

IN THE SUPREME COURT OF FLORIDA

TERRANCE LORENZO LOVE,            )  
  )  
          Petitioner ,                )  
vs.                                        )  
STATE OF FLORIDA,                 )  
  )  
          Resondent.                 )

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CASE NO. 73,401

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents	i
Authorities Cited	ii
Preliminary Statement	1
Statement of the Case and Facts	2-3
Summary of Argument	4-5
Argument --	

POINT I 6-9

PETITIONER'S CONVICTION AND SENTENCE FOR BOTH ROBBERY WITH A FIREARM AND POSSESSION OF A FIREARM WHILE ENGAGED IN A CRIMINAL OFFENSE VIOLATES THE DOUBLE JEOPARDY CLAUSE.

POINT II 10-11

THE TRIAL COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINE SENTENCE.

Conclusion	12
Certificate of Service	13

AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<u>Bass v. State</u> , 13 F.L.W. 527 (Fla. September 1, 1988)	9
<u>Cantor v. Davis</u> , 489 So.2d 18 (Fla. 1986)	8
<u>Carawan v. State</u> , 515 So.2d 161 (Fla. 1987)	7
<u>Delaine v. State</u> , 486 So.2d 39 (Fla. 2d DCA 1986)	10
<u>Hall v. State</u> , 517 So.2d 678 (Fla. 1988)	4,6,7,8,9
<u>Hudson v. Louisiana</u> , 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981)	7
<u>Keys v. State</u> , 500 So.2d 134 (Fla. 1986)	11
<u>State v. Gibson</u> , 452 So.2d 553 (Fla. 1984)	6
<u>State v. Johnson</u> , 483 So.2d 420 (Fla. 1986)	7
<u>State v. Jones</u> , 530 So.2d 53 (Fla. 1988)	10
<u>State v. Stafford</u> , 484 So.2d 1244 (Fla. 1986)	8
<u>Williams v. State</u> , 504 So.2d 392 (Fla. 1987)	11
<u>Witt v. State</u> , 387 So.2d 922 (Fla. 1980)	8
<u>OTHER AUTHORITIES</u>	
<u>Florida Statutes</u>	
§790.07(2)	2,6
§812.13(1) and (2)(a)	2,6

PRELIMINARY STATEMENT

Petitioner was the appellant and the respondent was the appellee in the Fourth District Court of Appeal. In this brief the parties will be referred to as they appear before this Honorable Court. A copy of the district court's opinion is attached to this brief as the Appendix.

The following symbol will be used:

"R"                      Record on Appeal

STATEMENT OF THE CASE AND FACTS

On June 9, 1986, Petitioner, **TERRENCE LOVE**, was charged with two counts of armed robbery with a firearm under Fla. Stat. § 812.13(1) and (2)(a) (Counts I and 11), and one count of possession of a firearm while engaged in a criminal offense under Fla. Stat. § 790.07(2) (Count III) (R12-13). Petitioner was found guilty of all three offenses as charged (R14). The trial court departed from the recommended guideline sentence. On appeal the Fourth District Court of Appeal found three of the four reasons for departure to be invalid and remanded to the trial court for resentencing (R16-17).

At the resentencing hearing on December 21, 1987, the trial court departed from the recommended guidelines and sentenced Petitioner to nineteen (19) years in prison for each of the robberies and fifteen (15) years in prison for possessing a firearm during a felony (R20-22). The trial court entered an order<sup>1</sup> giving the following reasons for departure:

The Defendant's criminal activity is of an escalating nature from property crimes to violent personal crimes with the utilization of a firearm. This Court finds that the above finding is sufficient to justify a departure of the Defendant's presumptive sentence.

On January 5, 1988, Petitioner timely filed his notice of appeal (R28). On October 26, 1988, the Fourth District Court of Appeal affirmed Petitioner's convictions and sentences and certified the following question as one of great public importance:

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<sup>1</sup> The trial court made this order on December 9, 1987, which was prior to the resentencing hearing (R25).

