IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 90,524

SOLOMON STEVENS,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE FIFTH JUDICIAL CIRCUIT IN AND FOR
LAKE COUNTY, FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This case is before the court upon a question certified by the district court to be of great public importance, namely, whether this Court's decision in **State v.** *Iacovone, 660 So.* 2d 1371 (Fla. 1995), should be applied retroactively.

Stevens was convicted after a jury trial of numerous offenses committed on November 11, 1989, including attempted second degree murder of a law enforcement officer. On direct appeal, the district court affirmed, per curiam, and mandate issued on May 31, 1991. Stevens *v. State, 580* So. 2d 769 (Fla. 5th DCA 1991).

On April 30, 1996, Stevens filed a second motion for postconviction relief alleging, among other things, that his sentence as an habitual violent felony offender for attempted second degree murder of a law enforcement officer **was** illegal. The trial court summarily denied the motion as time barred.

On appeal, the district court held that Stevens' sentence of life imprisonment with a twenty-five **year** minimum mandatory term on this count must be reversed because of the retroactive application of *State v. Iacovone, 660 So.* 2d 1371 (Fla. 1995). The court noted that since this crime was no longer a life felony, on remand, the trial court may impose an enhanced sentence under the habitual offender act. The court certified the following question **as** one of

great public importance:

> WHETHER *STATE V. IACOVONE, 660 So.* 2d 1371 (Fla. 1995), MUST BE APPLIED RETROACTIVELY?

Stevens v. State, 691 So. 2d 622, 625 (Fla. 5th DCA 1997).

Judge Griffin dissented from the majority's finding that *Iacovone* was retroactive on the ground that the case was not constitutional in nature, but rather, was decided 'on the basis of garden variety statutory construction." *Stevens v. State,* 691 So. 2d at 625.

SUMMARY OF ARGUMENT

The certified question should be answered in the negative. This Court's decision in **Iacovone was** based upon statutory construction and was not constitutional in nature. Therefore, it should not be applied retroactively to cases which were final before it **was** decided.

ARGUMENT

THIS COURT'S DECISION IN ***STATE*** *V.* ***IACOVONE,*** 660 so. 2D 1371 (FLA. 1995) WAS NOT CONSTITUTIONAL IN NATURE AND SO SHOULD NOT BE RETROACTIVELY APPLIED.

In *State* ***v. Iacovone, 660 So.*** 2d 1371 (Fla. 1995), this Court reviewed section 784.07, Florida Statutes (1991), and determined that the penalty provision applied only to attempted first degree murder of a law enforcement officer. The decision was expressly based upon statutory construction and not constitutional arguments.

> We find standard rules of statutory construction dispositive of this case without reaching the constitutional issue. See, ***Singletary v. State, 332 So.*** 2d 551, 552 (Fla. 1975) ("[W]e adhere to the settled principle of constitutional law that courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds.").
>
> Under standard rules of construction,...if a literal interpretation leads to an unreasonable result...we must examine the matter further. Statutes, as a rule, "will not be interpreted so as to yield an absurd result." (Citations omitted)
> Id. at 1373.

Immediately after the first sentence quoted above, the Court added a footnote indicating that if it were to address the constitutional issue, there could be "formidable due process hurdles." Judge Griffin correctly found that this footnote was not the holding of the case. "The fact that the Court observed in dictum that if the statute meant what they had just finished saying it did not mean, then (maybe) there might be a constitutional problem does not make a decision 'constitutional in nature.'" *Stevens v. State, 691 So.* 2d 622, 625 (Fla. 5th DCA 1997).

The best evidence that *Iacovone* should not be retroactively applied is the decision itself, which clearly states that it is based upon rules of statutory construction. *Compare, State v. Woodley*, 22 Fla. L. Weekly S174 (Fla. Apr. 3, 1997).

