

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,607

**FILED**  
SID J. WHITE

THE STATE OF FLORIDA,  
Petitioner,

OCT 2 1980

-vs-

CLERK, SUPREME COURT  
By \_\_\_\_\_  
Deputy Clerk

ROY KENNETH FINNEY,  
Respondent.

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DISCRETIONARY REVIEW, CONFLICT JURISDICTION  
FROM THE DISTRICT COURT OF APPEAL,  
THIRD DISTRICT

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ANSWER BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

This is the answer brief on the merits by the defendant Roy Finney in this conflict review of the decision of the Third District Court of Appeal which affirmed the granting of the defendant's motion for post conviction relief reversing the defendant's conviction and sentence for possession of a firearm in the commission of a felony.

Citations to the record are abbreviated as follows:

- (R) - Clerk's Record on Appeal
- (T) - Transcript of Proceedings
- (A) - Appendix attached hereto

STATEMENT OF THE CASE AND FACTS

The defendant accepts the state's Statement of the Case and Facts in the initial brief.

SUMMARY OF ARGUMENT

The defendant submits the decision of the Third District Court of Appeal is correct and should be approved by this Court. The Third District's opinion holds that under this Court's decisions in Hall v. State, 517 So.2d 678 (Fla. 1988), and Carawan v. State, 515 So.2d 161 (Fla. 1987), the defendant's conviction and sentence for possession of a firearm in the commission of a felony should be reversed. Under the principles of Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), regarding whether a judicial decision announcing a change in the law is to be applied retroactively, the decisions in Hall and Carawan should be given retroactive application to motions for post conviction relief.

## ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL VACATING THE DEFENDANT'S CONVICTION AND SENTENCE FOR POSSESSION OF A FIREARM IN THE COMMISSION OF A FELONY IS CORRECT AND SHOULD BE APPROVED BY THIS COURT WHERE THIS COURT'S DECISIONS IN HALL AND CARAWAN SHOULD BE GIVEN RETROACTIVE APPLICATION TO MOTIONS FOR POST CONVICTION RELIEF.

As the state correctly notes in its initial brief, the issue before this Court concerns the retroactive application of Carawan v. State, 515 So.2d 161 (Fla. 1987), and Hall v. State, 517 So.2d 678 (Fla. 1988), holding that a defendant may not be convicted for both armed robbery and possession of a firearm in the commission of that robbery, to cases which were already final at the time of those decisions and in which the issue is raised for the first time in a motion for post conviction relief pursuant to Rule 3.850, Fla.R.Crim.P.

In Witt v. State, 307 So.2d 922 (Fla. 1980), cert. denied 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), this Court set forth the applicable standard in determining whether a judicial decision announcing a change in the law is to be applied retroactively in a claim for post conviction relief. This Court held that to be cognizable under Rule 3.850, a change in the decisional law must emanate from either this Court or the United States Supreme Court, must be constitutional in nature, and must constitute a development of fundamental significance rather than an evolutionary refinement of the law. Id., at 931. This Court observed that most major constitutional changes in the law are either those which place beyond the authority of the state the

power to regulate certain conduct or to impose certain penalties, or those which are of sufficient magnitude to necessitate retroactive application as ascertained by the principles of Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed2d 1199 (1967), and Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).<sup>1</sup> Id., at 929, 931. This Court emphasized that only major constitutional changes of law will entitle a defendant to collateral relief. Id., at 929. See also McCuiston v. State, 534 So.2d 1144, 1146 (Fla. 1988); Williams v. State, 421 So.2d 512, 514 (Fla. 1982).

Applying these principles to the present case, it is evident that this Court's decisions in Carawan and Hall involve a major constitutional development of fundamental importance and not a mere evolutionary refinement of law. Under these two decisions, dual convictions and sentences for both armed robbery and possession of a firearm in the commission of that robbery are impermissible and cause the defendant to be incarcerated for a greater length of time than the law permits. As such, they are of fundamental significance and their purpose is to address these fundamental sentencing and conviction errors. It has long been held that fundamental sentencing errors that could cause the defendant to be incarcerated for a greater length of time than the law permits may be challenged in a motion for post conviction relief under Rule 3.850. Bass v. State, 530 So.2d 282 (Fla.

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<sup>1</sup> The three considerations set forth in Stovall and Linkletter are (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of a retroactive application of the new rule. Witt v. State, 387 So.2d 922, 926 (Fla. 1980).



1988); Brown v. State, 535 So.2d 332 (Fla. 1st DCA 1988); Dowdell v. State, 500 So.2d 594, 595 (Fla. 1st DCA 1986); Kraus v. State, 491 So.2d 1278 (Fla. 2d DCA 1986); Cisnero v. State, 458 So.2d 377 (Fla. 2d DCA 1984); Hamm v. State, 380 So.2d 1101 (Fla. 2d DCA 1980); see also Rule 3.850, Fla.R.Crim.P. The impact of a change in sentencing law such as this is so direct and fundamental it simply cannot be deemed to be a mere evolutionary development of law.<sup>2</sup>

Both the Third District and the Second District have held

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<sup>2</sup> The issue presented here can be compared to cases holding that changes in decisional law were merely an evolutionary refinement of the law not requiring retroactive application. Such cases generally involve changes in matters regarding the admission of evidence, Bundy v. State, 471 So.2d 9, 18 (Fla. 1985); Williams v. State, 421 So.2d 512, 515 (Fla. 1982), admission of statements following denial of right to counsel, Henderson v. Dugger, 522 So.2d 835, 837 (Fla. 1988), admission of statements made to psychiatrist in sentencing proceeding, Alvord v. State, 396 So.2d 184, 191 (Fla. 1981), improper peremptory challenges of blacks from the jury, State v. Neil, 457 So.2d 481, 488 (Fla. 1984), absence of defendant when court responded to requests from jury, Morris v. State, 422 So.2d 338, 340 (Fla. 3d DCA 1982), procedure regarding appointment of experts to examine defendant, Clark v. State, 460 So.2d 886, 889 (Fla. 1984), jury instructions, State v. Austin, 532 So.2d 19, 21 (Fla. 5th-DCA 1988), and reasons for departure from the sentencing guidelines, McCuiston v. State, 534 So.2d 1144 (Fla. 1988) -(decision in Whitehead proscribing departure based on habitual offender not retroactive).