WHERE APPELLANT'S CONVICTION OF TWO COUNTS OF ARMED ROBBERY AND ONE COUNT OF POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY (SAID ROBBERIES) WAS VALID UNDER THEN EXISTING LAW AND WAS AFFIRMED ON APPEAL TO THIS COURT, BUT THE DUAL SENTENCES THEREFOR WERE REVERSED ON SAID APPEAL DUE TO IMPROPER DESIGNATION OF SEVERAL INVALID GROUNDS FOR DEPARTURE FROM THE GUIDELINES, CAN APPELLANT NOW RELY RETROACTIVELY ON HALL V. STATE, 517 So.2d 678 (Fla. 1988) DECIDED BY THE SUPREME COURT OF FLORIDA DURING THE INTERIM, IN WHICH THE SUPREME COURT OF FLORIDA DURING THE INTERIM, IN WHICH THE SUPREME COURT OVERRULED THE HOLDING IN GIBSON V. STATE, 454 So.2d 553 (Fla. 1984), THEREBY CHANGING THE PRIOR LAW BY PRECLUDING DUAL CONVICTIONS AND SENTENCES WHERE THE DEFENDANT IS CHARGED WITH TWO CRIMINAL VIOLATIONS ARISING OUT OF ONE CRIMINAL ACT.

On November 23, 1988, Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court. On December 6, this Court issued an order setting a briefing schedule for this cause.

### SUMMARY OF ARGUMENT

1. This Court's decision in Hall v. State, 517 So.2d 678 (Fla. 1988), made it clear that dual convictions for robbery with a firearm, and possession of a firearm while engaged in a criminal offense, are improper. Hall, supra, was decided on the same day that the notice of appeal was filed in the instant case. The decision in Hall, supra, should apply in the instant case for a number of separate reasons. First, double jeopardy violations are fundamental and may be corrected at any time. Second, Hall, supra, was the law at the time of the appeal and should control the result in the instant case. Third, it would be manifestly unjust for Hall to apply only to those individuals whose convictions and sentences, for the exact same conduct as Petitioner, occurred at a more fortunate time than Petitioner's convictions and sentences. Fairness requires that Hall be equally applicable to Petitioner's case. Petitioner's sentence for possession of a firearm while engaged in a criminal offense should be reversed.

2. The trial court departed from the recommended guideline sentence due to an escalating pattern of criminal activity. For a pattern of criminal activity to be a valid reason for departure the trial court must recite a specific pattern of criminal conduct. Here, the trial court did not recite such a pattern. The trial court merely referred to the judgment and sentence form. Consequently, the court's reason for departure was invalid. Petitioner's sentences must be reversed.

In addition merely because Petitioner committed a serious personal crime for the first time, does not mean that there was an escalating pattern of crime. Instead, there must be a series of escalating crimes. Thus, this reason for departure was invalid. Petitioner's sentences must be reversed.

ARGUMENT

POINT I

PETITIONER'S CONVICTION AND SENTENCE FOR BOTH  
ROBBERY WITH A FIREARM AND POSSESSION OF A  
FIREARM WHILE ENGAGED IN A CRIMINAL OFFENSE  
VIOLATES THE DOUBLE JEOPARDY CLAUSE.

On August 27, 1986, Petitioner was found guilty of, and sentenced for, both robbery with a firearm under Fla. Stat. § 812.13(1) and (2)(a) (Counts I and 11), and possession of a firearm while engaged in a criminal offense under Fla. Stat. § 790.07 (Count 111) (R14). Petitioner appealed the convictions and sentences. On December 21, 1987, Petitioner was resentenced for each of the above convictions (R20-22). Petitioner appealed again. One of the issues on appeal was whether dual convictions and sentences for both robbery with a firearm and possession of a firearm while engaged in a criminal offense were proper. On the very date of the filing of the notice of appeal in this case, January 7, 1988, in Hall v. State, 517 So.2d 678 (Fla. 1988), this Court held that dual convictions for both offenses was improper.<sup>2</sup> However, the district court held that Hall was decided too late to help Petitioner. Consequently, the district court affirmed Petitioner's convictions and sentences, but did certify the following question:

WHERE APPELLANT'S CONVICTION OF TWO COUNTS OF  
ARMED ROBBERY AND ONE COUNT OF POSSESSION OF A  
FIREARM DURING THE COMMISSION OF A FELONY (SAID  
ROBBERIES) WAS VALID UNDER THEN EXISTING LAW

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<sup>2</sup> In Hall, supra, this Court overruled State v. Gibson, 452 So.2d 553,558 (Fla. 1984), where this Court held that convictions and sentences for both the offenses were not prohibited by the double jeopardy clause because of legislative intent.

AND WAS AFFIRMED ON APPEAL TO THIS COURT, BUT THE DUAL SENTENCES THEREFOR WERE REVERSED ON SAID APPEAL DUE TO IMPROPER DESIGNATION OF SEVERAL INVALID GROUNDS FOR DEPARTURE FROM THE GUIDELINES, CAN APPELLANT NOW RELY RETROACTIVELY ON HALL V. STATE, 517 So.2d 678 (Fla. 1988) DECIDED BY THE SUPREME COURT OF FLORIDA DURING THE INTERIM, IN WHICH THE SUPREME COURT OF FLORIDA DURING THE INTERIM, IN WHICH THE SUPREME COURT OVERRULED THE HOLDING IN GIBSON V. STATE, 454 So.2d 553 (Fla. 1984), THEREBY CHANGING THE PRIOR LAW BY PRECLUDING DUAL CONVICTIONS AND SENTENCES WHERE THE DEFENDANT IS CHARGED WITH TWO CRIMINAL VIOLATIONS ARISING OUT OF ONE CRIMINAL ACT.

As can be seen by the certified question, the district court analyzed the present double jeopardy issue only in terms of whether this Court's decision in Hall can be applied retroactively. However, Petitioner respectfully submits that the issue in this case does not really involve the retroactive application of Hall. In any event, Hall should be applied to this case for any one of several reasons.

First, double jeopardy violations may be corrected at any time. This Court's decision in Hall, supra, was based on Carawan v. State, 515 So.2d 161,163 (Fla. 1987), in which it was made clear that the central issue was whether the double jeopardy clause was violated. Because this issue involves a double jeopardy violation, it is fundamental and the violation may be corrected at any time, even after a criminal guilty plea, State v. Johnson, 483 So.2d 420 (Fla. 1986), or even where it has not been asserted until after all appeals had been concluded. Hudson v. Louisiana, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

Consequently, Petitioner's conviction and sentence for possession of a firearm during the commission of a felony should be reversed.

Second, the application of Hall, supra, is not a retroactive application of that decision. Hall was decided on January 7, 1988. The notice of appeal in this case was filed on the same date (R28). Thus, the law at the time of the appeal should be applied at the time of the appellate decision. Cantor v. Davis, 489 So.2d 18,20 (Fla. 1986). Those who have not completed the appellate process are entitled to the benefit of the law in effect at the time of the decision of their case. State v. Stafford, 484 So.2d 1244,1245 (Fla. 1986). At the time of this appeal the law is clear that the dual convictions involved here violate double jeopardy. Consequently, Petitioner's conviction and sentence for possession of a firearm during the commission of a felony should be reversed.

Third, Hall, supra, should have retroactive application. As noted by this Court in Witt v. State, 387 So.2d 922, 925 (Fla. 1980), the issue of whether to apply a decision retroactively depends on weighing two goals of the criminal justice system - ensuring finality of a case and ensuring fairness and uniformity of cases. Finality should be abridged only where the more compelling objective of ensuring fairness and uniformity appears. Witt, supra at 925. Where it would be manifestly unjust to treat individuals differently merely due to the timing of their cases, this Court has made it a policy of principle to apply decisions retroactively:

Upon consideration, we have now concluded as a matter of policy that the principle of Palmer should be applied retroactively. We believe that it would be manifestly unfair for prisoners such as Bass, who received consecutive minimum mandatory sentences prior to Palmer, to be treated differently from those who had the good fortune of being sentenced for similar conduct after that decision was rendered.