Stevens' sentence became final in 1991. In order for him to reap the benefit of the *Iacovone* holding, he bears the burden of demonstrating that the decision should be retroactively applied to cases like his which were final before the decision was rendered. To meet this burden, Respondent must establish that the change in decisional law satisfies each of three prongs: 1) that the decision issued from the Supreme Court of the United States or this Court; 2) that the decision is constitutional in nature; and 3) that the decision has fundamental significance. *Witt v. State,* 387 *So.* 2d

922 (Fla. *1981); State v. Callaway, 658 So.* 2d 983 (Fla. 1995). The State contends that the district court's decision erred in finding that the second prong had been met in this case.

The holding of the Iacovone case was expressly based upon statutory construction, and not the constitutional issues raised. The court below found that in addition to the footnote discussed above, the decision's discussion of the legislative goal of providing protection for law enforcement officers would not be served by punishing an attempt more severely than the completed offense. "This discussion reveals the statute's vulnerability to equal protection arguments, thereby further suggesting that the **Iacovone** decision is constitutional in nature." ***Stevens v. State, 691 So.*** 2d at 624. As noted by the dissent, equal protection is inapplicable to this case because persons who attempt to murder **law** enforcement officers are not a suspect class. See, ***In re Estate of*** Greenburg, 390 So. 2d 40 (Fla. 1980).

The State has a strong interest in finality of criminal cases, and this Court rarely finds a change in decisional law to require retroactive application. Most recently, this Court concluded that ***State*** v. ***Gray,*** 654 So. 2d 522 (Fla. 1995), is not retroactive. ***State v.*** *Woodley*, 22 Fla. L. Weekly S174 (Fla. Apr. 3, 1997). This holding comports with several other decisions which decline to

apply decisional law to cases which were final before the decision issued, even when the decisions may relate to constitutional issues. See, State ***v. Glenn, 558 So.*** 2d 4 (Fla. 1990) (double jeopardy analysis of ***State*** v. Carawan, 515 So. 2d 161 (Fla. 1987) not retroactive); ***Taylor v. State,*** 630 So. 2d 1038 (Fla. 1993) (invalidation of jury instruction on flight as improper comment upon evidence not retroactive); ***Valentine v. State,*** 616 So. 2d ***971*** (Fla. 1993) (requirement of inquiry into motives for exercising peremptory challenges not retroactive).

The certified question should be answered in the negative. This Court's decision in *Iacovone* was based upon statutory construction and was not constitutional in nature. Therefore, it should not be applied retroactively to cases like this which were final before it was decided.

CONCLUSION

Based upon the foregoing argument and authority, the State respectfully requests this Honorable Court to accept jurisdiction in this case and answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief has been furnished by United States Mail to Solomon Stevens, Petitioner pro se, DC# 711465, at Sumter Correctional Institution, P.O. BOX 667, Bushnell, FL 33513, this 16th day of June, 1997.

Belle B. Turner
Assistant Attorney General

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APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

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facie case of authenticity. However, in the instant case, it was erroneous for the trial court to exclude the letter because there was *prima facie* evidence that the defendant, or someone acting as his scribe, penned the letter. Accordingly, we reverse the trial court's suppression order and remand this matter to the trial court for further proceedings.

REVERSED and REMANDED. (DAUKSCH and GRIFFIN, JJ., concur.)

'90.901 Requirement of authentication or identification.—Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

* * *

Criminal law--Post conviction relief--Decision in which supreme court held that statute **providing for enhancement of** attempted murder of law enforcement officer to **life felony applies only to crime of attempted first-degree** murder **applies** retroactively-Question certified-Decision **was** constitutional in nature-Change **in law** effectuated by **decision removed** from state **the** legislative **authority to impose certain penalties for crimes of** attempted **second-** and third-degree murder of law enforcement officers

SOLOMON STEVENS, Appellant, v. STATE OF FLORIDA. Appellee. 5th District. Case No. 96-2492. Opinion filed April 18, 1997. 3.850 Appeal from the Circuit Court for Lake County, Mark J. Hill, Judge. Counsel: Solomon Stevens, Bushnell, pro se. Robert A. Butterworth, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

(ANTOON, J.) Following his conviction for, among other things, attempted second-degree murder of a law enforcement officer, Solomon Stevens (defendant) was sentenced to life in prison with a mandatory minimum term of twenty-five years. He has appealed the denial of his motion for post-conviction relief filed under Florida Rule of Criminal Procedure 3.850. We reverse because the defendant's sentence is illegal under *State v. Iacovone*, 660 So. 2d 1371 (Fla. 1995).[1]

