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

RESPONDENT'S BRIEF ON THE MERITS

SOLOMON STEVENS #B711465-B2106L
SUMTER CORRECTIONAL INSTITUTION
P. 0. BOX 667
BUSHNELL, FLORIDA 33513-0667

RESPONDENT, PRO SE.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

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.

The Respondent, Solomon Stevens, was convicted on several sworn and signed amended information after a jury trial of numerous offenses committed on November 11 1989, including attempted second degree "felony" murder of a law enforcement officer. On direct appeal, the district court affirmed, per curiam, and mandate issued on May 13, 1991, Stevens v. State, 580 So. 2d 769 (Fla. 5th DCA 1991).

On April 30, 1996, Respondent, Stevens, filed a second motion for postconviction relief, pursuant to Florida Rules of Criminal P. Rule 3.850(b) alleging, among other grounds raised that his sentence as an habitual violent felony offender for attempted second degree "felony" 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 twenty-five years 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 affirmative. This Court's decision in Iacovone was based upon statutory construction and was constitutional in nature. Therefore, it should be applied retroactively to all case which were final before it was decided,

ARGUMENT

THIS COURT'S DECISION IN STATE V. IACOVONE, 660 SO. 2D 1371 (Fla. 1995), WAS CONSTITUTIONAL IN NATURE AND SHOULD BE RETROACTIVELY APPLIED.

This Court reviewed section 784.07(3) and 775.0825, Florida Statutes (1991), in State v. Iacovone, 660 So. 2d 1371 (Fla. 1995), and determined that the penalty provision applies only to first-degree murder of a law enforcement officer. But it appears that the District Courts of Appeals have interpreted this Court's decision as only applying to attempted first-degree murder of a law enforcement officer. Lamb v. State, 668 So. 2d 666 (Fla. 2d DCA 1996); and Newbold v. State, 667 So. 2d 996 (Fla. 3d DCA 1996).

This Court in State v. Iacovone, 660 SO. 2d 1371 (Fla. 1995), stated;

> When the statutes are limited to first degree murder is enhanced when undertaken against a law enforcement officer, and the penalty for the attempted. This is a logical arrangement that reasonably advances the legislature's goal of providing law enforcement officers with the greatest protection possible under state law.
>
> We hold that section 784.07(3) and 775.0825 apply only to first degree murder.

Respondent, submit's that Florida Court's interpretation and irrational classification of said Statute's violate's the Due Process and Equal Protection Clause of the United States Constitution

in that said interpretation and irrational classification leads to an absurd and unreasonable result, which render's it unconstitutional on it's face.

ISSUE

CONSTITUTIONALITY OF FLORIDA STATUTES 782.04(1)(a)1, (2), (3), 777.04(1),(4), 784.07(3); SECTION 775.082(3)(a) AND (3)(b).

SECTION 782.04(1)(a)1, (2), (3)- MURDER

(l)(a) The unlawful killing of a human being:

1. When perpetrated design to effect the death of the person killed or any human being;

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any particular individual, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) When aperson is killed in the perpetration of, or in the attempt to perpetrate, any:

(a) Trafficking offense prohibited by s. 893,135(1),

(b) Arson,

(c) Sexual battery,

(d) Robbery,

(e) Burglary,

(f) Kidnapping,

(g) Escape,

(h) Aggravated child abuse,

(i) Aircraft piracy, or

(j) Unlawful throwing, placing, or discharging of a

destructive device or bomb
by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony is guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

SECION 777.04(1), (4)- ATTEMPT, SOLICITATION, CONSPIRACY, GENERALLY.

(1) Whoever at attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such an offense, but fails in the perpetration or is intercepted or prevented in the execution of the same, commits the offense of criminal attempt and shall, when no express provision is made by law for the punishment of such attempt, be punish as provided in subsection (4). The offense of criminal attempt shall include the act of an adult who, with intent to commit an offense prohibited by law, allures, seduces, coaxes, or induces a child under the age of 12 to engage in an iffense prohibited by law.

(4) Whoever commits the offense of criminal attempt, criminal solicitation, or criminal conspiracy shall be punished as follows:
(a) If the offense attempted, solicited, or conspired to is a capital felony, the person convicted is guilty of a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
(b) If the offense attempted, solicited, or conspired to is a life felony or a felony of the first degree, the person convicted is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084.

