IN THE SUPREME COURT OF FLORIDA

PAUL WAYNE NEW,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC00-1240

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

TRISHA E. MEGGS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 045489

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Paul Wayne New, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The symbol "I" will refer to the one volume record on appeal; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State adds the following facts for clarity:

Petitioner pled guilty to three counts of robbery, and on November 1, 1994, the trial court sentenced him as a habitual violent felony offender to concurrent terms of fifteen years in prison with a ten year minimum mandatory sentence. (I.8-24). Petitioner did not appeal his convictions or sentences. (I.1). On June 9, 1999, petitioner filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. (I.1-5).

Petitioner claimed that his attorney was ineffective for advising him that he must be sentenced to the mandatory minimum sentence when classified as a habitual violent offender and that the trial court unknowingly failed to exercise his discretion in sentencing the defendant to the mandatory minimum. (I.2-5).

The circuit court denied petitioner's motion because it was untimely in that it was filed more than two years after petitioner's judgment and sentence became final. (I.6-7). Petitioner filed a motion for rehearing arguing that the Florida Supreme Court's decision in State v. Hudson, 698 So. 2d 831 (Fla. 1997), was a change in law, and therefore the motion was timely. (I.25-26). The circuit court denied the motion for rehearing. (I.30).

Petitioner appealed to the First District Court of Appeal, and the First District issued a per curiam affirmance, citing Anthony v. State, 25 Fla. L. Weekly D289 (Fla. 2d DCA Jan. 26, 2000), and certifying conflict with Crawford v. State, 735 So.2d 514 (Fla. 3d DCA 1999).

This Court postponed its decision on jurisdiction and ordered briefing.

SUMMARY OF ARGUMENT

In State v. Hudson, infra, this Court found that the mandatory minimum for habitual violent felony offenders was in fact permissive rather than mandatory. More than two years after petitioner's conviction and sentence became final, Petitioner filed a motion for postconviction relief asserting errors relating to State v. Hudson, and he argued that Hudson was a change in law expanding his time to file a postconviction motion. The circuit court denied the motion as untimely. Petitioner appealed, and the First District affirmed the trial court's order citing Anthony v. State, infra. The Second District, in Anthony, held that this Court had not found that Hudson applied retroactively, and Hudson should not apply retroactively because it is an evolutionary refinement in the law and not a change of constitutional dimension. The First District certified conflict with the Third District's decision in Crawford v. State, infra. However, the defendant in Anthony petitioned for discretionary review in this Court arguing that the Second District's decision conflicted with Crawford, and this Court found that Anthony did not expressly and directly conflict with Crawford. Accordingly, as this Court has found there is no express and direct conflict, and this Court does not have jurisdiction.

Nevertheless, even if this Court did have jurisdiction, the Second District was correct in that Hudson was an evolutionary refinement in law and not a change of constitutional dimension. Therefore, Hudson does not apply retroactively and does not extend

the time period to file a motion for postconviction relief. Thus, petitioner's motion was untimely, and this Court should affirm the circuit court's order denying the motion.

ARGUMENT

ISSUE I

DID THE TRIAL COURT PROPERLY FIND THAT PETITIONER'S MOTION FOR POSTCONVICTION RELIEF WAS UNTIMELY WHEN APPELLANT CHALLENGED THE TRIAL COURT'S DECISION TO SENTENCE HIM AS A HABITUAL VIOLENT FELONY OFFENDER AND IMPOSE THE MANDATORY MINIMUM? (Restated)

Petitioner filed a motion for postconviction relief asserting that his attorney was ineffective and the trial court unknowingly failed to exercise his discretion because both defense counsel and the trial court believed that the mandatory minimum which the statute states the court shall impose was mandatory rather than permissive. The trial court denied petitioner's motion as untimely. Petitioner argues that State v. Hudson, 698 So. 2d 831 (Fla. 1997), which found that the mandatory minimum was in fact permissive, was a change in law, and therefore the motion should be timely. The First District affirmed the trial court's order denying appellant's motion by citing Anthony v. State, 25 Fla. L. Weekly D289 (Fla. 2d DCA Jan. 26, 2000). The Second District, in Anthony, held that this Court had not found that Hudson applied retroactively, and Hudson does not apply retroactively because it is an evolutionary refinement in the law and not a change of constitutional dimension.

Jurisdiction

This Court does not have jurisdiction to review this case because there is no conflict between the decisions of the district courts. To establish jurisdictional conflict under Art. V,

§3(b)(3), Fla. Const., a petitioner must show that there is an express and direct conflict of decisions. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). The alleged conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

The question is not whether this Court might or would rule differently, but whether the district court's ruling as it stands can only create vital conflict. Nielsen v. City of Sarasota, 117 So. 2d 731, 734-735 (Fla. 1960). As this Court pointed out in Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962), "if the points of law settled by the two cases are not the same, then no conflict can arise." See also Dep't of Health and Rehabilitative Serv. v. Nat'l Adoption Counseling Serv., Inc., 498 So. 2d 888 (Fla. 1986)("implied" conflict may not serve as a basis for jurisdiction).

The First District issued a per curiam affirmance, citing Anthony v. State, 25 Fla. L. Weekly D289 (Fla. 2d DCA Jan. 26, 2000), and certifying conflict with Crawford v. State, 735 So.2d 514 (Fla. 3d DCA 1999). However, this Court has already found that Anthony did not expressly and directly conflict with Crawford. Anthony petitioned for discretionary review in this Court arguing that the Second District's decision conflicted with Crawford. The State responded that Third District, in Crawford, did not find that retroactive application of Hudson was compelled by Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796,

66 L.Ed.2d 612 (1980). Although it appears that the Third District in Crawford implicitly determined that a Hudson claim could be raised in an out-of-time rule 3.850 motion, the Crawford court did not expressly determine that the Hudson decision met the test for retroactive application. Therefore, Anthony did not result in express and direct conflict with Crawford. See Anthony v. State, Case Number SC00-257. This Court denied Anthony's petition for discretionary review. Because the First District's decision was based on Anthony and this Court has found that there is express and direct conflict with Crawford, this Court does not have jurisdiction to review this case. Accordingly, this case should be dismissed.

Argument

Florida Rule of Criminal Procedure 3.850(b) provides that:

> (b) Time Limitations. A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case or more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that
>
> (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively, or
>
> (3) the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion.

Petitioner's conviction became final on December 1, 1994, when his time to file a notice of appeal expired. Gust v. State, 535 So.2d 642 (Fla. 1st DCA 1988)(holding that when a defendant does not appeal his conviction or sentence, the judgment and sentence become final when the 30-day time period for filing an appeal expires). Therefore, petitioner's motion filed on June 9, 1999 was filed well after the two-year period expired. Moreover, petitioner does not fall within any of the exceptions to the time limitation because Hudson does not involve a fundamental constitutional right which was not established within the period provided and it has not been held to apply retroactively.

In State v. Hudson, 698 So.2d 831, 832 (Fla. 1997), this Court stated that it "has repeatedly held that sentencing under the habitual offender statute is permissive, not mandatory." Therefore, this Court held that "[c]onsistent with Burdick[v. State, 594 So.2d 267 (Fla.1992)] and its progeny, we conclude that the court's sentencing discretion extends to determining whether to impose a mandatory minimum term." Id. at 833. However, the Court did not hold that Hudson applied retroactively, and "only this Court and the United States Supreme Court can adopt a change of law sufficient to precipitate a post-conviction challenge to a final conviction and sentence." Witt v. State, 387 So.2d 922, 930 (Fla. 1980)(footnote omitted).

In Witt, this Court stated that:

> To allow non-constitutional claims as bases for post-conviction relief is to permit a dual system of trial and appeal, the first being tentative and nonconclusive. Our justice system could not accommodate

> such an expansion; our citizens would never tolerate the deleterious consequences for criminal punishment, deterrence and rehabilitation. We reject, therefore, in the context of an alleged change of law, the use of post-conviction relief proceedings to correct individual miscarriages of justice or to permit roving judicial error corrections, in the absence of fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding.

Id. at 928-929. Thus, this Court "emphasized that 'only major constitutional changes of law' will be given retroactive effect so as to be cognizable under rule 3.850(b)(2)". Anthony v. State, supra. As examples of "major constitutional changes, this Court cited Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), in which the court first announced that each state must provide counsel to every indigent defendant charged with a felony at all critical stages of the proceeding, and Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), in which the court held that imposition of the death penalty for the crime of rape of an adult woman was forbidden by the Eighth Amendment to the United States Constitution as cruel and unusual punishment." Anthony v. State, at D289.

"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." Witt at 929. This Court stated that "[t]o 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." Id. at 929-930 (footnoted omitted).

This Court's decision in Hudson, to extend the discretion to impose habitual violent offender sentence to the discretion to impose the mandatory minimum for a habitual violent offender sentence, was a evolutionary refinement in criminal law and not a major constitutional change of law. See Anthony v. State, at D289(concluding that "[u]nder the analysis set forth in Witt, we conclude that Hudson made an "evolutionary refinement" in the law and not a change of constitutional dimension."). Therefore, Hudson does not apply retroactively to postconviction proceedings filed beyond the two-year limitation period. Id. Accordingly, petitioner's motion filed beyond the two-year time period set forth in Rule 3.850(b) was untimely, and this Court should affirm the circuit court's order denying the motion.

CONCLUSION

Based on the foregoing, the State respectfully submits the that the decision of the Second District Court of Appeal reported at Anthony v. State, 25 Fla. L. Weekly D289 (Fla. 2d DCA Jan. 26, 2000), should be approved, and the order entered in the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

_____
TRISHA E. MEGGS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 045489

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT
[AGO# L00-1-09579]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Paul W. New, DOC# 310679, North Florida Reception Center, Post Office Box 628, Lake Butler, Florida 32054-0628, this _____ day of August, 2000.

_____
Trisha E. Meggs
Attorney for the State of Florida

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