In 1988, the legislature enacted section 784.07(3), Florida Statutes (Supp. 1988), which provided that any person convicted of attempting to murder a law enforcement officer would be guilty of a life felony, punishable as provided in section 775.0825, Florida Statutes (Supp. 1988). This latter section in turn provided that a person convicted of attempted murder of a law enforcement officer would be required to serve "no less than 25 years before becoming eligible for parole." These statutes made no distinction with regard to the degrees of the murder attempted. In other words, it appeared from the plain reading of the statute that the punishment would be the same regardless of whether the attempt was to commit first-, second-, or third-degree murder.

However, in *Iacovone*, our supreme court construed sections 784.07(3) and 775.0825 to apply only to the crime of attempted first-degree murder. In so ruling, the court pointed out that, if the statutes were interpreted otherwise, the crimes of attempted second- and third-degree murder would be punished more severely than the completed crime of second- or third-degree murder. For example, a defendant convicted of attempted second-degree murder of a law enforcement officer would receive a sentence of life or forty years with a twenty-five-year mandatory minimum, while a defendant who actually committed second-degree murder would receive no more than thirty years with a twenty-five-year mandatory minimum, Similarly, a defendant convicted of attempted third-degree murder of a law enforcement officer would receive a sentence of life or forty years with a twenty-five-year mandatory minimum, while one who actually committed third-degree murder would receive a term of imprisonment not exceeding fifteen years with a fifteen-year mandatory minimum. 660 So. 2d at 1373.

The state acknowledges the holding in *Iacovone* but argues that the decision cannot be applied retroactively to the defendant's 1990 conviction. We disagree. Pursuant to the test for retroactivity set forth in *Witt v. State*, 387 So. 2d 922 (Fla.1980), *Iacovone* must be applied retroactively to this case.

In *Witt*, our supreme court held that a "change in decisional law" will not be considered in a motion for post-conviction relief unless the change: (a) originates in either the United States Supreme Court or the Florida Supreme Court; (b) is constitutional in nature; and (c) has fundamental significance. *Witt v. State*, 387 So. 2d at 931. In reaching this conclusion, the court weighed two conflicting "goals of the criminal justice system—ensuring finality of decision on the one hand, and ensuring fairness and uniformity in individual cases on the other...." *Id.* at 925, This three-part test was recently affirmed in *State* v. *Callaway*, 658 So, 2d 983,986 (Fla. 1995).

The *Iacovone* decision clearly satisfies the first prong of the *Witt* analysis. The second prong is not as easily resolved because the *Iacovone* decision rests upon the application of standard rules of statutory construction. However, in a footnote, the court referred to the constitutional implications of the issue, writing:

> Were we to address the constitutional issue, the penalty scheme proposed by the State [applying the statutes to all degrees] would face formidable due process hurdles." See. *e.g., State v. Saiez*, 489 So. 2d 1125, 1128 (Fla. 1986) ([T]he guarantee of due process requires that the means selected shall have a reasonable and substantial relation to the object sought to be obtained ....).

Iacovone v. State, 660 So. 2d at 1373, n.1. This language supports the conclusion that the *Iacovone* decision is constitutional in nature.

The second district court's opinion in *Iacovone v. State, 639* So. 2d 1108 (Fla. 2d DCA 1994), evinces concern over the due process implications of sections 784.07(3) and 775.0825. While the second district's opinion focuses on equal protection, the court refers to Judge Zehmer's concurring opinion in *Carpentier* v. State, 587 So. 2d 1355, 1359 (Fla. 1st DCA 1991), *review denied,* 599 So. 2d 654 (Fla. 1992), wherein he wrote that:

> [A statutory scheme that provides] for a single level of punishment for an "attempted murder" of a law enforcement officer while preserving different levels of punishment for the actual murder of such officers . . . and . . . purports to impose a greater penalty for an "attempted murder in the third degree" than for a consummated killing constituting "murder in the third degree," smacks heavily of arbitrary and capricious legislation so vague and uncertain in meaning that it fails to meet constitutional requirements of due process.

