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IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,677

DCA NO. 96-1021

THE STATE OF FLORIDA,

Petitioner,

v.

STACY GANTORIUS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
(CERTIFIED QUESTION)

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

OTHER AUTHORITIES

FLORIDA STATUTES

IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,677

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THE STATE OF FLORIDA,

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-vs-

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INTRODUCTION

Petitioner, the State of Florida, was the prosecution in the trial court and the Appellee before the Third District Court of Appeal. Respondent Stacy Gantorius was the Defendant in the trial court and the Appellant before the District Court of Appeal of Florida, Third District. The parties are referred to in this brief as Petitioner and Respondent or by proper name where appropriate. References to the appendix to this brief are marked "A. "

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Petitioner's Statement of the Case and Facts as set forth in its Initial Brief of Petitioner as a non-argumentative statement of the relevant facts, subject to the following addition or correction:

Mr. Gantorius was convicted of four counts of attempted second-degree murder. Although simple attempted second-degree murder with a firearm normally is a first-degree felony subject to a maximum sentence of thirty years and carries no mandatory minimum term, because a police officer was the alleged victim below, the court reclassified Mr, Gantorius's convictions to life felonies under section 784.07(3), and imposed a sentence of life on each count; additionally, the court imposed twenty-five-year mandatory minimum terms on each count pursuant to section 775.0825, Judgment; Sentence of December 13, 1991.

QUESTION PRESENTED

WHETHER THE LOWER COURT IN THIS CASE AND OTHER DISTRICT COURTS OF APPEAL HAVE HELD CORRECTLY THAT THIS COURT'S DECISION IN *IACOVONE V. STATE,* 660 SO. 2D 1371 (FLA. 1995), APPLIES RETROACTIVELY?

SUMMARY OF ARGUMENT

The three district courts of appeal that have considered the question and unanimously concluded that this Court's decision in *Iacovone* v. ***State,*** 660 So. 2d 1371 (Fla. 1995), applies retroactively, have done so correctly. They correctly followed this Court's decision in *State* v. *Callaway*, 658 So. 2d 983 (Fla. 1995), in concluding that ***Zacovone*** meets the test of ***Witt v. State, 387 So.*** 2d 929 (Fla.), ***cert. denied,*** 449 U. S. 1067, 101 S. Ct. 796, 66 L.Ed.2d 612 (1980), to allow it to be applied retroactively: *Iacovone* was a decision of this Court; it was constitutional in nature because its holding that there exists no legal authority to enhance the crime of attempted second-degree murder to a life felony or to impose a twenty-five-year mandatory term for such a conviction implicates both Mr. Gantorius's due process rights and his liberty interests under the state and federal constitutions; and because the decision is of sufficient magnitude to require retroactive application and there would no significant impact on the administration of justice because no new trial or extensive factual inquiry would be required to apply ***Iacovone*** to him. Rather, the only effect would be to require correction of the written judgment forms and reducing the outstanding sentence to a legal sentence. Under these circumstances, the scales that balance basic notions of fairness against the interest in finality of criminal proceedings tip heavily in favor of applying ***Iacovone*** retroactively,

ARGUMENT

THE LOWER COURT IN THIS CASE AND OTHER DISTRICT COURTS OF APPEAL HAVE HELD CORRECTLY THAT THIS COURT'S DECISION IN *IACOVONE V. STATE, 660 SO.* 2D 1371 (FLA. 1995), APPLIES RETROACTIVELY.

Petitioner, the State of Florida, has called upon this Court to quash the decision of the Third District Court of Appeal below, which held that this Court's decision in *Iacovone V. State,* 660 So. 2d 1371 (Fla. 1995), applies retroactively. In so doing, the State has not even acknowledged -- much less made any attempt to distinguish -- the primary case upon which the Third District's decision is premised, *State v. Callaway, 658 So.* 2d 983 (Fla. 1995). Neither has the State acknowledged that two other district courts of appeal have held exactly as the Third District did below, that *Iacovons* applies retroactively. *(House v. State,* 22 Fla. L. Weekly D1689 (Fla. 4th DCA July 8, 1997); *Stevens v. State,* 691 So. 2d 622 (Fla. 5th DCA 1997)). It is clear that each of these decisions is correct.

Initially, Respondent points out that, contrary to the State's assertion at page 8 of its brief, the Third District did not decide this case under *Stovall v. Demo, 388* U.S. 293, 87 S. Ct., 18 L.Ed.2d 1199 (Fla. 1967), and federal law. Rather, the Third District applied this Court's decision in *Witt v. State,* 387 So. 2d 929 (Fla.), *cert. denied, 449* U. S. 1067, 101 S. Ct. 796, 66 L.Ed.2d 612 (1980), which stated the test to be applied to determine retroactivity questions as a matter of Florida law. This Court has repeatedly applied *Witt* in making such determinations, most recently in *Callaway,* where the Court explicitly reaffirmed that *Witt* is the correct test. *Id.* at 986. The test under Florida law, then, is:

1) whether the decision at issue was announced by the Supreme Court of the United States or the Supreme Court of Florida;
2) whether the decision is constitutional in nature; and,

3) whether the decision has fundamental significance.

Witt at 929-30. The State has conceded that prong one is met in this case because ***Iacovone*** was a decision of this Court's. However, the State has argued that prong two is not met because the decision is not "constitutional in nature," and prong three is not met because the decision is not of "fundamental significance." The State is in error on both of these grounds.

First, the State suggests ***Iacovone*** is not constitutional in nature because the basis for the decision was a matter of statutory construction and legislative intent -- the Court ruled that the Legislature's intent was for the reclassification and enhanced penalty statutes to apply only to attempted first-degree murder. [1] Although the State would have a narrow definition of what is "constitutional in nature" that encompasses only rulings that are grounded in specific articles or amendments to the constitution, it is clear that this Court has not recognized such a narrow, wooden definition. In ***Hale v. State,*** 630 So. 2d 521 (Fla. 1993), ***cert. denied,*** ___ U.S. ___, 115 S. Ct. 278, 130 L.Ed.2d 195 (1994), this Court ruled that habitual offender sentences arising out of the same criminal transaction or episode cannot be run consecutively because the Legislature did not intend to allow both an extended statutory maximum under the habitual offender statute and a second enhancement by running extended sentences consecutively, In ***State v. Callaway***, 658 So. 2d 983 (Fla. 1995), the Court ruled that ***Hale*** applies retroactively. In so holding, the Court rejected the very argument the State makes here, for its decision in ***Hale*** regarding concurrence of sentences was based only on principles of statutory construction; yet, the Court ruled in ***Callaway*** that ***Hale*** was "constitutional in nature":

> Hale also satisfies the requirement that it be constitutional in

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[1] The Court did note at footnote one, 660 So. 2d 1374, "Were we to address the constitutional issue, the penalty scheme proposed by the State would face formidable due process hurdles."

> 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. Callaway [v. State], 642 So.2d [636,] 640 [(Fla. 2d DCA 1994)]. Furthermore, the decision in Hale significantly impacts a defendant's constitutional liberty interests.

Callaway, 658 So. 2d at 986. Here, as there, because under ***Iacovone*** sections 775.0825 and 784.07(3) do not apply to convictions for attempted second-degree murder, there exists no legal authority for the trial court to have reclassified Mr. Gantorius's offenses to life felonies thus subjecting him to possible life sentences on those counts, nor is there authority for the court to have imposed twenty-five-year mandatory minimum terms upon him; hence, due process is clearly implicated. And here, as there, this also plainly impacts on Mr. Gantorius's constitutional liberty interests. Thus, the decision in ***Iacovone*** is "constitutional in nature" as this Court has defined that phrase. ***See also Logan v. State,*** 666 So. 2d 260 (Fla. 4th DCA 1996) (ruling that this Court's decision in *Flowers* ***v. State,*** 586 So. 2d 1058 (1991), was constitutional in nature even though holding was matter of statutory interpretation that Legislature did not intend for legal restraint points to be added to guidelines more than once, because rule involved application of rule of lenity, which itself has underpinnings in the due process clauses of the state and federal constitutions)

The last consideration would be prong three of the ***Witt*** test which would require the ***Iacovone*** decision to have "fundamental significance." The State argues it does not. However, this again is not correct under this Court's analysis in *Callaway*. The *Callaway* court declined to reach the issue of whether specifically the ***Hab*** decision is of fundamental significance, because the ***Hale*** decision met the substitute analysis of *Stovall* ***v.*** *Denno*, ***388*** U.S. 293, 87 S. Ct. 1967,

18 L.Ed.2d 1199 (1967), which asks whether the decision simply is "of sufficient magnitude" to necessitate retroactive application The *Stovall* test identities three subsidiary considerations under this inquiry. The first requires examination of the purpose of the newly announced rule. In *Callaway*, the Court held *Stovall* was satisfied because the purpose of Hale was to ensure that defendants did not receive doubly-enhanced punishment. Here, the purpose of the *Iacovona* rule obviously is to protect defendants who were not convicted of attempted first-degree murder of a law enforcement officer from having their convictions enhanced and their potential punishments extended (from thirty years to life, and including a mandatory term of twenty-five years) as if they had been convicted of that offense.

The second consideration is whether courts have relied on the previous law to the point where it has become entrenched precedent. The *Court* in *Callaway* held that the pre-*Hale* law had not become so entrenched because the rule had been in existence only for a short time, since 1988 . Here, just as in *Callaway*, the provisions at issue, sections 775.0823 and 784.07(3), both were created by the Legislature in 1988, in chapter 88-381, sections 55 and 56, **LAWS OF FLORIDA** (1988) and thus were in existence only for a short time.

The third, and in some ways most important, consideration is the impact upon the administration of justice that will be occasioned by retroactive application. In *Callaway*, the Court held that no serious adverse impact upon justice would occur because no new trials would be required[2] and there would be no need for extensive delving into stale records; the Court noted that

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[2]The cases relied on by the State at pages 14-15 of its brief all rejected retroactive application of Court decisions where such application would have occasioned wholesale new trials due to procedural deficiencies in pre-trial or time-of-trial proceedings.

The only exceptions are *McCuiston v. State,* 534 So. 2d 1144 (Fla. 1988), which rejected retroactive application of *Whitehead v. State,* 498 So. 2d 863 (Fla. 1986), which was a sentencing-related case, and *State* v. *Glenn*, 558 So. 2d 4 (Fla. 1990). However, these two cases

justice would be more adversely impacted if the affected defendants were required to serve sentences twice as long as similarly-situated defendants who did have the benefit of the *Hale* rule. Here, as there, no new trials will be required; no ancient convictions will have to be overturned; no stale evidence will have to be unearthed. Rather, the courts will have to look only to the very face of the judgment and sentence to determine whether there is an *Iacovone* problem and to correct it, the court merely would have to check a box on the judgment form for the correct degree of offense, and reduce the sentence to a legal one. [3] Moreover, justice surely would be more adversely impacted if defendants convicted of what actually are first- or second-degree felonies nevertheless had their convictions treated as life felonies and were sentenced accordingly (perhaps to life, as Respondent has been), while defendants who have the benefit of the *Iacovone* rule were not so treated. These factors compel the same conclusion here that the Court reached in *Callaway*:

> The concern for fairness and uniformity in individual cases outweighs any adverse impact that retroactive application of

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are, in common parlance, a whole different animal. In *McCuiston*, this Court held that in fact Mr. McCuiston's sentence was not even rendered illegal under the decision McCuiston sought the benefit of. Accordingly, the new decision could not possibly have been of fundamental significance or otherwise met *the Witt* test as there simply was no great unfairness to balance against the need for finality. Similarly, there was no great unfairness to Mr. Glenn or persons similarly situated, because at the time he was convicted, double jeopardy did not prevent his dual convictions; although there was brief moment thereafter where dual convictions were prohibited, by the time of the Glenn decision dual convictions again were permitted. Accordingly, since Mr. Glenn's convictions were permissible under the law both before and after, there really was very little unfairness that he could point to to weigh against the interest in finality. No such considerations are present in the instant case, however.

