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THOMAS D. HALL

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IN THE SUPREME COURT OF FLORIDA

PAUL WAYNE NEW,
Petitioner,

vs.

CASE NO.: SC00-1240

STATE OF FLORIDA,
Respondent.
_____ /

PETITIONER'S REPLY BRIEF ON MERITS

(pursuant to Fla.R.App.P., Rule 9.210(d))

Paul W. New
Paul W. New, pro se
DC# 310679
North Florida Reception Center
P.O. Box# 628
Lake Butler, Florida 32054-0628

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CERTIFICATE OF FONT SIZE AND TYPE

The Petitioner certifies that the type font used in this brief is Legal Prestige 10 point.

PRELIMINARY STATEMENT

In this brief, the Petitioner is Paul Wayne New and shall be referred to as the Petitioner or Defendant throughout this brief. The Respondent is the State of Florida, and shall be referred as the State or the Appellee.

ARGUMENT

ISSUE I

WHETHER STATE V. HUDSON, 698 So.2d 831 (Fla. 1997) APPLIES RETROACTIVELY REGARDING FLA. STAT. § 775.084(4)(a) AND (4)(b) BEING PERMISSIVE AND NOT MANDATORY?

In his Initial Brief on Merits, Petitioner argued that there was a relevant "Fundamental" change in the law. This change occurred in State V. Hudson, 698 So.2d 831 (Fla. 1997) which clarified the confusion as to whether habitual violent offenders must be sentenced, or at the judge's discretion can be sentenced, to a minimum mandatory sentence.

In response, the state avoids the issue of "Fundamental" that being as cited in Adams V. Dugger, 816 F.2d 1493, 1497 (11th Cir. 1987), any sentencing error that could cause defendant to be incarcerated for greater length of time than provided by law. The Petitioner also provided this Court's ruling in Gilliam V. State, 582 So.2d 610, 612 (Fla. 1991), which applies

the requirement of "Fundamental" regarding the required retro-active application.

The state addresses needless surplus in effect acting like the proverbial Dutch Boy with its finger in the dike holding back the flood. The Petitioner realizes that the window of opportunity is now shut for other defendants to apply for this retroactive application of Hudson, supra. There will be no flood, unlike that of Heggs V. State, 25 Fla. L. Weekly S137 (Fla. Feb. 18, 2000), only a hand full of defendants will be effected.

Furthermore, the state is using Anthony V. State, 25 Fla. L. Weekly D289 (Fla. 2d DCA Jan. 26, 2000), as its "Red Cow". Anthony is not a red cow case, Anthony does not address the merits of Petitioner's "Fundamental" claim. In Adams, supra the 11th Circuit Court of Appeals held that: "...sentencing errors that could cause defendant to be incarcerated for greater length of time than provided by law is fundamental..." (Emphasis added). The state even cited the entire section of Florida Rule of Criminal Procedure 3.850(b) in their Answer Brief and it becomes apparent that they have overlooked ¶ (b)(2), which states:

(2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively, or... (Emphasis added)

Therefore when analyzing the meaning of "Fundamental" one would find in Black's Law Dictionary, Seventh Edition, 1999, on page 683 the phrase: **Fundamental Right**, with a definition

of:

1. A right derived from natural or fundamental law. 2. Constitutional law. A **significant component of liberty**, encroachment of which are rigorously tested by courts to ascertain the soundness of purported governmental justification. - A fundamental right triggers strict scrutiny to determine whether the law violates **Due Process Clause** or the Equal protection Clause of the 14th Amendment. (Emphasis added)

and page 307 the phrase **Constitutional Right**, with a definition of:

A right guaranteed by a constitution; esp., one guaranteed by the U.S. Constitution or by a state constitution.

Truly the Petitioner's "Fundamental" claim is one of liberty interest in that the Petitioner is presently faced with greater incarceration as being sentenced under a minimum mandatory sentence rather than a straight sentence in which gain time could be earned, creating an earlier release date. This extra incarceration is a violation of Due Process Clause as guaranteed under the Florida Constitution, Article 1, Section 9 and under the United States Constitution, Article 14, Section 1.

This Court has held in the case of Gilliam V. State, supra, that retroactive application is required when fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding. As echoed in the Petitioner's Initial Brief on Merits; when the elements of what constitutes "fundamental" and how fundamental applies to "retroactive" this Court can clearly justify the need of the retroactive requirement of Hudson. Mandatory versus permis-

sive sentencing is beyond any doubt much harsher, causing the Petitioner to remain incarcerated for a longer length of time. The Petitioner might also add that only a handful of defendant's will be effected by this decision.

The Respondent has obviously missed the recent decision of Jones V. State, 25 Fla. L. Weekly D1473 (Fla. 3rd DCA June 21, 2000), once again the Third District Court of Appeal ruled in favor of Jones, reversing the trial court order denying post-conviction relief and remanded to reconsider the minimum mandatory sentence as within its discretion, pursuant to Hudson. This authority also states that the only other case on point is Anthony, supra with which Crawford V. State, 735 So.2d 514 (Fla. 3rd DCA 1999) is in conflict.

CONCLUSION

Petitioner respectfully asks this Honorable Court to reverse the judgment and direct the trial judge to resentence the Petitioner in accordance with Hudson.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, Dept. of Legal Affairs, The Capitol, PL01, Tallahassee, Florida 32399-1050 on this 14th day of August, 2000.

Respectfully submitted,

Paul W. New

Paul W. New, pro se

DC# 310679

North Florida Reception Center

P.O. Box# 628

Lake Butler, Florida 32453-0628