Iacovone v. State, 639 So. 2d at 1109-1110, n.3.

The constitutional nature of the supreme court's opinion is further demonstrated by the court's discussion of the legislative goal of providing maximum protection for law enforcement officers, and the suggestion that this goal would not be served by punishing an attempt more severely than the completed act. This discussion reveals the statute's vulnerability to equal protection arguments, thereby further suggesting that the *Iacovone* decision is constitutional in nature,

The third and final consideration under the *Witt* analysis is whether the change in the law has fundamental significance. Changes in the law which have "fundamental significance" fall into two categories: (a) changes in the law which remove authority from the state to regulate certain conduct or to impose certain penalties, and (b) changes in the law which are of such sufficient magnitude to necessitate retroactive application. *Witt v. State,* 387 So. 2d at 929. The change in the law effectuated by the ruling in *Iacovone* satisfies the first category since the decision has removed from the state the legislative authority to impose certain penalties for the crimes of attempted second- and third-degree murder of law enforcement officers. In other words, the state may no longer punish the attempt to commit a murder more severely than the completed act of murder.'

In summary, we hold that the decision in *Iacovone* applies

rciroactivcly, and therefore, the defendant's sentence of life imprisonment with a twenty-five-year minimum mandatory term must be rcvcrscd, On remand, the trial court must resentence the defendant and treat the crime of attempted second-dcgrcc murder of a law enforcement officer as a second-degree felony. Notably, the trial court previously determined that the defendant was a habitual violent felony offender. While habitual offender sanctions can not be imposed for life felonies, see e.g. *Wiley v. State,* 636 So, 2d 547 (Fla. 1st DCA 1994), the instant offense is no longer a life felony and, as a result, on remand the trial court may impose enhanced sanctions.

We certify the following question as one of great public importance:

WHETHER *STATE V. IACOVONE, 660 So.* 2d 1371 (Fla. 1995), MUST BE APPLIED RETROACTIVELY.

REVERSED and REMANDED. (PETERSON, C.J., concurs. GRIFFIN, J., dissents, with opinion.)

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[1]The other grounds raised in the defendant's rule 3.850 motion are either time barred or meritless.

*We need not address the question of whether the change is one of "significant" magnitude as defined in *Stovall* v. *Denno,* 388 U.S. 293, 87 S. Ct. 1967. 18 L. Ed. 2d 1199 (1967).

(GRIFFIN, J., dissenting.) I respectfully dissent. The point at which I part company with the majority is its conclusion that the *Iacovone* decision is "constitutional in nature." This is based on dictum in footnote one of the Iucovone decision where the court referenced the due process requirement that the means selected have a reasonable and substantial relation to the object sought to be obtained. 660 So. 2d 1373, n. 1. The holding of Iucovone, however, was that section 784.07(3) and section 775.0825, Florida Statutes, in referring to "attempted murder of a law enforcement officer" meant attempted first-degree murder, not second or third-degree murder. The fact that the court observed in dictum that if the statute meant what they had just finished saying it did not mean, then (maybe) there might be a constitutional problem does not make a decision "constitutional in nature." Without engaging in a debate over whether it would be unconstitutional for a legislature to establish a criminal penalty for a completed crime, including murder, that is less severe than the attempt to commit the crime, it appears clear from the face of the *Iacovone* opinion that the case was decided on the basis of garden variety statutory construction. According to my understanding of most classical analyses of retroactive application of a high court decision in the area of criminal law, this one would not qualify. I do acknowledge, however, that the high court's treatment in *State* v. *Callaway,* 658 So. 2d 983 (Fla. 1995), of the retroactivity of its decision in *Hale* makes the application of the seemingly clear-cut three-prong test of *Witt* more difficult. The supreme court described its decision concerning the second prong of *Witt* as follows:

> "*Hale* also satisfies the requirement that it be constitutional in nature. As the district court in the instant case recognized, in the absence of an empowering statute, the imposition of consecutive habitual felony offender sentences for offenses arising out of a single criminal episode could not withstand a due process analysis. Furthermore, the decision in *Hale* significantly impacts a defendant's constitutional liberty interest."

