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IN THE SUPREME COURT OF FLORIDA

ISAIAH PERKINS,

Appellant,

v. CASE NO. 78,613

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF PETITIONER ON THE MERITS

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INITIAL BRIEF OF PETITIONER ON THE MERITS

I STATEMENT

This case is before the Court on discretionary review of the decision of the First District Court of Appeal, which expressly declared valid the habitual violent felony offender sentencing provisions of section 775.084, Florida Statutes. In this brief, record references to pleadings and orders are designated (R_), while references to the sentencing transcript appear as (S_).

STATEMENT OF THE CASE AND FACTS

A jury found petitioner, ISAIAH PERKINS, guilty of burglary of a structure and acquitted him of sexual battery. (R28, T248-250) Following conviction, the state sought to have petitioner sentenced as a habitual violent felony offender. In support, it offered evidence of a 1988 conviction for aggravated battery. (S22) Based solely on this single prior offense, the court found petitioner to be a habitual violent offender, and sentenced him to 10 years in prison with a five-year mandatory minimum term. (R37-40, S24-25, 39) On appeal, the First District Court of Appeal rejected petitioner's argument that his sentence violated constitutional due process, double jeopardy and ex post facto guarantees. Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991). This Court accepted jurisdiction, and this brief follows.

SUMMARY OF THE ARGUMENT

I. Principles of statutory construction require that an offense **for** which the state seeks an enhanced punishment as a habitual violent felony offender be an enumerated, violent felony, The title evinces a legislative intent to require that the instant felony be a violent crime, so that the punishment comports with the term "habitual violent felony offender.'' The phrase, "The felony for which the defendant is to be sentenced" should be construed together with the act's title to **read** "The [violent enumerated] felony. . . ." This construction is consistent with the plain meaning of the word habitual, and achieves the evident legislative intent to punish habitual violent crime more severely. Additionally, this reading of the statute is required to avoid the constitutional defects **explored** below.

If the Court rejects this interpretation, the statute suffers several fatal constitutional defects. Thus interpreted, the statute bears no substantial and reasonable relationship to its objective of punishing repetition of violent crime. It permits imposition of an enhanced sentence as a habitual violent felon upon one who has committed a single violent felony. The statute's fixation on the prior offense, for which an offender has already been punished, **also** renders the enhanced sentence a violation of constitutional prohibitions against double jeopardy. When the prior offense predates the amendment creating habitual violent offender sentencing, as here, the statute also violates constitutional protections against **ex** post facto laws.

II. The habitual violent felony offender provision, under which petitioner was sentenced, violates the one-subject rule of the Florida Constitution. Petitioner's offense occurred during the period when the amendment to the statute which violates the one-subject rule was in force. That amendment, which added aggravated battery to the list of enumerated offenses, directly affects petitioner, habitualized for a prior aggravated battery. Although this error was not argued below, it results in an illegal sentence, and thus may be raised at any time.

ARGUMENT

I, THE HABITUAL VIOLENT FELONY PROVISIONS OF SECTION 775.084, FLORIDA STATUTES, MUST BE CONSTRUED TO REQUIRE THAT THE OFFENSE FOR WHICH A SENTENCE UNDER THOSE PROVISIONS IS IMPOSED BE A VIOLENT, ENUMERATED FELONY; A CONTRARY CONSTRUCTION RENDERS THAT STATUTE VIOLATIVE OF CONSTITUTIONAL DUE PROCESS, DOUBLE JEOPARDY AND EX POST FACTO PROVISIONS.

In 1988, the legislature amended section **775.084,** Florida Statutes, creating among other changes a new classification, habitual violent felony offender. Ch. 88-131, **S.** *6*, Laws of Fla. Section 775.084(1)(b), Florida Statutes (1989), now defines a habitual violent felony offender as one who has committed one of 11 violent felonies within the past five years, or been released from a prison sentence for one of these crimes within the past five years, and then commits a new felony. Section 775.084(4)(b) provides enhanced penalties for those who qualify, including mandatory minimum terms.