(c) If the offense attempted, solicited, or conspired to is a felony of the second degree or a burglary that is a felony of the third degree, the person convicted is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(d) If the offense attempted, solicited, or conspired to is a felony of the third degree, the person convicted is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(e) If the offense attempted, solicited, or conspired to is a misdemeanor of the first or second degree, the person convicted is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083. or s. 775.084.

OBLIGATION OF REVIEWING COURTS

Reviewing courts must avoid interpertation of statutes that would lead to absurd of unreasonable outcome. See Carpenters Dist. Counsel of New Orleans & Vicinity v. Dillard Dept. Stores Inc., 15 F. 3d 1275, cert. denied, 115 S. Ct. 933, 130 L. Ed. 2d 879; Bouker v. Cigna Corp., 847 F. Supp. 377. (E. D. Pa. 1994).

It is obligatin of court to contrue statute to avoid absurd results, "if alternative interpertations are available and consistent with legislative purpose. See U. S. v. Schneider, 14 F. 3d 876. (C. A. La.1994); Griffin v. Oceanic Contractors, Inc., 458 U. S. 564, 575, 102 S. Ct. 3245, 3252, 73 L. Ed. 2d 973, (1982) (emphasis added).

The legislature enacts penal statutes, such as 775.082(3)(a) & (b) under the state's "Police Power", which derives from the states sovereign right to enact laws for the protection of it's

citizens. Such power, however, is not boundless and is confined to those acts which may be reasonably construed as expedient for protection of the public health, safety, welfare, or morals.

The Due Process Clause of our Federal and State Constitutions do not prevent the legitimate interference with individual rights under the police power, but do place limits on such interference. See State v. Saiez, 489 So. 2d 1125 (Fla. 1986).

SECTION 775.082(3)(b)- PUNISHMENT

> For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statutes, by imprisonment for a term of years not exceeding life. (emphasis added).

section 775.082(3)(a)

> For a life felony committed prior to October 1, 1983, by a term of imprisonment for life, or for a term of years not less than 30 years and, for a life felony committed on or after October 1, 1983, by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years.

Florida Courts reading of the statutes results in an interpretation unsustainable under the rules of statutory construction. Further, said statutes 775.082(3)(a) and (3)(b), should be interperted to "avoid untenable distinctions and unrealiable result whenever possible". See American Tobacco Co. v. Patterson, 456 U. S. 63, 71, 102 S. Ct. 1534, 1538, 71 L. Ed. 2d 748 (1982).

EFFECTS AND CONSEQUENCES

Irrational classifictions may violate fundamental constitutional principles, if the prescribed penalties are not "rationally related to recognized legislative objective of establishing more severe penalties for acts which it believes have greater social impact and more grave consequences". See Iacovone v. State, 639 So. 2d 1108 (Fla. 1st DCA 1994), approved, 660 So. 2d 1371 (Fla. 1995); Newbold v. State, 667 So. 2d 996, 997 (Fla.3d DCA 1996); People v. Suago, 867 P. 2d 161, Col. Ct. (1986); State v. Leone, 118 So. 2d 781, 784 (Fla. 1960); See also W. Lafave and A. Scott, Handbook on Criminal Law sect. 20 at 136-137, (1972).

For the state to exceed those bounds without rational justification is to collide with the Due Process Clause. See: Patch Enterprises v. McCall, 447 F. Supp. 1075, 1081 (M. D. Ocala, Fla. 1978).

The statutory scheme in question in this case invites a traditional equal protection analysis. The test to be used in examining a statutory classification was set forth by the United States District Court, in Patch Enterprises Inc. v. McCall (supra.), which states: "any form of state legislation creating discriminatory classifications. (1) That concern fundamental constitutional rights, or (2) Whose defining criteria are inherently suspect, or (3) That are unnecessarily restrictive and unreasonable related to legislative purported purpose, is subject to challenge and examination as a denial of equal protection of the laws".

The history of the legislative intent in passing said penal laws and punishment, therefore is noted as followed:

1983 Regular Session Chapter 83-87, Senate Bill No. 1140 (additions are underlined):

"An act relating to sentencing; amending s. 775.082(3)(a), redefining the penalty to be imposed for a life felony committed on or after October 1, 1983; amending s. 921.001 . . . pg. 715.

SECTION 775.082- PENALTIES

(3) A person who has been convicted of any other designated felony may be punished as follows:

(a) For a life felony, committed prior to October 1, 1983, by a term of imprisonment for life or for a term of years not less than 30 years and for a life felony committed on or after October 1, 1983, by a term of imprisonment not exceeding 40 years.