Callaway, 658 So. 2d 896 (citation omitted). On the face of it, that description of the second prong of the *Witt* test would make retroactive virtually any high court decision concerning the interpretation of a criminal law or procedure that was favorable to the defendant. It appears more likely, however, that this description is simply a shorthand reference to the Second District Court of Appeal's discussion of this issue. *Callaway v. State, 642* So. 2d 636 (Fla. 2d DCA 1994). There, Judge Altenbemd explained that *Hale* involved a problem of a trial court's imposing a sentence where there was no statutory authority to do so (i.e. nothing existed that would authorize what was done) as opposed IO a "common law analysis or a statutory interpretation." *Id.* at 640. The case before us, however, clearly does involve "a common law analysis or statutory interpretation." Thus, because this case involves a legal issue not rising to the level of a due process violation, it should not bc applied to judgments that arc final.[1]

The majority relies on the specially concurring opinion Of Judge Zehmer in *Carpentier* in support of the due process basis for the *Iacovone* decision but does not mention that, even though he assumed the statute punished the attempt more severely than the completed act, Judge Zehmer ncvcrthcless found the statute constitutional as applied to attempted second-degree murder.

> Nevertheless, I join in affirming the conviction and decline to bold the statute facially invalid on constitutional grounds because I believe that at the very least the statute puts one on notice that attempting to unlawfully kill a law enforcement officer is a criminal offense punishable as a life felony. Since the circumstances of this offense do not involve the elements of "attempted third degree murder" of a law enforcement officer, I conclude that we are not required to consider any potential constitutional infirmity based on an illogical scheme to punish for attempted murder at a significantly greater level than for third degree murder.

Carpentier v. State, 587 So. 2d 1355, 1359 (Fla. 1st DCA 1991). The defendant in this case was convicted of attempted second-degree murder. Thus, what Judge Zehmer found legal, this court, relying on Judge Zehmer, finds illegal. The irony is that based on the majority decision, Mr. Carpentier will now be entitled to the resentencing the First District Court denied him in his own promptly-to-be-filed 3.850 proceeding. This is an especially bizarre outcome given that the supreme court has now explained that "murder" as used in the statute really meant only first-degree murder. Thus, now that the statute has been construed nor to mean what Judge Zehmer assumed it meant, the sentence he found sustainable on constitutional grounds will be invalidated by this court on constitutional grounds.

Finally, the majority makes an equal protection argument in support of its decision. Equal protection finds no support in either the *Iucovone* decision or in *Carpentier.* With respect, equal protection in the constitutional sense can have nothing to do with this case-unless those persons who attempt to murder law enforcement officers now constitute a "suspect" class of persons entitled to the special protection of the law and heightened scrutiny of any law that disadvantages them.

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[1]I confess the distinction between the state prosecuting or punishing a defendant without statutory authority and prosecuting a defendant under an erroneous interpretation of a statute is not one I could drive a truck through, but the distinction appears to exist.

* * *

Criminal law-Grand theft by food service employee—Evidence-Confession-Error to suppress confession given to employer's security officers on ground that officers failed to advise defendant of his *Miranda* rights-No state action was involved in interrogation conducted by employer's security officers-Neither fact that county Sheriff's Office maintained office in same building as employer's security complex nor fact that Sheriff's Office was aware that employer regularly conducted interviews such as one in question caused interrogation to rise to level of state action-Shtute **requiring that law enforcement be called to scene immediately if offender is taken into custody does not apply to instant case where there was no evidence that defendant was ever detained** or otherwise placed into custody and, **in** fact, shop steward present during **interview advised defendant he was free to leave the interview and could 'just get up and leave"**

STATE OF FLORIDA. Appellant, v. JAMES M. CURLEY, Appellee. 5th District. Case No. **96-1766.** Opinion **filed April 18, 1997.** Appeal from the Circuit Court for Orange County, Robert C. Wattles, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Hall, Assistant Attorney General, Daytona Beach, for Appellant. John Notari, Orlando, for