[3] Indeed, it is interesting to note that application of *Iacovone* would require even less record-delving than application of *Hale*. This is because *Hale* necessarily requires an inquiry into whether the facts of the case revealed only one criminal transaction, By contrast, the only inquiry here is whether the judgment form and sentencing order reflect that defendant's convictions and sentences were enhanced under the applicable statutes; no factual inquiry is involved.

the rule might have on decisional finality.

Id. at 987. Hence, under the pertinent considerations, the *Zacovone* decision is of sufficient magnitude that it must be applied retroactively.

In short, the Third, Fourth and Fifth Districts all correctly concluded that *Zacovone* should apply retroactively, Mr. Gantorius respectfully requests that the Court approve the decision of the Third District below that Mr. Gantorius is entitled to relief under *Zacovone.*

CONCLUSION

Based on the foregoing arguments and authorities, Respondent Stacy Gantorius respectfully requests that this Honorable Court approve the decision of the Third District Court of Appeal in the instant case,

Respectfully submitted,

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BY: _____
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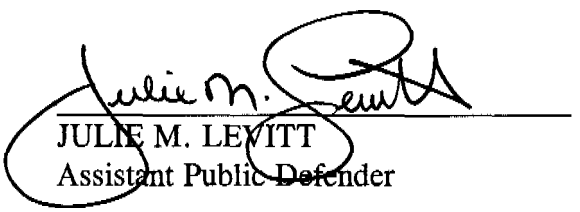
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Assistant Attorney General Roberta G. Mandel, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this 28th day of July 1997.



JULIE M. LEVITT
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,677

DCA NO. 96-1021

THE STATE OF FLORIDA,

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STACY GANTORIUS,

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APPENDIX

INDEX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF

96-1320644 FILE #2

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1997

STACY GANTORIUS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 96-1021

LOWER
TRIBUNAL NO. 90-17480

Opinion filed May 14, 1997.

An Appeal under Fla. R. App. P. 9.140(i) from the Circuit Court for Dade County, Michael A. Genden, Judge.

Bennett H. Brummer, Public Defender and Julie M. Levitt, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General and Steven Groves, Assistant Attorney General, for appellee.

Before NESBITT, COPE and SORONDO, JJ.

SORONDO, Judge.

Stacy Gantorius ("Gantorius"), appeals an order denying his motion to correct illegal sentence. On April 25, 1991, Gantorius was charged with four counts of attempted first-degree murder of a law enforcement officer, as well as burglary, kidnapping,

aggravated assault, aggravated battery, unlawful possession of a firearm and resisting an officer with violence. On November 15, 1991, the jury returned a guilty verdict, in pertinent part, on four counts of attempted second degree murder of a law enforcement officer as lesser included offenses. Gantorius was convicted and sentenced to four concurrent life sentences with 25-year minimum mandatory provisions pursuant to sections 784.07(3) and 775.0825, Florida Statutes. On July 6, 1993, this Court affirmed his judgment and sentence. Gantorius v. State, 620 So. 2d 268 (Fla. 3d DCA 1993).

On September 21, 1995, the Supreme Court held that these statutes, providing for enhancement of a conviction for attempted murder of a law enforcement officer to a life felony, apply only to the charge of attempted first-degree murder. State v. Iacavone, 660 so. 2d 1371, 1374 (Fla. 1995).

On January 22, 1996, Gantorius 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. Gantorius filed a timely appeal, pro se. Pursuant to this Court's Order to Show Cause the stare responded on Kay 16, 1996. After reviewing the state's response the Court appointed the Public Defender to file a brief on behalf of Gantorius with respect to the Iacavone issue.

The state first argues that Gantorius' sentence is not illegal as a matter of law and consequently he is not entitled to relief under Fla. R. Cr. P. 3,800. We disagree. If this court decides that the principles enunciated in Iacavone are applicable to the Appellant's case, the sentences at issue in this appeal are in excess of the statutory maximum of 30 years.

Gantorius argues 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. Ed. 2d 612 (1980), for retroactive application of a new decision. Witt held that in order for a change of law to have such application the change must, 1) emanate from the Florida Supreme Court or the Supreme Court of the United States; 2) be constitutional in nature; and 3) constitute a development of fundamental significance. We believe that the Iacavone decision satisfies this test and must be applied retroactively.