The First District Court of Appeal expressly rejected petitioner's argument that if the statute permits a habitual violent felony offender sentence for a nonviolent instant offense following **a** single prior violent offense, it fails the due process test of a substantial and reasonable relationship to its objective of punishing repetition of violent crime. **The** court also rejected the contentions that the sentence amounts to **a** prohibited second punishment for the prior offense, violating constitutional double jeopardy and ex post facto provisions. Following the panel decision, another panel of the same court certified these **two** questions:

1. DOES IT VIOLATE A DEFENDANT'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN HE IS CLASSIFIED AS A VIOLENT FELONY OFFENDER PURSUANT TO SECTION 775.084, AND THEREBY SUBJECTED TO AN EXTENDED TERM OF IMPRISONMENT, IF HE HAS BEEN CONVICTED OF AN ENUMERATED FELONY WITHIN THE PREVIOUS FIVE YEARS, EVEN THOUGH HIS PRESENT OFFENSE IS A NONVIOLENT FELONY?

2, DOES SECTION 775.084(1)(B) VIOLATE THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY BY INCREASING A DEFENDANT'S PUNISHMENT DUE TO THE NATURE OF A PRIOR OFFENSE?

Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), rev. pending, no. 78,715. The argument which follows addresses the constitutional aspects of the statute both in terms of the certified questions in Tillman and the opinion in this case below. First, however, this Court should determine whether an alternative construction which avoids these potential constitutional defects is possible.

A. STATUTORY CONSTRUCTION

The habitual violent felony provisions suffer internal conflict. The statute's title invokes the term "habitual violent felony offenders." The term is repeated in Section 775.084(1)(b). The word habitual denotes an act of custom or habit, something that is constantly repeated or continued. Oxford American Dictionary (1980 ed.) However, section 775.084(4)(b) defines a habitual violent felony offender as one who commits a felony within five years of a prior, enumerated violent felony. The statute may thus be construed as permitting habitual violent felon enhancement for an unenumerated, nonviolent instant offense, as it was here, That construction permits

a habitual violent felony offender sentence for a single, prior crime of violence.

Courts have a duty to reconcile conflicts within a statute. In Re: Natl. Auto Underwriters Assoc., 184 So.2d 901 (Fla. 1st DCA 1966); Vocelle v. Knight Bros. Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960). A court may resolve the conflict by considering the title of the act and legislative intent underlying it, and by reading different sections of the law in pari materia. See Parker v. State, 406 So.2d 1089 (Fla. 1981) (legislative intent); State v. Webb, 398 So.2d 820 (Fla. 1981) (title of the act); Speights v. State, 414 So.2d 574 (Fla. 1st DCA 1982) (in pari materia). If doubt over the meaning of the law remains, the court must apply a strict scrutiny standard and resolve the ambiguity in favor of the defendant, State v. Wershow, 343 So.2d 605 (Fla. 1977). This result is consistent with the rule of lenity, a creature of statute in Florida. S. 775.021(1), Fla. Stat. (1989). The rule, which requires the construction most favorable to the accused when different constructions are plausible, covers the entire criminal code, sentencing provisions included. Cf. Bifulco v. State, 447 U.S. 381, 387 (1980) (federal rule of lenity applies to interpretation of penalties imposed by criminal prohibitions).

Applying these principles, this Court should find that the instant offense must be a violent felony, as enumerated in section 775.084(4)(b)1, to subject the offender to habitual violent felony sentence enhancement. The statute is certainly susceptible of different constructions on this point. See

Canales v. State, 571 So.2d 87, 89 (Fla. 5th DCA 1990) (in dicta, court states that when requirement of prior violent felony is met, legislature intended offender be eligible for enhanced penalty "for a subsequent Florida violent felony.") The title evinces a legislative intent to require that the instant felony be a violent crime, so that it comports with the term "habitual violent felony offender." The phrase, "The felony for which the defendant is to be sentenced" in section 775.084(1)(b)2, should be construed together with the act's title to read "The [violent enumerated] felony. . . ." This construction is consistent with the plain meaning of the word habitual, achieves the evident legislative intent to punish habitual violent crime more severely, and comports with the rule of lenity. Additionally, this reading of the statute is required to avoid the constitutional defects explored below. See Schultz v. State, 361 So.2d 416, 418 (Fla. 1978) (when reasonably possible, a statute should be construed so as to avoid conflict with the Constitution).

