

IN THE SUPREME COURT OF FLORIDA

PAUL THOMPSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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CASE NO. SC02-800

LOWER TRIBUNAL # 5D01-1947

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF ON THE MERITS

HOWARD BABB  
PUBLIC DEFENDER  
FIFTH JUDICIAL CIRCUIT

JAMES R. BAXLEY #0104231  
ASSISTANT PUBLIC DEFENDER

JASON D. WINN ##526681  
LAKE COUNTY JUDICIAL CENTER  
550 WEST MAIN STREET  
TAVARES, FL 32778  
(352) 742-4270

ATTORNEYS FOR PETITIONER

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## PETITIONER'S REPLY ARGUMENT

Respondent's brief on the merits states that there is no express and direct conflict between *Thompson v. State*, 808 So. 2d (Fla. 5<sup>th</sup> DCA 2002) and *Huss v. State*, 771 So. 2d 591 (Fla. 1<sup>st</sup> DCA 2000). The Petitioner strongly disagrees with the Respondent's position.

The Court in *Thompson* held that *Huss* represents a change in law, which is not to be applied retroactively. *Thompson*, 808 So. 2d at 808. The Court in *Thompson* interpreted the *Huss* decision as holding that *Huss* did create new law for which a retroactive analysis must be done under *Witt v. State*, 387 So.2d 922 (Fla. 1980).

However, the decision in *Huss* does not state that there was a creation of new law, which would require a retroactive analysis under *Witt*. On the contrary, the decision in *Huss* is the exact opposite of what the Respondent is arguing and what the Court in *Thompson* held.

*Huss* stated that the law under which the appellant received his prior convictions was no longer in effect. *Huss*, 771 So. 2d at 593. The Court went further and stated that the statute by its "plain wording" only applies to convictions under the new statute. *Id.* Therefore, the Court in *Huss*,

states that its decision was based on interpreting the new statute by its plain meaning, not creating new law. In the Court's interpretation of the new statute, it did not create new law, but merely interpreted the statute. Therefore, the holding in *Huss* is not one for which a retroactive analysis is needed under *Witt*.

The holding in *Thompson* is in direct conflict with the holding in *Huss*, as the Court in *Thompson* interpreted the *Huss* decision as creating new law, which is in direct conflict with the decision of *Huss*.

Applying the *Huss* decision, no retroactive analysis will ever be needed in determining what convictions can be used for enhancing a conviction under § 322.34 (2) (c), Fla. Stat. (Supp.1998). Under the plain word reading of the Statute, if a conviction occurred prior to 1997, then that conviction can not be used to enhance an individual's sentence to that of a third degree felony under § 322.34 (2) (c), Fla. Stat. (Supp.1998), because the amended statute was not in effect prior to 1997.

Furthermore, the holding of *Stutts vs. The State of Florida*, 821 So. 2d 449 at 441, (Fla. 1<sup>st</sup> DCA 2002) also certifies a direct conflict with *Thompson*. The Court in *Stutts* held that

*Huss* merely stated the plain meaning of the new statute, and did not require a retroactive analysis under *Witt*.

Therefore, there does exist a direct and express conflict between *Thompson* and *Huss*. Furthermore, there does exist a direct and express conflict between *Stutts* and *Thompson*.

**CONCLUSION**

Based upon the foregoing analysis, arguments, and authorities, Petitioner urges the Court to remand his case to the trial court to be disposed of as a misdemeanor.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to RICHARD E. DORAN, Attorney General, by delivery to the Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, FL 32301, PAMELA J. KOLLER and KELLIE NIELAN, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118, and a copy has been mailed to PAUL THOMPSON, DOC # 025474, Okeechobee Correctional Institute, 3420 N.E. 168<sup>th</sup> Street, Okeechobee, FL 34972, on this \_\_\_\_ day of November, 2002.

**CERTIFICATE OF FONT SIZE**

I HEREBY CERTIFY that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.201(a) (2).

Respectfully submitted,

Howard Babb,  
PUBLIC DEFENDER  
FIFTH JUDICIAL CIRCUIT

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JAMES R. BAXLEY  
ASSISTANT PUBLIC DEFENDER  
FLA. BAR #0104231

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JASON D. WINN  
ASSISTANT PUBLIC DEFENDER  
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