It is undisputed that Jacavone is a decision of the Supreme Court of Florida, consequently the first prong of the Witt test is satisfied.

The state argues that the second prong of the test is not satisfied because the Supreme 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.[1] The state's interpretation of the second part of the test is far too restrictive. In analyzing the second prong of the Witt test the issue is not whether the decision in question was resolved on the basis of a particular section of the Constitution but whether the decision is constitutional in *nature.* In Hale v. State, 630 So. 2d 521 (Fla. 1993), the Supreme Court of Florida held, as a matter of statutory construction, that a trial court could not impose consecutive sentences when sentencing a criminal defendant under the provisions of section 775.084, Florida Statutes (Supp. 1988), the habitual violent offender statute. In State v. Callaway, 658 So. 2d 983, 986 (Fla. 1995), the Court acknowledged that its decision in Hale had been constitutional in nature and said, ". . . 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 interests." We find the same reasoning applies to Iacavone and conclude that it is constitutional in nature.

Finally, as concerns the fundamental significance of Iacavone, we pursue the analysis of the Supreme Court in Callaway where the

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[1]The Court observed in footnote 1 of the opinion that "were we to address the constitutional issue, the penalty scheme proposed by the State would face formidable due process hurdles." 660 So. 2d at 1373.

Court stated:

> According to the Witt court, decisions which have fundamental significance generally fall into two broad categories: (a) those decisions such as Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 792, 9 L. Ed. 2d 982 (1977), "which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties;" and (b) decisions such as Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), which are of sufficient magnitude to necessitate retroactive application" under the threefold test of. Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967) , and Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965). We need not decide whether the rule announced in Hale can be characterized as one of fundamental significance because we believe that the rule satisfies the threefold test of Stovall.

Callaway, 658 so. 2d at 986-87. As the Supreme Court did in Callaway, we move on to apply the Stovall test to the present analysis.:

In Stovall the United States Supreme Court held that consideration must be given to 1) the purpose to be served by the new rule; 2) the extent of reliance on the old rule; and 3) the effect that retroactive application of the rule will have on the administration of justice. Stovall, 388 U.S. at 297.

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[2]We note,. as did the Fourth District Court of Appeal in Loaan v. State, 666 so. 2d 260, 262 (Fla. 4th DCA 1996), that the United States Supreme Court no longer appiies the Stovall test to determine retroactivity on collateral review. In Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) the Court announced a more stringent standard for the determination of retroactivity for collateral appeals. Because the Florida Supreme Court applied the Stovall test to decide Callaway we do the same here.

The purpose of the rule announced in Iacavone is to ensure that the maximum penalty for a criminal attempt is not greater than that established for the completed crime.

The extent of reliance on the old rule in this area is limited to the brief life span of section 784.07(3), Florida Statutes. The statute became effective on October 1, 1988 and was eliminated on June 8, 1995. Reliance was therefore limited to 6 years and 8 months.[1]

The last of the Stovall factors directs the court to consider the impact that the retroactive application of the rule will have on the administration of justice. We conclude that the impact will not be significant. If applied retroactively, Iacavone will not affect convictions. There will therefore be no need to address the issues of guilt or innocence, no need to track down witnesses or engage in lengthy and costly preparation of old cases for trial. The most that will be required of our Circuit Courts is to re-sentence the affected defendants. Although this will require the transportation of the prisoners in question to the appropriate venues, the process of re-sentencing itself will be relatively brief.

For the reasons set forth above, we find that the factors set forth by the Supreme Court of Florida in Witt for retroactive

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[1] In Callaway the Court found a six year period of reliance to have been brief.

application of new law have been satisfied.'

Because this is an issue which will ultimately have to be decided by the Supreme Court, we certify the following question as one of great public importance:

> DOES 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?

We reverse the denial of the Appellant's motion to correct illegal sentence and remand with instructions that the sentences imposed in the four counts of attempted second degree murder be vacated and the defendant be re-sentenced thereon.

Reversed; question certified.

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[1]See also, Slowers v. State, 586 . 2d 1058 (Fla. 1991); Logan v. State, 666 So. 2d 260 (Fla. 4th DCA 1996).