IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,677

THE STATE OF FLORIDA,

petitioner,

-VS-

STACY GANTORIUS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, **THE STATE OF FLORIDA,** was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Respondent, STACY GANTORIUS, was the Respondent in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stood in the trial court. The symbol "R."designates the original record on appeal. The symbol "T" will be used to refer to the transcript of the trial court proceedings.

STATEMENT OF THE CASE AND FACTS

On April 25, 1991, the defendant was charged by an amended information with four counts of attempted first-degree murder of a law enforcement officer, burglary, kidnaping, aggravated assault, aggravated battery, unlawful possession of a firearm while engaged in a criminal offense, and resisting an officer with violence. (R. 10-20). The defendant was tried, found guilty, and received (among other sentences) four life sentences with a twenty-five minimum mandatory pursuant to sections 784.07 (3) and 775.0825, Florida Statues (1991) on the convictions for attempted second-degree murder of a law enforcement officer. (R. 90-97). The defendant appealed to the Third District Court of Appeal, which affirmed his convictions and sentences. Gantorius v. State, 620 So. 2d 268 (Fla. 3d DCA 1993).

Subsequent to the affirmance, this Court in Jacovone v. State, 660 so. 2d 1371, 1374 (Fla. 1995), held that sections 784.07 (3) and 775.0825, Florida Statutes (1991), providing for enhancement of a conviction for attempted murder of a law enforcement officer to a life felony, applied only to the charge of attempted first-degree murder.

On January 22, 1996, the defendant filed a 3.800 (a) motion to correct illegal sentence, alleging pursuant to the holding of Iacavone, that the trial court erred by punishing his offenses of attempted second degree murder of a law enforcement officer more harshly than the completed act. On March 15, 1996, the trial court denied the motion to correct illegal sentence. The defendant filed a pro se appeal. The State responded and after reviewing the State's response, the Third District appointed the Public Defender to file a brief on behalf of the defendant with respect to the Iacavone issue,

The defendant argued that the Iacavone decision should be applied retroactively to his case because it satisfies the test set forth in Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L.E.d. 2d 612 (1980), for retroactive application of a new decision.

The State argued that the second prong of the Witt test, that the change of law must be constitutional in nature, was not satisfied because this Court specifically stated that it was resolving the issues presented in Iacavone on the basis of standard rules of statutory construction without reaching the constitutional issue.

The Third District held that this Court's decision in Pacavone was in fact, constitutional in nature. The Third District also disagreed with the State's argument that the third prong of the Witt test was not met, namely that the decision in Jacavone did not constitute a development of fundamental significance.

The Third District concluded that the factors set forth by this Court in Witt for retroactive application were satisfied. The Third District stated that since this was an issue which would ultimately have to be decided by the Supreme Court, the Third District certified the following question as one of great public importance:

> DOES THE HOLDING OF STATE V. IACAVONE, 660 2D 1371 (FLA. 1995) SATISFY THE TEST OF WITT V. STATE, 387 SO. 2D 922 (FLA. 1980), FOR RETROACTIVE APPLICATION?

See Gantorius v. State, 22 Fla. L. Weekly D1194 (Fla. 3d DCA May 14, 1997).

Accordingly, Petitioner filed a notice to invoke discretionary jurisdiction on May 20, 1997. On June 18, 1997, this Court entered an order postponing its decision on jurisdiction and ordering the Petitioner to file a brief on the merits. This brief follows.

QUESTION PRESENTED

WHETHER THE HOLDING OF STATE V. IACAVONE, 660 SO. 2D 1371 (FLA. 1995) SATISFY THE TEST OF WITT V. STATE, 387 SO. 2D 922 (FLA. 1980), FOR RETROACTIVE APPLICATION?

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal erred in applying the test set forth in Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967, 18 L.Ed. 2d 1199 (1967), since the test in Stovall is no longer applied in the determination of retroactivity for collateral appeals. In Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed. 2d 334 (1989), the Supreme Court of the United States adopted a more stringent retroactivity test for collateral appeals. Under this test, the defendant has failed to show that either of the exceptions to the general rule of nonretroactivity for cases on collateral review applies to the case at hand.

Even applying the more liberal Stovall test, it is clear that the decision in Iacovone v. State, 660 So. 2d 1371 (Fla. 1995), does not involve a major constitutional change of fundamental significance requiring retroactive application. Examining this issue in light of the test as set forth in Witt v. State. 387 So. 2d 922 (Fla.), cert denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L.Ed. 2d 612 (1980), the decision in Iacovone does not involve a major constitutional change of fundamental significance requiring retroactive application. Iacovone merely involves an evolutionary refinement of decisional law and accordingly does not

necessitate retroactive application through a motion for post conviction relief.

ARGUMENT

THE HOLDING OF STATE V. IACAVONE, 660 SO. 2D 1371 (FLA. 1995) DOES NOT SATISFY THE TEST OF WITT V. STATE, 387 SO. 2D 922 (FLA. 1980), FOR RETROACTIVE APPLICATION

The State would initially submit that the Third District erred in applying the Stovall[1] test in order to determine the question of retroactivity. In so doing, the Third District in fact, noted that Stovall is no longer the test to be applied in the determination of retroactivity for collateral appeals. In so doing the Third District cited to the United State's Supreme Court's decision in Teaaue v. Lane, 489 U. S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). A review of the decision in Teague v. Lane, indicates that the United States Supreme Court in that decision announced a distinction between direct appeals and collateral review in determining the question of retroactivity. The Supreme Court adopted a more stringent retroactivity test for collateral appeals. In so doing the Court adopted Justice Harlan's view of retroactivity for cases on collateral review asserted in Desist v. United States, 394 U.S. 244, 256-257, 89 S. Ct. 1030, 1037-1038, 22

[1]Stovall v. Denno, 388 U. S. 293, 87 S, Ct, 1967, 18 L.E.d. 2d 1199 (1967).

L.Ed.2d 248 (1969) (Harlan, J., dissenting). Justice Harlan identified only two exceptions to his general rule of nonretroactivity for cases on collateral review. First, a new rule should be applied retroactivity if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Mackev v. United States, 401 U.S. 667, 692, 91 S. Ct. 1160, 1180, 28 L.Ed.2d 404 (1971) (opinion, concurring in judgments in part and dissenting in part). Second, a new rule should be applied retroactively if it requires the observance of "those procedures that...are "implicit in the concept of ordered liberty." Id., at 693, 91 S. Ct. at 1180.

The Court in Teague v. Lane, adopted Justice Harlan's view of retroactivity and found that unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.

The first exception suggested by Justice Harlan--that a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, is not relevant here. The second exception suggested by Justice Harlan--that a new

rule should be applied retroactively if it requires the observance of "those procedures that are.,. implicit in the concept of ordered liberty is also not applicable to the case at hand. The Iacovone case is merely a nonconstitutional, evolutionary development in the law. Using the stringent analysis in Teague, it is clear that the defendant should have been precluded from raising his claim in collateral proceedings.

It is further respectfully submitted if this Court chooses to still follow the test as set forth in Stovall, in spite of the fact that the United States Supreme Court held in Teague that the Stovall test is no longer to be used to determine retroactivity on collateral review, this Court should still determine that the holding in State v. Iacavone does not satisfy the test of Witt v. State for retroactive application.

In Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L.Ed.2d 612 (1980), this Court reiterated its adherence to the very limited role for post conviction proceedings even in death cases. This Court held that only major constitutional changes of law which constitute a development of fundamental significance are cognizable under a motion for post conviction relief. Most such "jurisprudential upheavals" in the law fall within two broad categories, i.e.,

decisions such as Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L.Ed.2d 982 (1977) (death penalty inappropriate in rape cases), which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties, and decisions such as Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (state must provide adequate counsel for indigent criminal defendants in felony cases), which are of such significant magnitude as to necessitate retroactive application as determined by the three-prong test applied in Stovall v. Denno) See Witt, 387 So. 2d at 929.

Every change in decisional law, however, may not require retroactive application. As this Court stated in Witt:

> In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.
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> Id. at 929-930 (footnote omitted).

This Court further stated in Witt:

> The importance of finality in any justice system including the criminal justice system, cannot be understated. It has long been recognized that,for several reasons, litigation must, at some point come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.

Id. (footnote omitted).

In Witt, this Court held that a change in the law would not be retroactive unless it (1) originates in either the United States Supreme Court of the Florida Supreme Court; (2) is constitutional in nature; and (3) has fundamental significance. The State would respectfully submit that the defendant has only met the first prong of the test. The rule relied upon by the defendant for relief did originate in the Florida Supreme Court in the

decision in State v. Iacovone. The second and third prong of Witt however, are not met in the defendant's case.

The second prong in Witt requires that the new rule be constitutional in nature. This Court in Iacovone however specifically stated that "We find standard rules of statutory construction dispositive of this case WITHOUT reaching the constitutional issue, 660 So. 2d at 1373. This Court wrote a footnote stating, "were we to address the constitutional issue, the penalty scheme proposed by the State would face formidable due process hurdles." Id. at 1373, n. 1. This Court then went on to dispose of the case on statutory construction grounds. Therefore, the new rule of Iacovone is not constitutional in nature and the second prong of Witt has not been met.

