requires that the movement or confinement must not be: (1) slight and merely incidental to the other crime; (2) inherent in the nature of the other crime; (3) must have independent significance. In other words, it is legally impossible for a kidnapping, armed robbery and use of a firearm to result from one discrete act. Thus, the First District Court of Appeal's opinion, which concluded that the events of this crime constituted one act, was an application long rejected. Single transaction or episode standard, Borges v. State, 415 So.2d 1265 (Fla. 1982), and thus the opinion conflicts with the discrete act standard of Carawan. This conclusion is supported by the First District's citation to Neal v. State, 531 So.2d 410 (Fla. 1st DCA 1988) as authority for the reversal of several of Respondent's convictions. In Neal the First District Court of Appeal stated:

> The convictions and sentences for the four counts of aggravated assault and five counts of use of a firearm violate appellant's right against double jeopardy due to armed robbery convictions for the same criminal

transaction and are hereby reversed and vacated.

Id. at 410.

In relying on Neal the First District Court of Appeal continues to use the abrogated single transaction rule. Borges, supra. Carawan did not resurrect the single transaction rule. Thus, the opinion of the First District conflicts with numerous opinions of this Court and this Court should take jurisdiction.

**STATUTORY CONSTRUCTION**

Carawan, supra, and Hall, supra, are no longer applicable because they were decisions based upon this Court's erroneous perception of legislative intent. Chapter 88-131, Laws of Florida, established that this Court's interpretation of legislative intent in Carawan was wrong. Chapter 88-131 did not change the law, it only clarified what the Legislature intended all along.

The First District Court of Appeals holding that "Courts say what the law is", while a broad statement of general applicability is specifically not relevant to the multiple punishment issue, in fact places the opinion of the District Court in direct conflict with Carawan, State v. Whitehead, 472 So.2d 730 (Fla. 1985), and Carpenter, supra. For in areas of punishment the Legislature not only says what the law is, but the Legislature's intent controls how the law is to be interpreted.

## EX POST FACTO

The First District Court of Appeal's statement that interpreting Chapter 88-131 to apply to this situation would be an ex post facto application is in express conflict with decisions of this Court.

At the time these offenses were committed State v. Gibson, 452 So.2d 553 (Fla. 1984), was the controlling law; it allowed multiple punishments for these offenses. To the extent that Carawan or Hall modified the ruling in Gibson, the legislative (Chapter 88-131, Laws of Florida, effective July 1, 1988) elimination of Carawan and its progeny reinstate Gibson as the controlling law. Thus, even without the application of Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985), or State v. Lanier, 464 So.2d 1385 (Fla. 1984), no ex post facto effect could possibly occur because Gibson was the law and is now the law again. Dobbert v. State, 432 U.S. 282, 53 L.Ed.2d 344 (1977).

The First District's opinion holding that it would be ex post facto to apply it to the Respondent is in direct and express conflict with Lowry and Lanier because those cases hold when the issue is legislative intent a legislative abrogation of an erroneous court interpretation of that intent does not implicate ex post facto consideration.

## CONCLUSION

Based on the above cited legal authorities, Petitioner prays this Honorable Court should accept jurisdiction in this case.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, this 14 day of March, 1989.

EDWARD C. HILL, JR.
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