IN THE SUPREME COURT OF FLORIDA

ISAIAH PERKINS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 78,613

REPLY BRIEF OF PETITIONER

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SECOND JUDICIAL CIRCUIT

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REPLY BRIEF OF PETITIONER

PRELIMINA STA E [illegible]

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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 AND DOUBLE JEOPARDY PROVISIONS.

Respondent eschews dictionary definitions in favor of a hypothesis that legislatures are immune to rules of English usage. (AB19-20) In reply, "habitual" does modify "violent" in the title of the statute because no comma separates the two words. See W. Follett, Modern American Usage 401-403 (1966); M. Shertzer, The Elements of Grammar 80 (1986). Moreover, petitioner differs with respondent over whether the legislature intended that one prior violent felony plus one felony of any character qualify an offender as habitually violent under the statute. The meaning of the statute is not so plain as respondent would like. At best, the legislature created an ambiguity in in its frequent use of the phrase "habitual violent felony offender" coupled with its negligible reference to the instant offense. If, however, respondent has correctly divined the legislature's intent, the statute suffers the constitutional flaws detailed in the initial brief.

Despite its earlier distaste for dictionaries, respondent turns to the lexicographer's art for a definition of propensity which, though once removed, is to its advantage. (AB22) Petitioner maintains that one act of violence does not a propensity make. Subject to constitutional limitations, the Florida Legislature may decide to enhance the punishment of one

who previously committed a violent crime. What petitioner contends it may not do -- and did not intend to do -- is, in a measure explicitly targeting the habitually violent, enhance the punishment of one guilty of only one violent crime.

Finally, respondent makes little response to petitioner's constitutional arguments other than to invoke the panel decision below as well as earlier decisions rejecting due process and double jeopardy claims against wholly distinguishable recidivist statutes. Evidently, respondent could not find a recidivist statute resembling the habitual violent felon provisions of section 775.084, Florida Statutes (1989). (AB23-27) Neither could petitioner. The parties are in goad company:

> I view the imposition of the extent of punishment for the instant criminal offense based on the nature of the prior conviction as effectively imposing a second punishment on defendant solely based on the nature of his prior offense, a practice I had thought was prohibited by the Florida and United States Constitutions. This new statutory procedure is entirely different from the former concept of enhancing sentences of habitual offenders having prior offenses without regard of the nature of the prior felony, which has been upheld in this state and all other jurisdictions.

Hall v. State, 16 FLW D2894 (Fla. 1st DCA Nov. 15, 1991) (Zehmer, J., specially concurring). The cases cited by respondent, and relied upon by the First District Court of Appeal below, simply do not speak to a statute that characterizes an offender solely by the nature of his prior offense.

Petitioner is not, as implied by respondent, seeking to resurrect an argument long-dead. The constitutional protections relied upon remain as viable today as ever. Rather, petitioner

has mounted a renewed thrust against a defective new strain of statute. The defect renders the new version susceptible to the attack where the old version could withstand it. Unless construed as urged in the initial brief, the habitual violent offender provisions of section 775.084 violate the state and federal constitutions.

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

Respondent asserts that it made an extensive preservation argument in Johnson v. State, 16 FLW D2876 (Fla. 1st DCA Nov. 15, 1991), but the court of appeal "failed to discuss the jurisdictional issue and reversed.'' (AB29) Since respondent has thrown open these proceedings to its pleadings in Johnson, this Court should receive a complete picture. After the court of appeal reversed without addressing the state's preservation claim, it denied respondent's request to certify a question of great public importance on preservation. The court's actions are thus better characterized as a rejection of the claim out of hand than a failure to discuss it. Incidentally, this Court has not accepted jurisdiction in Johnson, as claimed by appellee. (AB29) A decision on jurisdiction was postponed. No. 79,150.

The state strains to find a connection between the two aspects of Chapter 89-280 Laws of Florida: career criminals and repossession of motor vehicles. The repossession provision amends a statute that protects the public against abuse by repossessors, and provides criminal penalties, while the habitual felon statute is designed to protect the public against repeat felons. (AB31-32) The connection, says the state, is controlling crime, This is tenuous, at best. This Court should note that the portion of Chapter 89-280 concerning repossession did not add, delete, reduce or enhance criminal penalties under Chapter 493, Florida Statutes. Evidently, respondent would incorporate an entire chapter of statutes in which a provision of a bill

resides to satisfy the test of singularity, It cites no authority for this proposition. Article 111, section 6 of the Florida Constitution governs "enactments," not the overall statutory scheme to which the enactments pertain.

Merely finding a broad topic on which each provision touches is insufficient to satisfy the requirement of singularity, As noted by the court of appeal, the matters included in an act must have a natural or logical connection to the broad subject matter of an act. The test is whether "the provisions of the bill are designed to accomplish separate and disassociated objects of legislative effort," 16 FLW at D2877. The court found no logical or natural connection between career criminal sentencing and repossession of motor vehicles by private investigators. Indeed, there is none.

Justice Kogan recently observed that a test of the singularity requirement of article XI, section 3 of the Florida Constitution is whether the petition contains more than one separate issue on which voters might differ. Advisory Opinion Re: Limited Political Terms in Certain Elective Offices, 16 FLW S779, 782 (Fla. Dec. 19, 1991) (Kogan, J., concurring and dissenting). Article 111, section 6 employs the same language as article XI, section 3, and thus holds bills to the same test as constitutional revisions. A legislator might have favored one part of Chapter 89-280 but disapproved of another. The choice, however, was up or down on the bill as a whole.

For these reasons and those presented in the initial brief, appellant's sentence must be vacated.

III. THE COURT MAY PROPERLY REACH THE ISSUES PRESENTED.[1]

Petitioner separately addresses preliminary concerns on respondent's argument as to Point I, then responds to the state's claims as they affects both issues, and concludes with a brief response limited to Point II.

A. Point I

Respondent argues that petitioner cannot make his argument on statutory construction and constitutionality of the habitual violent felony offender provisions because it was not made first in the trial court. This is a preservation argument couched in terms of jurisdiction. This Court has already accepted jurisdiction, which rests upon the court of appeal expressly declaring valid a state statute.

Preservation is a separate question, one which respondent brings to this Court with unclean hands. The state's claim of lack of preservation is, ironically, not preserved. To preserve an issue for review in a higher court, it must first be presented below. Tillman v. State, 471 So.2d 32 (Fla. 1985). As respondent acknowledges, it made no claim in the district court of appeal that the statutory construction and constitutional arguments were not preserved in the trial court. (A85) Nonetheless, the state argues:

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[1]This argument is in response to Point I of the answer brief. Much of the argument made herein is taken from the reply brief in Tillman v. State, Fla. Sup. Ct. No. 78,715, in which the issues are the same.

> Totally absent from petitioner's attack upon the habitual violent felon statute is any reference to the manner in which this issue was raised in the trial court. Upon review of the record the reason for the omission becomes clear. Trial counsel did not challenge the constitutionality of the statute.

(A85) Respondent is blowing smoke to cover its own neglect. If a review of the record provided such a clear view of petitioner's tactics, to what may be attributed the state's failure to raise its preservation argument in the district court of appeal? Had the state first made this claim below, it would have alerted the court of appeal to the potential defect and the proceedings may well be in a different posture today. The contemporaneous objection rule cuts both ways, and the state's disregard of it here exemplifies the consequences of noncompliance.

B. Both Points

In its dissertation on the Contemporaneous objection rule in the context of constitutional error, respondent has muddled the distinction between trial and sentencing error. The rule was fashioned primarily for use in trial proceedings, to ensure that objections are made when witness recollections are freshest and to prevent sandbagging reversible issues as a hedge against conviction. State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984). The purpose for the rule "is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge." Id. See also, Castor v. State, 365 So.2d 701 (Fla. 1978). Moreover, an error which could cause an offender to be incarcerated for a period longer than permitted by law is fundamental and may be raised at any time. Lentz v.

State, 567 So.2d 997, **998 (Fla. 1st DCA 1990)**; Gonzalez v. State, 392 So.2d **334** (Fla. **3d DCA** 1981). Respondent's assertion that courts apply the rule of preservation of constitutional issues uniformly in trial and sentencing is misleading, for the test of fundamental error differs from one context to the other. If this Court finds that petitioner's sentence was unauthorized by statute or that the statute is unconstitutional as applied to him, he will face longer incarceration than the law permits, error he may raise at any time.

Respondent attaches great significance to Davis v. State, **383** So.2d 620 (Fla. 1980) (AB6) Davis pled nolo contendere without reserving any appellate issues, then on appeal attacked the trespass statute under which he was prosecuted. The Court can plainly see the distinction between the unpreserved constitutional challenge to **a** substantive criminal statute in Davis and the sentencing challenge made here. The former is sandbagging: the latter is not, Section 924.06(1)(d), Florida Statutes, expressly provides for appeals from illegal sentences. The statute was not at issue in Davis.

The state urges this Court to turn its face from constitutional sentencing issues unless an appellant has gone through his paces below. If this Court takes the hard line, trial counsel will habitually hold **up** sentencing hearings to utter the required incantations. This cannot be a pleasing prospect to anyone in the criminal justice system. These issues will have their day in this Court; better now than later.

C. Point 11

Respondent incredibly asserts that Johnson v. State, 16 FLW 02876 (Fla. 1st DCA Nov. 15, 1991), provides no basis for a claim that appellant received an illegal sentence. Of course it does. Johnson effectively held that a court cannot base sentence enhancement as a habitual violent felony offender on a prior aggravated battery when the instant offense falls within the window of the invalidity of the amendment adding aggravated battery as an enumerated offense. Appellant meets both qualifications: an instant offense within the window, and enhancement based on a prior aggravated battery. See also, Tims v. State, 17 FLW D289 (Fla. 1st DCA Jan. 14, 1991). Finally, respondent is reaching in its speculation that the decision of the court of appeal "relating to the proper preservation of this issue" in Johnson may be reversed by this Court. The Johnson opinion contains no hint of a preservation concern. Perhaps the court of appeal declined to speak to the issue because it found the state's argument no more convincing than the one made in this case.

CONCLUSION

Based on the arguments contained herein and in the initial brief, petitioner requests that this Honorable Court vacate his sentence and remand for resentencing 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, on this 13th day of February, 1992.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER