

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE

APR 10 1989

CLERK, SUPREME COURT

By _____
Deputy Clerk

Case No. 73955

2d DCA Case No. 88-3195

STATE OF FLORIDA,)
)
 Petitioner,)
)
 v.)
)
 JAMES MICHAEL ETLINGER,)
)
 Respondent.)

DISCRETIONARY JURISDICTION OF THE DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT
STATE OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

/sas

TABLE OF CONTENTS

| | <u>PAGE NO.</u> |
|---|-----------------|
| PRELIMINARY STATEMENT..... | 1 |
| STATEMENT OF THE CASE AND FACTS..... | 2 |
| SUMMARY OF THE ARGUMENT..... | 4 |
| ARGUMENT..... | 5 |
| ISSUE..... | 5 |
| WHETHER THE DECISION IN <u>ETLINGER V. STATE</u> , No. 88-3195 (Fla. 2d DCA, Feb. 22, 1989) [14 F.L.W. 539] IS IN EXPRESS AND DIRECT CONFLICT WITH <u>HARRIS V. STATE</u> , 520 So.2d 639 (Fla. 1st DCA), <u>review denied</u> , No. 71,999 (Fla. Oct. 12, 1988) AND <u>CLARK V. STATE</u> , 530 So.2d 519 (Fla. 5th DCA 1988). | |
| CONCLUSION..... | 7 |
| CERTIFICATE OF SERVICE..... | 7 |

TABLE OF CITATIONS

| | <u>PAGE NO.</u> |
|--|-----------------|
| <u>Carawan v. State</u> 515 So.2d 161 (F.a. 1987), | 3 |
| <u>Clark v. State</u> , 530 So.2d 519 (Fla. 5th DCA 1988), | 5 |
| <u>Etlinger v. State</u> , No. 88-3195 (Fla. 2d DCA, Feb. 22, 1989) [14 F.L.W. 539], | 1, 5 |
| <u>Glenn v. State</u> , No. 88-1256 (Fla. 2d DCA, Nov. 30, 1988) [13 F.L.W. 26221, | 4-5 |
| <u>Gonzalez-Osorio v. State</u> , 535 So.2d 644 (Fla. 2d DCA 1988), F.S.Ct. Case No. 73,677, | 5 |
| <u>Harris v. State</u> , 520 So.2d 639 (Fla. 1st DCA), <u>review denied</u> , No. 71,999 (Fla. Oct. 12, 1988), | 3-4 |
| <u>State v. Glenn</u> , No. 73,496, | 6 |
| <u>OTHER AUTHORITIES:</u> | |
| §775.021(4), Florida Statutes, | 6 |

PRELIMINARY STATEMENT

Petitioner, The State of Florida, was the appellee in the Florida District Court of Appeal, Second District, and the plaintiff in the trial court. Respondent, James Michael Etlinger, was the appellant in the Second District Court of Appeal and the defendant in the trial court. The appendix to this brief contains a copy of the decision filed on February 22, 1989, and rendered on March 14, 1989, upon denial of a motion for rehearing. The order denying rehearing is also appended hereto.

STATEMENT OF THE CASE AND FACTS

The following statement of the case and facts is taken verbatim from the opinion of the Florida District Court of Appeal, Second District:

On July 26, 1984, Etlinger pleaded guilty to multiple charges and, pursuant to a negotiated plea, was sentenced to thirty years' imprisonment. In case number CRC8400694, Etlinger was adjudicated guilty and sentenced for armed robbery, burglary, aggravated assault, and grand theft. He did not appeal his convictions and sentences, but on February 1, 1985, he filed a motion for postconviction relief, alleging that he was denied due process, his counsel was ineffective, and that his sentences were illegal. The trial court summarily denied the motion, which this court affirmed without an opinion on October 11, 1985, and denied rehearing on November 20, 1985.

Almost three years later, on September 27, 1988, Etlinger filed a second motion for postconviction relief. That motion is the subject of this appeal and in it he alleged (1) that his convictions and sentences in case number CRC8400694 violated the prohibition against double jeopardy, (2) that his guilty pleas were involuntary, and (3) that the trial court committed fundamental error in accepting his plea without first determining whether it was supported by a factual basis. The trial court summarily denied the motion, finding that it was an abuse of process because Etlinger did not allege any facts previously unknown to him or facts that could not have been discovered through due diligence, and that Etlinger did not raise any newly established fundamental constitutional right. The trial court also found the motion untimely because it was filed more than two years after Etlinger's judgment and sentence had become final. Etlinger timely appealed.

The Second District Court of Appeal affirmed the summary denial of the second and third grounds for post-conviction relief.

However, as to the first ground, the Second District reversed on the basis of Carawan v. State, 515 So.2d 161 (Fla. 1987). Although Carawan was decided after the judgment and sentence was entered in the defendant's case, the Second District followed the precedent of that court and held that Carawan is retroactively applicable to convictions which were obtained prior to the rendition of that opinion. In so doing, the Second District expressly acknowledged conflict with Harris v. State, 520 So.2d 639 (Fla. 1st DCA), review denied, No. 71,999 (Fla. Oct. 12, 1988).

SUMMARY OF THE ARGUMENT

The decision in the instant case directly and expressly conflicts with the decision rendered by the First District Court of Appeal in Harris v. State, 520 So.2d 639 (Fla. 1st DCA), review denied, No. 71,999 (Fla. Oct. 12, 1988). The holding of the Second District in the instant case was consistent with the holding in Glenn v. State, No. 88-1256 (Fla. 2d DCA, Nov. 30, 1988) [13 F.L.W. 26221, a case which has been accepted for review by this Honorable Court.

ARGUMENT

ISSUE

WHETHER THE DECISION IN ETLINGER V. TATE, No. 88-3195 (Fla. 2d DCA, Feb. 22, 198') [14 F.L.W. 539] IS IN EXPRESS AND DIRECT CONFLICT WITH HARRIS V. STATE, 520 So.2d 639 (Fla. 1st DCA), review denied, No. 71,999 (Fla. Oct. 12, 1988) AND CLARK V. STATE, 530 So.2d 519 (Fla. 5th DCA 1988).

This Honorable Court has accepted jurisdiction of Glenn v. State, No. 88-1256 (Fla. 2d DCA, Nov. 30, 1988) [13 F.L.W. 26221, a case which certified conflict with Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988), review denied, No. 71,999 (Fla. Oct. 12, 1988).¹ As in Glenn, the Second District in the instant case expressly and directly held that Harris v. State, supra, reached a contrary holding to that reached at bar.

The Second District has now held that Carawan is to be retroactively applied to cases which occurred before the rendition of Carawan. In addition to the cases above discussed, it must be observed that the Fifth District Court of Appeal in Clark v. State, 530 So.2d 519 (Fla. 5th DCA 1988), reached a decision directly in conflict with the position taken by the Second District Court of Appeal. In Clark, the court was faced with an analogous factual situation to that presented in the instant case. The Fifth District specifically held that Carawan was not the law at the time of Clark's conviction, nor is Carawan the law now because of the amendment to §775.021(4), Florida

¹ Also pending this Court's decision as to whether jurisdiction will be exercised is the Second District opinion rendered in Gonzalez-Osorio v. State, 535 So.2d 644 (Fla. 2d DCA 1988), F.S.Ct. Case No. 73,677.

Statutes. Although the decision in Harris deals with the same subject matter we are concerned with sub judice, the decision in Clark is squarely on point and is, therefore, squarely in conflict with the decisions rendered by the Second District Court of Appeal, including that rendered in the instant case. Inasmuch as the Second District Court of Appeal directly conflicts with both the Fifth District and the First District Courts of Appeal as to the retroactive applicability of Carawan, this Honorable Court should exercise its jurisdiction to hear the instant case, and perhaps carry the instant case with State v. Glenn, No. 73,496.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, Your petitioner respectfully requests this Honorable Court to exercise its jurisdiction based upon the clear conflict between the Second District Court of Appeal in the instant case and the First and Fifth District Courts of Appeal with respect to retroactive application of Carawan.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



ROBERT J. KRAUSS
Assistant Attorney General
Florida Bar #: 238538
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to James Michael Etlinger, DOC# 252764, Zephyrhills Correctional Institution, P. O. Box 518, Zephyrhills, Florida 34283, this 6th day of April, 1989.



OF COUNSEL FOR PETITIONER