HISTORICAL AND STATUTORY NOTES

West Fla. Stat. Ann, 1992: s. 775.08- Classes and Definitions of Offenses: "The 1971, Legislature continued on its course to keep Florida in the mainstream of the nation-wide movement for criminal code revision by ranking the first step in substantive revision. Chapter 71-136 (C. S. for H. B. 935) is a forerunner of the implementation of the recommendations contained in the American Bar Associations Minimum Standards relating to sentencing alternatives and procedures and the model penal code sentencing provisions. The act classifies over 1150 crimes into six uniform categories and standardizes the penalties for each category as follows:

MAXIMUM PENALTY

FELONIES:	IMPRISONMENT	FINES	SUBSEQUENT FELONIES
Capital	Life-Death		
First Degree	30 years	$10,000	Life

Second Degree	15 years	$10,000	30 years
Third Degree	5 years	5,000	10 years
MISDEMEANORS:			
First Degree	1 year	1,000	
Second Degree	60 days	500	

Florida, as all states, define and/or categorize crimes by degree of felonies receiving the more severe punishment.

In Sterling v. State, 584 So. 2d 626 (Fla.2d DCA 1991); sentence of 45 years followed by 30 years probation for armed robbery legal pursuant to s. 775.082(3)(b) and s. 812.13(2)(a), a first degree felony. However, 40 years was the maxmum for attempted first degree murder enhanced to life felony for the gun. See also: Dunn v. State, 522 So. 2d 4 (Fla. 5th DCA 1988).

All Florida Courts have repeatedly refused to rule on the constitutionality of s. 775.082(3)(b). However, most Florida Courts points out the "anomaly" that exists. Said courts have declined to rule "sua sponte" on this anomaly simply, because most of the foregoing cases (as the instant case) were filed pro se by inmates uneducated in legal terminology and therefore, failed to spell out in capital letters, that the statutory scheme is irrational and therefore, is unconstitutional. However, said cases (including the instant case) did challenge said statute as being unconstitutional.

Crabtree v. State, 624 So. 2d 743 (Fla. 5th DCA 1993), review denied, 634 So. 2d 623 (Fla.1994), is a prime example of state courts irrational interpretations used to circumvent the Legislative intent, not to further said intent.

In Carpenter v. State, 587 So. 2d 1355 (Fla.lst DCA 1991), the

First District Court of Appeal (which denied Petitioner's habeas corpus) further refused to address this issue by holding; "It's true, under current law a person convicted of third degree murder of a law enforcement officer would receive a less severe sentence than one convicted of attempted murder of an officer under s. 784.07(3). However, there is no requirement that the legislature address all related evils simultaneous or that it even address all related evils". See State ex.rel. Florida R. Com'rs v. Atlantic Coast Line R. Co., 60 Fla. 218, 53 So. 601, 610 (1910)(emphasis added).

It should be noted that by the courts failure to certify the question to the Florida Supreme Court, sucessfully prohibited Carpenter and similiarly situated inmates from review by the State highest court, the same as the instant case.

In State v. Iaovone, 660 So. 2d 1371 (Fla. 1995), the Supreme Court held; "the discrepany recognized by the penalty for attempted third degree murder of a law enforcement officer (i.e. life or 40 years with a 25 years mandatory minimum) is vastly greater than the penalty for the completed third degree murder of a law enforcement officer (i.e. 15 years with a 15 years mandatory minimum). The statutes violates equal protection by punishing attempted third degree murder more harshly than the completed act".

The court, in failing to rule on the constitutionality of said statutes quotes it's decision in Singletary v. State, 322 So. 2d 551, 552 (Fla. 1975), wherein it held;

> "We 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".

It should be noted that in Singletary, the case involved speedy trial violations, not irrational scheme in classification or interpretation of penal statutes. The court in Singletary, further stated; procedural rules should be given a construction calculated to further justice, and not to frustrate it. Respondent submits that the same should hold true for sentencing statutes as a "procedural rule".

The instant case, unlike Singletary, must be decided upon the constitutionality of these statutes because, the instant case in which the question arises, may not be effectively disposed of an other grounds due to the 1st DCA denied without opinion of Petitioner's State habeas corpus. Thus, the Florida Supreme Court is prohibited by law from hearing this Issue. The Florida Supreme Court further stated in Iacovone, that;

> ". ..under standard rule of construction, it is our primary duty to give effect to the legislative intent; and if a literal interpretation leads to an unreasonable result, plainly at variance with the purpose of the legislation as a whole, we must examine the matter further". at 1373.