The defendant also failed to meet the third prong under Witt. To determine whether the change in law has fundamental significance such that it overcomes the doctrine of finality and may be made applicable on collateral attack of a conviction, the change must fall within one of two broad categories. The first are those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties. The second are those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-

fold test of Stovall. The Iacovone case does not rise to the level of fundamental change in the law that occurred in Coker v. Georgia, or Gideon v. Wainwright. The decision was not even constitutional in nature by this Court's own analysis. The Iacovone case was instead a nonconstitutional, evolutionary development in the law. The State would submit that there has been no fundamental constitutional change in the law as contemplated by this Court in Witt which would permit the defendant's collateral attack on his sentences. In the interests of decisional finality this Court should find Iacovone to merely be an evolutionary refinement of the decisional law and accordingly refuse to permit its retroactive application through post conviction relief proceedings.

In State v. Glenn, 558 So. 2d 4 (Fla. 1990), this Court maintained that because of the strong concern for decisional finality, this Court rarely finds a change in decisional law to require retroactive application, citing to State v. Washington, 453 So.2d 389 (Fla. 1984); McCuiston v. State, 534 So.2d 1144 (Fla. 1988) (declined to retroactively apply Whitehead v. State, 498 So.2d 863 (Fla. 1986), which held that finding a defendant to be an habitual offender is not a legally sufficient reason for departure from sentencing guidelines); Jones v. State, 528 So. 2d 1171 (Fla. 1988) (declined to retroactively apply Haliburton v. State, 514 So.

2d 1088 (Fla. 1987), which held that police failure to comply with attorney's telephonic request not to question a defendant further until that attorney could arrive was a violation of due process); State v. Safford, 484 So. 2d 1244 (Fla. 1986) (declined to retroactively apply State v. Neil, 457 So. 2d 481 (Fla. 1984), which changed the long-standing rule in Florida that a party could never be required to explain the reasons for exercising preemptory challenges); State v. Statewright, 300 So.2d 674 (Fla. 1974) (declined to retroactively apply Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966), which established that police must warn arrested persons of their right to remain silent before questioning those persons).

This Court in State v. Glenn, contended that the decision in McCuiston provides an example of both the limited role of collateral remedies and the proper approach to be utilized in determining whether a change in decisional law should have retroactive application. In McCuiston, this Court recognized Witt as the controlling case by which to determine whether a change in decisional law should be applied retroactively. This Court in McCuiston then applied the principles of Witt and concluded that Whitehead was merely an evolutionary refinement in the law and not one which required retroactive application. 534 so. 2d at 1146.

Similarly in State v. Glenn, this Court concluded that Carawan[2] was an evolutionary refinement of the law which should not have retroactive application. Carawan involved this Court's attempt to clarify its past decisions interpreting the legislature's intent in enacting subsections 775.021 (1) and (4), Florida Statutes (1985). This Court accepted jurisdiction 'to elaborate the constitutional and statutory rationale upon which our prior decisions are grounded." 515 So. 2d at 163. This Court in State v. Glenn held that in Carawan this Court was not making a major change in the law, but rather attempting to harmonize and refine the law as it is applied in determining the proper method of construing criminal statues in light of the constitutional prohibitions against double jeopardy. This Court contended that granting collateral relief to Glenn and others similarly situated would have a strong impact upon the administration of justice. Courts would be forced to reexamine previously final and fully adjudicated cases. Moreover, courts would be faced in many cases with the problem of making difficult and time-consuming factual determinations based on state records, 558 So. 2d at 7.

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[2] Carawan v. State, 515 So. 2d 161 (Fla. 1987).

The State respectfully submits that policy interests of decisional finality weigh heavily in quashing the district court's opinion and refusing to permit retroactive application of Iacovone through collateral proceedings. The decision in Jacovone did not involve a major constitutional change of fundamental significance requiring retroactive application. In the interests of decisional finality, this Court should find Iacovone to be merely an evolutionary refinement of decisional law and accordingly refuse to permit its retroactive application through a motion for post conviction relief.

CONCLUSION

Based upon the preceding authorities and arguments, the Petitioner respectfully requests that this Court enter an opinion answering the certified question in the negative and directing the District Court to remand the matter to the trial court with instructions to reinstate the original order denying the defendant's motion to correct illegal sentence and remand with instructions to re-instate the sentences imposed in the four counts of attempted second degree murder.

Respectfully submitted,

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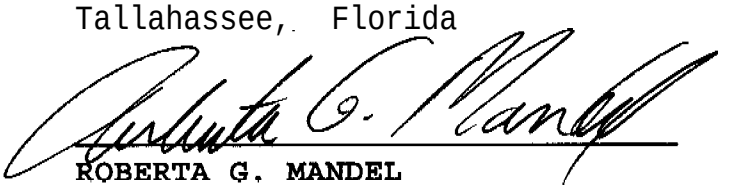

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to JULIE M. LEVITT, Assistant Public Defender, Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida 33125, on this 22nd day of July 1997.

Roberta C. Mandel

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Assistant Attorney General