The state relies on the guidelines cases in support of its position that Hall was an evolutionary refinement of law and not retroactive. (Petitioner's brief, pg. 10) The guidelines cases are very different from the present case, however, because this case involves a fundamental sentencing consideration directly impinging on the defendant's immediate length of incarceration, whereas the guidelines cases merely involve reasons for departure that may enter into the judge's discretion in imposing a sentence. See Tafero v. State, 459 So.2d 1034, 1035 (Fla. 1984) (change of law regarding propriety of death sentence under Enmund cognizable in post conviction relief). Moreover, as this Court noted in McCuiston v. State, supra at 1146, guidelines departure reasons were an entirely new and unsettled area of law that is still in the process of refinement.

that a defendant may challenge a finalized conviction and sentence under Carawan and Hall by way of a motion for post conviction relief. Pastor v. State, 536 So.2d 356 (Fla. 3d DCA 1988), review granted, Case No: 73,780; Henderson v. State, 526 So.2d 743 (Fla. 3d DCA 1988); Etlinger v. State, 538 So.2d 1354 (Fla. 2d DCA 1989); Jensen v. State, 538 So.2d 540 (Fla. 2d DCA 1989), review granted, Case No: 73,828; Merckle v. State, 541 So.2d 1312 (Fla. 2d DCA 1989), review granted, Case No: 74,106; Spadaro v. State, 539 So.2d 1169 (Fla. 2d DCA 1989); Glenn v. State, 537 So.2d 611 (Fla. 2d DCA 1988), review granted, Case No: 73,496; Gonzalez-Osorio v. State, 535 So.2d 644 (Fla. 2d DCA 1988). Although the First District and the Fourth District have held that Hall is not retroactive because they "do not discern anything in Hall that would make that decision apply retroactively or provide that such dual convictions now constitute fundamental error under the reasoning in Witt v. State," Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988), review denied, 536 So.2d 244 (Fla. 1988); Love v. State, 532 So.2d 1133 (Fla. 4th DCA 1988), review granted, Case No: 73,401; Clark v. State, 530 So.2d 519 (Fla. 5th DCA 1988), the defendant submits those decisions were incorrectly decided and should be disapproved by this Court.

This Court stated in Witt that the question of whether to retroactively apply a change in the law in a claim for post conviction relief requires resolution of the "conflict between two important goals of the criminal justice system - ensuring finalty of decisions on the one hand, and ensuring fairness and

uniformity in individual cases on the other - within the context of post conviction relief . . ." 387 So.2d at 924-925. In the present case, resolution of this conflict must be to ensure fairness and uniformity. To not permit retroactive application of Carawan and Hall would allow the conviction and sentence for possession of a firearm under identical circumstances to be determined by the status of a defendant's appeal at the time of issuance of those decisions. As this Court stated in Bass v. State, 530 So.2d 282 (Fla. 1988), with respect to the retroactive application of stacked mandatory minimum sentences in Palmer, "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 of being sentenced for similar conduct after that decision was rendered.'" See also Brown v. State, 535 So.2d 332, 333 (Fla. 1st DCA 1988) (interests of fairness and uniformity require retroactive application of changes in law regarding applicable guidelines scoresheet because otherwise permissible sentence under the guidelines would be determined by the status of the defendant's trial).'

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<sup>3</sup> With respect to the other two considerations of Stovall, it should be noted that the effect on the administration of justice of a retroactive application of Hall and Carawan is negligible and would not unduly burden the courts since the lower courts need only vacate the conviction and sentence for the possession of the firearm count. See Brown v. State, 535 So.2d 332, 333 (Fla. 1st DCA 1988) (retroactive application of Miller regarding amended guidelines will place no undue burden on courts to resentence using proper guidelines scoresheet); compare Williams v. State, 421 So.2d 512, 515 (Fla. 1982) (retroactive application of Sarmiento excluding evidence illegally seized prior to the decision would increase burden of administration of justice by requiring hearings and by running the risk of having destroyed (Cont'd)

In sum, this Court's decisions in Hall and Carawan are of fundamental significance and it would be manifestly unfair to not permit post conviction relief based on those decisions. The decision of the Third District Court of Appeal in this case is correct and the lower court's order vacating the defendant's conviction and sentence for possession of a firearm in the commission of the robbery should be approved.

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evidence, unavailable witnesses and dimmed memories).

Moreover, the reliance on the old rule is of little significance since the remedy of merely vacating the conviction and sentence is so efficient. Compare Williams v. State, supra at 515 (significant reliance placed on pre-Sarmiento law by police in obtaining warrantless, electronic communications of defendants).

CONCLUSION

For the foregoing reasons, the defendant respectfully requests this Court to approve the decision of the Third District Court of Appeal and to remand the case with directions to vacate the defendant's conviction and sentence for possession of a firearm in the commission of a felony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was hand-delivered to Penny Brill, Assistant State Attorney, 1351 NW 12 Street, Miami, Florida 33125, this 29th day of September 1989.

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