Adoption by the Court of this interpretation does not require reconsideration of the statute as a whole, or review of sentences imposed under the nonviolent provisions. Presumably, only a small portion of sentences imposed under the habitual violent felony offender provisions are for commission of nonviolent instant offenses. These provisions would remain fully viable, although available in more limited circumstances.

B. CONSTITUTIONALITY

1. Due Process

If a construction of the statute which does not require the instant offense to be an enumerated violent felony is approved, the habitual violent felony provisions fail the due process test of "a reasonable and substantial relationship to the objects sought to be obtained." See State v. Saiez, 489 So.2d 1125 (Fla. 1986); State v. Barquet, 262 So.2d 431 (Fla. 1972). U.S. Const., amend. V; Fla. Const., art. I, s. 9. This defect goes to the first of the two certified questions in Tillman. As noted above, the label "habitual violent felony offender" purports to enhance the punishment of those who habitually commit violent felonies. S. 775.084(1)(b), Fla. Stat. This is the object the statute seeks to attain, Below, the court reasoned that the statute serves a "general objective of providing additional protection to the public from certain repetitive felony offenders," and that enhancing the sentence of one who has previously committed a violent offense serves that objective. Perkins v. State, 583 So.2d at 1104. This nebulous view of the statute's objective led the court into a circular reasoning the legislature's actions define its purpose, and therefore the actions comport with that purpose. Phrased another way, the court concluded that the legislature must have intended to do that which it did.

The same court took a slightly different tack in rejecting a similar due process argument in Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991), rev. pending, Fla. Sup. Ct. No, 78,179. The court stated, "[i]n our view, just as the state is justified in

punishing a recidivist more severely than it punishes a first offender, its even more severe treatment of a recidivist who has exhibited a propensity toward violence is also reasonable." Id. at 878. Petitioner has no quarrel with this proposition, except that the court's use of the word "propensity" does not reflect the showing required for habitual violent felon enhancement. Propensity connotes tendency or inclination, If the habitual violent provisions required that the state establish commission of two prior violent felonies, a propensity would be shown. However, a single, perhaps random act of violence does not fit within the common understanding of the word. In a guideline departure case, Judge Cowart of the Fifth District Court of Appeal has noted:

> If the term "pattern" is not carefully defined by reference to objective criteria, looking for a "pattern" in a defendant's criminal record is like looking for a pattern or figure in the moon, or in the clouds or in the Rorschach test or in tea leaves or in sheep entrails--the process is highly subjective and the result is in the eye of the beholder. One sees largely what one wants to see. Those who do not like guideline sentencing can always say, "I spy a pattern and two offenses show continuous and persistent conduct "

Lipscomb v. State, 573 So.2d 429, 436 (Fla. 5th DCA), rev. dismissed, 581 So.2d 1309 (1991) (Cowart, J., dissenting). The manner in which the Ross court emplays the word "propensity" sparks the same concern. By any objective measure, one violent offense does not establish a propensity. Moreover, as noted above, the expressed legislative intent is to punish habitual violent conduct, not merely a loosely defined propensity. The

failure of the contested provisions to reasonably and substantially relate to this purpose renders its application a violation of due process of law.

Petitioner reasserts that the statute's purpose is to punish repetition of violent crime, and that the provisions at issue fail to rationally and substantially effectuate that purpose. Here, the state established only one prior violent felony, aggravated battery, plus the instant, nonviolent burglary. On this record, there is no evidence of a habit of violent crime. The statute permits an even greater absurdity: A defendant may be convicted of attempted aggravated assault -- a misdemeanor -- in 1986, then be sentenced to 30 years with a 10-year mandatory minimum term in 1991 as a habitual violent offender for dealing in stolen property. Thus, despite its objective as expressed four times in the statute's use of the term "habitual violent felony offender," the only habit this construction of the statute punishes is crime, not necessarily felonious crime and certainly not habitual violent felonious crime.

2. Double Jeopardy and Ex Post Facto

The state and federal constitutions both forbid imposition of ex post facto laws and twice placing a defendant in jeopardy for the same offense. U.S. Const., art. I, s. 10, cl. 1; amend. V. Fla. Const., art. 1, ss. 9 and 10. This First District Court of Appeal has noted that the violent felony provisions of the amended habitual offender statute implicate constitutional protections. Henderson v. State, 569 So.2d 925, 927 (Fla. 1st DCA 1990). The fixation of the habitual violent felony provisions on

prior offenses renders application of this statute to petitioner a violation of these protections. This goes to the second of the certified questions in Tillman.

To punish a defendant as a habitual violent felony offender, the state need only show that he has one prior offense within the past five years for a violent felony enumerated within the statute. The current offense need meet no criteria, other than that it be a felony committed within five years of commission, conviction or conclusion of punishment for the prior "violent" offense. Analysis of the construction of this statute and its potential uses leads to an inescapable conclusion: that the enhanced punishment is not for the new offense, to which the statute pays little heed, but instead for the prior, violent felony. The almost exclusive focus on this prior offense renders use of the statute a second punishment for that offense, violating state and federal double jeopardy prohibitions. When that prior offense also occurred before enactment of the amended habitual offender statute" as did petitioner's 1988 aggravated battery offense, the statute's use also violates prohibitions against ex post facto laws.

An ex post facto violation occurs when a statutory change applies to events occurring before its enactment, and disadvantages the offender affected by it. Miller v. Florida, 96 L.Ed.2d 351, 360 (1987). The amendment to the habitual offender statute applies in the instant case to petitioner's pre-amendment offense. He is disadvantaged by it in that he is deprived of the limitation of the statutory maximum for the current offense,

deprived of eligibility for a guideline sentence, and required to serve a mandatory minimum term. On its face, application of the amendment to petitioner creates an ex post facto violation.

Habitual offender and enhancement statutes have been upheld against challenges similar to the one made here, as long ago as 1948, on the grounds that the enhanced sentence was based not on the prior offenses but on the offense pending for sentencing. See, e.g., Gryger v. Burke, 334 U.S. 728 (1948). There the Court explained:

> The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes, It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.

Id. at 728. Using the same reasoning, Florida's courts have also rejected challenges based on double jeopardy arguments. See generally, Reynolds v. Chochran, 138 So.2d 500 (Fla. 1962); Washington v. Mayo, 91 So.2d 621 (Fla. 1956); Cross v. State, 96 Fla. 768, 119 So. 380 (1928). If the provisions in question were more concerned with repetition, the inquiry might end here. The only repetition on which this portion of the statute dwells, however, is the repetition of crime, not the repetition of violent crime. Its focus on the character of the prior crime, without regard to the nature of the current offense, distinguishes Florida's habitual violent felony offender sentencing scheme from other enhanced sentencing provisions. See Hall v. State, 16 FLW D2894 (Fla. 1st DCA Nov. 15, 1991) (Zehmer, J., concurring).

This distinction is the point at which the amended statute runs afoul of constitutional double jeopardy clauses,

The First District Court of Appeal did not meaningfully address this distinction in Ross, supra, or in this case below. In this case, the court merely rejected Petitioner's arguments on the authority of Washington, Cross and Reynolds, concluding that "the reasoning of these cases is equally applicable to this enactment." 583 So.2d at 1104. The court thus left unaddressed the constitutional implications identified by the panel in Henderson, supra.

The amended statute also differs from recidivist schemes focused on repetition of a particular type of crime. In U.S. v. Leonard, 868 F.2d 1393 (5th Cir. 1989), enhancement of a sentence under a federal enhancement statute was upheld against an ex post facto attack. Leonard was convicted of possession of a firearm by a convicted felon and sentenced under the Armed Career Criminal Act, which authorized increased punishment for that offense upon proof of conviction of three prior enumerated violent or drug felonies. Id, at 1394-1395. In contrast to the statute at issue here, the U.S. statute applied exclusively to persons convicted of a specific offense, possession of a firearm by a convicted felon. In that respect, the defendant was being punished primarily for the instant offense, as held by the court. Id. at 1400. The Florida provisions at issue focus not on any specific offense pending for sentencing, but on the character of a prior offense for classification purposes. Consequently, an offender subjected to the operation of S, 775.084(4)(b), Florida

Statutes, is being punished more for the prior offense than for the current one. In effect, as noted by Judge Zehmer in Hall, this then is a second punishment for the prior offense barred by the state and federal constitutions. 16 FLW at D2594 concurring opinion).

C. CONCLUSION

For these reasons, petitioner's sentence must be vacated and the case remanded for resentencing without resort to the habitual violent felon provisions of section 775.084, Either the statute must be construed to require that the sentence for which the sentence is imposed be an enumerated felony, or it violates constitutional due process, double jeopardy and ex post facto provisions. As either result applies only to those sentenced as habitual violent felons for commission of a nonviolent felony, retroactive application would require resentencing of a relatively small portion of those sentenced as habitual offenders since the 1988 amendment.

11. PETITIONER'S SENTENCE RESTS ON A STATUTE AMENDED IN VIOLATION OF THE SINGLE SUBJECT RULE OF THE FLORIDA CONSTITUTION,

Petitioner's offense occurred on January 7, 1990. He was sentenced as a habitual violent felony offender based on an enumerated offense of aggravated battery. The First District Court of Appeal has recently held that Chapter 89-280, Laws of Florida, which added aggravated battery to the list of enumerated felonies under section 775.084(1)(b)1, was enacted in violation of the one-subject rule of Article 111, Section 6 of the Florida Constitution. Johnson v. State, 16 FLW D2876 (Fla. 1st DCA Nov. 15, 1991). The constitutional defect remained in effect from October 1, 1989, the effective date of Chapter 89-280, until the statute was validly re-enacted, effective May 2, 1991. 16 FLW at D2877. Petitioner's offense falls within the time period of the amendment's invalidity, and the state's reliance on the prior aggravated battery offense bears directly on the subject-matter of the amendment.

The Johnson court observed that chapter 89-280 addressed two distinct subjects, career criminal sentencing and repossession of motor vehicle and boats. The constitution requires a natural or logical connection between different targets of an enactment. See Burch v. State, 558 So.2d 1 (Fla. 1990). The Johnson court found it "somewhat difficult to discern a logical or natural connection between career criminal sentencing and repossession of motor vehicles by private investigators." 16 FLW at D2877. No natural or logical relationship exists. Although the First DCA certified the issue as a question of great public importance in

Johnson, there is little basis for this Court to reach a contrary conclusion. Chapter 89-280 is more like that two-subject law held violative of the one-subject rule in Bunnell v. State, 453 So.2d 808 (Fla. 1984), than it is the comprehensive law upheld by this Court in Burch.

For these reasons, petitioner's sentence must be vacated. This Court may address the issue, though it was not raised in the First DCA. An illegal sentence may be raised at any time. Purvis v. Lindsey, 16 FLW D2673 (Fla. 4th DCA Oct. 16, 1991); Fla.R. Crim.P. 3.800(a). Additionally, resolving petitioner's claim at this point would conserve judicial resources by eliminating the need for post-conviction proceedings.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court vacate his sentence and remand with appropriate directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon Edward C. Hill, Jr., Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399; and a copy has been mailed to petitioner on this 30th day of December, **1991.**

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER