067

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 REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

When considering whether a decision represents a change in law, the decision itself must be examined to determine its basis. Respondent improperly attempts to reargue the Iacovone decision and offer additional, constitutional grounds why it was correctly decided. This argument ignores the fact that the decision was based solely on statutory construction and expressly not decided on the constitutional arguments presented. Iacovone represents an evolutionary refinement and not a major jurisprudential upheaval which should be retroactively applied.

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 response to the State's argument that the decision in Jacovone was not constitutional in nature, Mr. Stevens essentially argues that it should have been. In a lengthy and generally well presented brief for a layman, Respondent contends that the statute violates due process, is based upon an irrational classification, and produces an irrational result. While Petitioner disagrees with these conclusions, ultimately the State contends that these arguments are an improper attempt to reargue the basis for the Jacovone decision.

The question here is whether the decision in Iacovone represents a "...*major* constitititutonal change of law" that constitutes a 'jurisprudential upheaval" or merely an "...evolutionary refinement in the criminal law." Witt v. State, 387 So. 2d 922, 929 (Fla. 1981). The decision in Iacovone was solely based upon statutory construction, and this Court expressly declined to consider the constitutional arguments presented. It cannot represent even a minor constitutional change in law because

it was not decided on the basis of constitutional principles.

Mr. Stevens' conviction became final on May 31, 1991. Nothing prevented him from **raising** this allegedly fundamental constitutional violation on direct appeal or in his first motion for postconviction relief.

Respondent's reliance upon the decision in State v. Gray, 654 so. **2d 552** (Fla. 1995) cannot offer him solace. In State v. Woodley, 22 Fla. L. Weekly S174 (Fla. Apr. 3, 1997), this Court held that Gray is not entitled to retroactive application. 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 long before it was decided.

Even if this Honorable Court determines the decision is a major constitutional change of law representing a judisprudential upheaval, Respondent requests an incorrect remedy. He is not entitled to a new trial, but rather, a new sentencing hearing only. It is only the sentencing provisions of the statute which were invalidated in the Iacovone case. As noted by the district court, at this resentencing, he is now subject to habitual offender enhancement.

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 8th day of September, 1997.

belle B. Turner
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