IN THE SUPREME COURT OF FLORIDA

GEREMI BERNARD PIERCE,

Petitioner,

v. **CASE NO. 94,053**

STATE OF FLORIDA,

Respondent.
_____/

APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF TYPE

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STATEMENT OF THE CASE AND FACTS

Respondent State of Florida accepts Petitioner Geremi Pierce's Statement of the Case and of the Facts as substantially correct for purposes of this appeal.

SUMMARY OF THE ARGUMENT

Respondent State of Florida submits that Brown v. State, 23 Fla. L. Weekly S535 (October 15, 1998) should be applied only prospectively.

In the case at bar, disclosure to the jury that Petitioner's prior felony was a robbery was harmless error, if error at all, in view of the overwhelming evidence of Petitioner's possession of a firearm.

ARGUMENT

ISSUE I

THE QUESTION CERTIFIED BY THE SECOND DISTRICT IS THE SAME AS THIS COURT ANSWERED IN BROWN V. STATE, CASE NO. 91,764 (OCTOBER 15, 1998) AND SHOULD ALSO BE ANSWERED IN THE AFFIRMATIVE.

The Second District Court of Appeal affirmed Petitioner's conviction and sentence below, and struck costs which were improperly imposed. The Second District Court of Appeal expressed its agreement with the Third District's opinion in Brown v. State, 700 So. 2d. 447 (Fla. 3d DCA 1997) and certified the same question certified to this Court as in Brown.

Respondent State of Florida acknowledges the authority of Brown v. State, 23 Fla. L. Weekly S535 (October 15, 1998) in which this Court receded from Parker v. State, 408 So. 2d. 1037 (Fla. 1982), holding that when requested by a defendant in a felon-in-possession of a firearm case, the trial court must approve a stipulation whereby the parties acknowledge that the defendant is, without further elaboration a prior convicted felon. At the same time, the State may place into the record, at its discretion, the actual judgment(s) and sentence(s) of the prior convicted felony conviction(s). Neither these documents nor the number and nature of the prior convictions should be disclosed to the trial court. The defendant should be required, out of the jury's presence and

after consultation with counsel, to personally acknowledge the stipulation and his voluntary waiver of his right to have the State otherwise prove the convicted felon status element beyond a reasonable doubt. This Court adopted the rationale of Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

Respondent State of Florida agrees that Petitioner's claim as to the certified question issue has been adequately preserved for review below, and that Petitioner's case was pending in the Florida Supreme Court when the Brown decision was released on October 15, 1998, making his case one of the so-called "pipeline" cases.

However, Respondent State of Florida submits the following argument to this Court for its consideration.

A. THIS COURT'S OPINION IN BROWN CHANGES THE PROCEDURE FOR ESTABLISHING THAT A DEFENDANT IS IN FACT A PRIOR CONVICTED FELON AND AS SUCH SHOULD ONLY BE APPLIED PROSPECTIVELY.

Respondent State of Florida adopts the position of Justice Harding who concurred with the majority "that the better practice in these types of cases is to require that the trial court approve a stipulation by the defendant, when so requested,

without further elaboration" and that the State should be permitted to file without disclosure to the jury, any certified copies of such prior adjudication. Justice Harding dissented as to the application of the Brown opinion, stating that the decision concerns a change in the procedure for establishing that a defendant is in fact a

prior convicted felon and as such should be applied only prospectively.

Justice Harding noted that in Brown, the trial court exercised its discretion in determining whether or not to allow a defendant's stipulation. In declining Brown's request to stipulate, the trial court was following the law as the Florida Supreme Court directed in Williams v. State, 492 So. 2d. 1051 (Fla. 1986) and Parker v. State, 408 So. 2d. 1037 (Fla. 1982).

Respondent State of Florida respectfully requests this honorable Court to re-consider its position, and restrict the Brown opinion to prospective application only.

B. IN THE CASE AT BAR, THE ERROR IF ANY WAS HARMLESS IN LIGHT OF OVERWHELMING EVIDENCE OF MR. PIERCE'S GUILT.

In State v. DeGuiglio, 491 So. 2d. 1129 (Fla. 1986) this Court stated:

> The harmless error test, as set forth in Chapman and progeny, places the burden on the state as beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or alternately stated, that there is no reasonable possibility that the error contributed to the conviction. See Chapman v. California, 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Application of the test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

DeGuilio, 491 So. 2d. at 1138.

The permissible evidence was sufficient to find Appellant guilty of possession of a firearm beyond a reasonable doubt. A loaded nine millimeter automatic pistol was found under the driver's seat of a vehicle lawfully stopped and searched by Officers Estevez and Womack and driven by Petitioner. The appellate record demonstrates that Petitioner knew there was a concealed weapon under the driver's seat. When the car was stopped, Mr. Pierce was asked to produce his registration and driver's license; Mr. Pierce reached for the glove box, was told to stop it and complied. He looked over at Officer Estevez and made a "real quick" movement (T23) down between his legs. The officer yelled to him to stop, grabbed his own gun and removed Petitioner forcibly from the car and secured him. This movement under the circumstances described indicates Mr. Pierce's knowledge of what was under the car seat.

After being read Miranda warnings, Petitioner made a statement that he had just gotten into the car to go get Chinese food for his wife, before the car was stopped. The hour was 1:00 am to 1:30 am. There was Chinese food in the car as well as an open forty ounce bottle of beer. Later Petitioner spontaneously changed his story, indicating he had been in the car since 4:00 pm that day.

The defense presented two witnesses, Petitioner's wife Angela McKenzie, and Petitioner's mother, Betty Jean Pierce. His wife testified that she drove the same car to work and after work at 4:30 pm went to her mother-in-law's house in the Ponce DeLeon housing

project at about 5:30 pm. The evidence showed a discrepancy as to the basic question as to how long Petitioner had been in the car. Mr. Pierce's wife testified that she found the gun on an electrical box in the housing project, told her mother-in-law about it, got a towel and picked the gun up with it and placed the gun under the driver's seat of her car. (Of this testimony, her mother in law corroborated only that she asked for a towel and returned it.) Leaving the gun and calling the police did not occur to her. She used a towel so as not to get her prints on the gun in case it had been used in a crime, she testified. She admitted she could have used her mother-in-law's phone to call police about the gun but didn't. She testified she intended to take the gun to the police the next day.

Interestingly enough, she arrived home at 7:00 pm, greeted Petitioner and did not tell him about the gun or finding it. In fact on cross-examination she testified that she knew her husband was a convicted felon and it was a crime for him to possess a gun. She told no one about the event of finding the gun until five months after her husband's arrest, except her husband who she told when he called about 1:30 am to say he had been arrested.

Petitioner's wife testified that her husband left about 9:00 pm to go get Chinese food at her request. She admitted the Chinese restaurant she usually went to was 25 minutes away but closed at

9:00 pm. She admitted her husband was arrested four hours after he left for Chinese food.

Both Petitioner's and his wife's testimony or statements are filled with internal inconsistencies and are inconsistent with the other's. The evidence of Petitioner's knowing possession of a firearm is overwhelming.

Respondent State of Florida submits that admission of Mr. Pierce's prior conviction of robbery to establish his "felon" status did not contribute to a verdict of guilt on the element of possession of a firearm. Alternately stated, there is no reasonable possibility that disclosure of the nature of Petitioner's prior felony contributed to the conviction. The evidence of Petitioner's guilt was overwhelming as established by trial testimony of law enforcement officers, the inconsistencies in Petitioner's post-Miranda statements and the internal inconsistencies in his wife's testimony. Moreover, conviction of simple robbery does not imply use of a firearm. Section 812.13 Florida Statutes provides:

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault or putting in fear.

Robbery, while it involves force, violence, assault or putting in fear, does not necessarily infer the use of a firearm and

therefore a person convicted of a past robbery is no more likely to be guilty of possessing a firearm than any other person.

Respondent State of Florida respectfully requests this honorable Court to find that the admission of a certified copy of Appellant conviction for robbery, if error at all, is harmless error in the instant case.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Appellee respectfully requests that this honorable Court hold that the Brown decision be applied prospectively only or alternately that Petitioner's judgment and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by U.S. mail to Douglas S. Connor, Esquire, Public Defender's Office, Post Office Box 9000-Drawer PD, Bartow, Florida 33831 on this 5th day of November 1998.

OF COUNSEL FOR RESPONDENT