Bass v. State, 13 F.L.W. 527,528 (Fla. September 1, 1988). It would be manifestly unfair to not apply Hall, supra, to Petitioner's case merely because Hall was not decided until the day that Petitioner filed his notice of appeal, while it is applied to others who were fortunate enough to be convicted and sentenced for the exact same conduct at a later time. Hall, supra, should apply retroactively. Consequently, Petitioner's conviction and sentence for possession of a firearm during the commission of a felony should be reversed.

For any one of the three reasons given above, Hall, supra, should be applied to the instant case. Petitioner's conviction and sentence for possession of a firearm during the commission of a felony should be reversed. In addition, because the reversal of this conviction and sentence will result in the elimination of ten (10) points scored on the guideline scoresheet, Petitioner's recommended guideline range will be lowered from seven (7) to nine (9) years to five-and-a-half (5 1/2) to seven (7) years, Petitioner's other sentences must be reversed and remanded for resentencing after consideration of the recomputed guideline scoresheet.<sup>3</sup>

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<sup>3</sup> If the trial court decides to depart to the same extent he originally departed, the lower recommended guideline range would cause a lower total sentence. In addition, if the

POINT II

THE TRIAL COURT ERRED IN DEPARTING FROM THE  
RECOMMENDED GUIDELINE SENTENCE.

The trial court gave the following written reason for departure:

The Defendant's criminal activity is of an escalating nature from property crimes to violent personal crimes with the utilization of a firearm. This Court finds that the above finding is sufficient to justify a departure of the Defendant's presumptive sentence. See the felony judgment and sentence sheet.

(R24). **As** can be seen from the trial court's order, the trial court failed to recite a specific pattern of criminal conduct to show an escalating pattern of criminal conduct. The reference to the judgment and sentence sheets (R14,20-22) does not show such a pattern. **As** noted by this Court in State v. Jones, 530 So.2d 53 (Fla. 1988), the failure to recite to a specific pattern of conduct will invalidate the pattern as a valid reason for departure:

If the trial court's order fails to recite a specific pattern of criminal conduct, then a defendant's pattern of criminal activity and the timing of the commission of the offenses cannot constitute clear and convincing reasons for departure from the presumptive guidelines sentence.

530 So.2d at 55. At bar the trial court did not recite to any specific facts indicating an escalating pattern of criminal

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trial court is unaware of the actual presumptive sentence under the guidelines, the court lacks sufficient information to decide whether to depart and the extent of the departure. See Delaine v. State, 486 So.2d 39 (Fla. 2d DCA 1986).

activity. Compare the trial court's recitation in Williams v. State, 504 So.2d 392,393 (Fla. 1987). Thus, the departure must be reversed.

In addition, the guidelines scoresheet does show one third degree felony and a number of misdemeanors. However, merely because Petitioner committed a serious personal crime for the first time in this case, does not mean there **is** an escalating pattern of crime. The escalating pattern of crimes exists only where there is a series of increasingly severe criminal offenses. See Keys v. State, 500 So.2d 134 (Fla. 1986) (commission of four crimes escalating in nature); Williams v. State, 504 So.2d 392 (Fla. 1987) (nine escalating offenses over ten years). In this case there was no series of increasingly severe criminal offenses. The departure should be reversed and Petitioner should be resentenced within the recommended guideline range.

CONCLUSION

For the reasons stated in Point I, Petitioner requests this Honorable Court to quash the decision of the district court with directions that Petitioner's conviction and sentence for possession of a firearm during the commission of a criminal offense be reversed and, because such reversal affects the recommended guideline range, his other sentences must be reversed and the cause remanded for recomputation of the guideline score and resentencing.

For the reasons state in Point 11, Petitioner respectfully requests this Honorable Court to reverse his sentences and to remand this cause for resentencing within the recommended guideline range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to CELIA A. TERENCE, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 28th day of December, 1988.

*Jeffrey J. Anderson*  
of Counsel