IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 96,095
	)	
TELFA DEAN HALL,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts, subject to the addition of the following facts:

With the enhancement of 25 points for firearm possession in this case, Respondent's total sentencing points rose to 66 and his sentence for possession of a firearm by a convicted felon to 36 months (sentencing transcript 10, 11; record 84-87).

SUMMARY OF ARGUMENT

The Fifth District's ruling must be upheld because Respondent's case is indistinguishable from ***White***, ***Williams***, and ***Carder***. No more did the legislature intend that we punish crimes we have not charged than it intended to enhance the punishment of a crime because it involved possession of a firearm where such possession is already an element of the crime being punished.

ARGUMENT

BECAUSE THIS CASE IS INDISTINGUISHABLE FROM *WHITE* AND *WILLIAMS*, THE DISTRICT COURT CORRECTLY REVERSED RESPONDENT'S SENTENCE

Finding the instant case indistinguishable from both ***White v. State***, 714 So.2d 440 (Fla.1998), and its own ***Williams v. State***, 724 So.2d 652 (Fla. 5th DCA 1999), and ***Carder v. State***, 731 So.2d 784 (Fla. 5th DCA 1999), the Fifth District reversed a sentence enhanced by 25 points for firearm possession. Petitioner now calls upon this Court to restore all 25 points to the computation of proper sentences for Respondent and defendants similarly-situated. It may be that Petitioner has set up a straw man named "*25* points" to invite a ruling that sentences for possession of a *semiautomatic* firearm may be enhanced by *seven* points (that is, 25 minus the eighteen ***White*** disallowed for possession of *any* firearm).

But this Court has already refused to infer, "absent more specific expression," that our legislature intended to heap added punishment on the possessor of a thing (here, Respondent) when the act of possessing it is precisely what called for his punishment in the first place. ***White*** at 444. White's case is indistinguishable from Respondent's because each received a sentence enhanced for firearm-possession upon conviction for firearm-possession-by-a-convicted-

felon. Although Petitioner argues that Respondent's sentencing was proper because the firearm *he* possessed was a semiautomatic, this conclusion is no more supportable than those reached at trial level in this line of cases.

It is too well-settled to require citation that we punish only the crimes we charge. Now the phrase *"absent more specific expression"* echoes from ***White*** through ***Williams*** to ***Hall***. In all three, the charge in question (in ***Williams*** and ***Hall***, the only charge) was simple "possession of a firearm by a convicted felon," although both Williams and Hall were caught with semiautomatics. Judge Dauksch's special concurring opinion in ***Williams*** pinpointed the flaw:

> Because appellant was not charged with having a semiautomatic firearm in his possession when he committed the crime and because the jury did not make a
> specific finding regarding the possession of a semiautomatic weapon, it was error for the judge to enhance the sentence.
>
> If appellant had been charged and found guilty of possession of a firearm while in commission of a felony and the charge and verdict said semiautomatic weapon, then the sentence could be enhanced. There is a difference between a firearm and a semiautomatic weapon and the legislature has recognized it by permitting a more severe penalty.

724 So.2d at 653. "It may be," wrote Judge Sharp in the main opinion,

> ... that courts should impose the same requirements for application of additional points pursuant to rule 3.702(d)(12) as they have for enhancing the seriousness of offenses pursuant to section 775.087(1). In general, those requirements are that the information must actually

> charge use of a firearm, and the jury must make a fact finding that a firearm was used. *See* ***State v. Overfelt***, 457 So.2d 1385 (Fla.1984); ***King v. State***, 705 So.2d 668 (Fla. 4th DCA 1998); ***Hargrove v. State***, 675 So.2d 1010 (Fla. 4th DCA 1996); *approved*, 694 So.2d 729 (Fla.1997). Thus **in this case, the information should have charged** Williams with **possession of a semi-automatic weapon and** had the case gone to **the jury**, it **would have had to have specifically found he possessed a semi-automatic weapon**.
>
> However, we have found no appellate case that applies those requirements for section 775.087(1) cases to rule 3.702(d)(12). Since it is not necessary to this opinion to reach that issue, we decline to do so.

Id. (emphasis supplied). Unlike Williams', Respondent's case did go to the jury, and neither the charge nor the verdict form contained the words "semiautomatic weapon." Thus, what was dicta in ***Williams*** should become the law of ***Hall***.

CONCLUSION

BASED UPON the foregoing cases, authorities and policies, Respondent Telfa Dean Hall prays this Honorable Court to uphold the ruling of the Fifth District Court of Appeal in this case.

Respectfully submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

_____
JANET BROOK GOODRICH
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal, and mailed to Mr. Telfa Dean Hall, Inmate #375209 MB 237, Hardee Correctional Institution, 6901 State Road 62, Bowling Green, Florida 33840, on this 12th day of November, 1999.

_____

JANET BROOK GOODRICH
ASSISTANT PUBLIC DEFENDER