If, the legislative intent when enacting statute 775.082(3)(b), was to enhance the crime of robbery from a second degree felony to a first degree felony for "carrying a weapon", then what about 775.087 ?

F. S. SECT. 775.081-CLASSIFICATION OF FELONIES:

1. Felonies are classified, for the purpose of sentence and for any other purpose specifically provided by statutes, into the following categories:

a. Capital Felony

b. Life Felony

c. First Degree Felony

[remainder omitted].

F. S. SECT. 775.082-PENALTIES:

a. Capital felony-death or life with 25 years mandatory minimum.

b. Life felony committed prior to October 1, 1983, term of life or for a term not less than 30 years, and for a life felony committed on or after October 1, 1983, by a term of imprisonment not exceeding 40 years.

c. For a felony of the first degree, by a term of imprisonment not exceeding 30 years, or, when specifically provided by statutes, by imprisonment for a term of years not exceeding life imprisonment.

COMMENT (LAWS 1972, c. 72-724)

"A distinction between life imprisonment under subsection (1) and that contemplated under subsection (4)(a) [now (3)(a)], relating to life felonies should be noted. In the former case, there is a minimum period to be serve on a life sentence before eligibility for parole. In the latter, there is no such minimum, but only a minimum term of years, which must be imposed if

> life imprisonment is not the sentence. There is no minimum sentence for felonies of the first degree...
>
> Thus, each category contemplates a descending degree of severity according to the classification of the crime.

Webster's dictionary defines 'descending" as follows: 'to pass from higher to lower in any scale or series". Black's law dictionary defines "descending" as follows: 'to pass by succession... the term has no aquisition by devise'.

Thus, there can be "no doubt" the legislative intent was to impose more severe punishment for life felony than first degree felony.

IRRATIONAL INTERPRETATIONS

Florida courts have had numerous opportunities to correct this irrational classification, which leads to absurd results. In Mills v. State, 642 So. 2d 15 (Fla. 4th DCA 1994), the court, in a footnote opinion noted; "Salas highlights an anomaly that exists in the permissible punishments for life felonies and first degree felonies. Ironically, the statutory language allows the latter to be punished more severely than the former, In Salas, this court reversed 99 years sentence imposed for sexual battery, life felonies, because they exceed the 40 years sentence limit under section 775.082(3)(a), Florida Statutes (1983), Salas, 589 So. 2d at 344-45.

At the same time, the court upheld 99 years dentence for kidnapping, because kidnapping is a first degree felony punishable 'by a term of imprisonment not exceeding 30 years, or, when speifically

provided by statutes, by imprisonment for a term of years not exceeding life imprisonment". s. 775.082(3)(b) Fla. Stat. (1983).

In Greenhalgh v. State 582 So. 2d 107 (Fla.2d DCA 1991), the court held;

> "Whenever, court sentencing life felony opts for term of years in lieu of life sentence that court is limited to sentence no harsher than 40 years, but no such limitations is imposed with respects to first degree felonies punishable by life, section 775.082(3)(a) and s. 787.01(2).

Greenhalgh, also claims that his 99 years sentence for kidnapping exceeds the statutory maximum. This point highlights a statutory anomaly with regards to the punishment of certain serious felony offenses. "It has been held elsewhere that 300 years is less than life". Powlowski v. State, 467 So. 2d 334 (Fla. 5th DCA 1985). The court further noted; "A fortiori, Greenhalgh's 99 years sentene would be a lawful sentence, if his kidnapping charge was not enhanced by his possession of a weapon".

In Bell v. State, 589 So. 2d 1374 (Fla. 1st DCA1991), held that robbery without firearm is a second degre felony for, which defendant may be sentenced to term of imprisonment not exceeding 15 years. See s. 775.082(3)(c) and s. 812.13(2)(c). By virture of a statutory anomaly, no comparable limitations is placed on the term of years that may be imposed on a first degree felony. s. 775.082(3)(b).

SECTION 775.087 (1992): HISTORICIAL ANDSTATUTORY NOTES

This section, as it appeared in Florida Statutes

(1974)(has never been repealed).

> 1. Unless, otherwise prohibited by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be classified as follows:
>
> a. In the case of a felony of the first degree, to a life felony. [remainder omitted].

Thus, Statutes 775.082(3)(b), cannot be said to be "necessary to promote compelling government interest", as required. See Hankins v. State of Hawaii, 639 F. Supp. 1552 (D. Hawaii 1986); also see Soverino v. State, 356 So. 2d 269, 271 (Fla. 1978); and State v. Saiez, 489 So. 2d 1125, 1128 (Fla. 1986)(the means selected must have a reasonable and substantial relation to the object sought to be obtained).

> 1982 Supplement to Fla. Stat. 921.001-Sentencing Commission.
>
> [There is a sentencing commission which shall be responsible for the development of a state wide system of sentencing guidelines... as are necessary to ensure certainty of punishment as well as fairness to offenders and to citizens of the state. [emphasis added].
>
> By enacting the sentencing guidelines the legislators acknowledged the fact that sentencing judges possessed uncontrolable power to sentence a defendant to any term he or she desired. However, it failed to

> repeal or modify s. 775.082(3)(b) and this unconstitutional statute is stell law and still being used.

It is evident: from sequent legislative history and other reason stated herein that said statute was not intented for such irrational classification, that said classification and interpretation is arbitrary, capricious, completely lacking any rational basis and brings forth an absurd result which is of course is unconstitutional.

It is further evident from the subsequent cases and opinions given by Florida Courts, including the Supreme Court of Florida, that the state has had ample opportunity to correct this evil, but has repeatly failed to do so.

Petitioner states that the Respondentbears the burden of de monstrating 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 Petitioner contends that the district court's decision erred in finding that the second prong had been met in this case. That the holdind of the Iacovone case was expressly based upon statutory construction, and not the constitutional issues raised.

This Court in Iacovone, 660 So. 2d 1371 (Fla. 1995), stated;

> We fail to seehow this goal is furthered by applying sections 784.07(3) and 775.0825 to all degrees of muder. If the purpose of the statutes is to discourage lethal attacks against law enforcement officer, as the State contends, then the penalty for the completed crime should be greater, not less, than the penalty for the attempt. Otherwise, a criminal who attempts to murder a law enforcement officer would have a substantial incentive to complete the act in order to avoid exposure to the harsher penalty. The State's interpretation thus would seem to encourage, not discourage, lethal attacks. This is an irrational result.
>
> When the statutes are limited to first degree murder, they result in a sensible scheme. The penalty for attempted first degree murder is enhanced when undertaken against a law enforcement officer, and the penalty for the completed act of first degree murder of a law enforcement officer is greater than the penalty for the attempt. This is a logical arrangement that reasonably advances the legislature's goal of providing law enforcement officer with the greatest protection possible under state laws.
>
> We hold that section 784.07(3) and 775.0825 apply only to first degree murder.

In State v. Glenn, 558 So. 2d 4 (Fla. 1990) Id. (footnote omitted). This Court stated that three prongs in Stovall v. Denno, 388 U. S. 293, 297, 87 S. Ct. 1967, 1970, 18 L. Ed. 2d 1199 (1967), 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. Before

applying Witt v. State, 387 So. 2d 922 (Fla.) cert. denied, 449 U. S. 1067, 101 S.Ct. 796, 66 L. Ed. 2d 612 (1980), to the facts in McCuiston v. State, 534 So. 2d 1144 (Fla. 1988), we initially addressed problems arising out of our opinions in Bass v. State, no. 68,230 (Fla June 12, 1987), withdrawn on reh'g 530 So. 2d 282 (Fla. 1988). In Bass we considered whether Palmer v. State, 438 So. 2d 1 (Fla. 1983), which forbade "stacking" of minimum mandatory sentences for crimes arising out of a single criminal episode, should be applicable to cases adjudicated prior to Palmer. In our original opinion in Bass, we did not even consider whether Palmer should be applied retroactively, yet applied Palmer in granting relief to Bass, We held that in Palmer we did not change the law, but rather interpreted "statutory provisions" and corrected errors in the district court's implementation of that statute. Therefore, we reasoned that the interpretation of the statute in Palmer related back to the enhancement of the statute and, thus, was applicble to Bass. In our opinion on rehearing, while maintaining the result of our original opinion, we abandoned the rationale for that decision. In its place, we held that as a matter of policy, Palmer should be applied retroactively because it would be manifestly unfair to hold otherwise.

Whereas, here in the case of State v. Iacovone, 660 So. 2d 1371 (Fla. 1995), section 784.07(3), Florida Statutes (Supp. 1988) which was being applied to all degree of attempted murder of a law enforcement officer has been changed to only apply to first degree murder of a law enforcement officer, and not attempted first degree murder as the appeal courts have been interpreting because they knew that

applying 784.07(3) and 775.0825 only to first degree murder enacted a change the law.

In Moody v. State, 679 So. 2d 23, 24 (Fla. 4th DCA 1996), the court held:

In light of Iacovone and Gray, 654 So. 2d 552 (Fla. 1995)(holding that there is no crime of attempted felony murder in Florida), it is now apparent that one may be convicted of a violation of section 784.07(3) only if it is established that the murder attempted satisfies all of the elements found in that section and, in addition, the elements of first degree premeditated murder. Given this, and the fact that it appears from Iacovone that section 784.07(3) was intented by the legislature to act as an enhancement statute, it seems to us that, to change the offense of attempted murder of a law enforcement officer, one must allge in the information all of the elements set out in section 784.07(3) and the elements of first degree premeditated murder pursuant to section 782.04(1)(a)1, Florida Statutes. See generally Mesa v. State, 632 So. 2d 1094, 1097 (Fla. 3d DCA 1994)(possession of a firearm is "an essential element of the crime charged," which "must be alleged in the indictment or information," before enhancement is permitted pursuant to section 775.087, Florida Statutes).

See also, Isaac v. State, 626 So. 2d 1082, (Fla. 1st DCA 1993), review denied, 634 So. 2d 624 (Fla. 1994), where the court stated;

The clear intent behind section 784.07(3) is that one who attempts to murder "a law enforcement officer engaged in the lawful performance of his duty," or who attempts to murder "a law enforcement offgicer when the motivation for such attempt was related, all or in part, to the lawful duties of the officer," is guilty of a

life felony and subject to the additional penalties set out in section 775.0825. Whether the attempted murder would otherwise have been classifies as first, second or third degree is irrelevant. Carpentier, 587 So. 2d at 1358; Nephew, 580 So. 2d 306. All are punished in precisely the same manner under section 784.07(3). Accordingly, there is no offense as attempted first degree, attempted second degree or attempted third degree murder of a law enforcement officer. There is only attempted murder of a law enforcement officer. Because there is no such offense as attempted second.degree murder of a law enforcement officer, it was not "error" for the trial court to refuse to give an instruction on that "nonexistent offense" as a lesser-included offense of attempted murder of a law enforcement officer.

Therefore, not only should Iacovone be applied retroactively to the Respondent's case, but the case should be reversed and remanded back to the trial court for a new trial. Because as the court in Isaac v. State, 626 So. 2d 1082 (Fla. 1st DCA 1993), review denied, 634 So. 2d 624 (Fla. 1994), "there is no such offense as attempted second degree murder of a law enforcement officer**. As this Court in State v Gray, 654 So. 2d 552 (Fla. 1995), held; "there is no such offense as attempted felony murder in Florida".

In Stevens v. State, 691 So. 2d 622, 624-25 (Fla. 5th DCA 1997), the District Court stated that; On remand, the trial court must resentence the defendant and treat the crime of attempted second degree "felony" 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. Respondent contends that it would be error for the trial court to resentenced him or impose enhanced sanction on or for a "nonexistent offense".

Respondent, respectfully request this court to rule that Florida Statuttes 775.082(3)(b) and 784.07(3), violates the United States Constition's Due Process and Equal Protection Clauses and therefore, is null and void. Respondent, further request this court to order to all courts that the decision holding in Iacovone should be applied retroactively to the instant case and cases like it which were final before the decision was redender and that the instant case be reversed and remanded back to trial court for a new trial.

CONCLUSION

Based upon the foregoing argument and authority, the Respondent respectfully requests this Honorable Court to accept jurisdiction in this case and grant the relief requested and any other relief this Honorable Court deems proper.

Respectfully submitted,

SOLOMON STEVENS #B711465-B2106L
SUMTER CORRECTIONAL INSTITUTION
P. 0. BOX 667
BUSHNELL, FLORIDA 33513-0667

RESPONDENT, PRO SE.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that as requested by this Honorable Court that the original and seven ture and correct copies of the above and fore -going brief has been furnished by United States Mail to Office Of The Clerk, Supreme Court Of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, this 3 , day of July, 1997,

Solomon Stevens

CERTIFICATE OF OATH

STATE OF FLORIDA

COUNTY OF SUMTER

I HEREBY CERTIFY that the foregoing instrument was acknowledge before me this 7 day of July, 1997, by SOLOMON STEVENS, who has produced Inmate's Identification and who did take an oath that everything herein is true and correct.

Terri S Clark

NOTARY PUBLIC

TERRI S. CLARK MY COMMISSION EXPIRES AUGUST 16, 1998 #CC 385909 Bonded thru Troy Fain-Insurance NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES: