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IN THE SUPREME COURT OF FLORIDA

LESHAWN TILLMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 78,715

REPLY BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT

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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. (AB10-11)[1] 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 one prior violent felony plus one felony of any character to qualify an offender as habitually violent under the

[1] Herein, references to the initial and answer briefs appear as (IB[page number]) and (AB[page number]).

statute. If, however, it did so intend, 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. (AB12) 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 no response to petitioner's constitutional arguments other than to invoke 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). Neither could petitioner. The cases cited by respondent, and relied upon by the First District Court of Appeal in the opinion excerpted at pages 12-13 of the answer brief, simply do not **speak** to a statute that characterizes an offender solely by the nature of his prior offense.

Petitioner is not, as contended by respondent, seeking to "resurrect an argument long-dead." (AB14) The constitutional protections relied upon remain as viable **today as** in 1928. 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. The "added twist or dimension" which respondent fails to discern is the statute itself. Unless construed as urged in the initial brief, the habitual violent offender provisions of section 775.084 violate the state and federal constitutions.

II. RESPONDENT HAS FAILED TO DEMONSTRATE A COGNIZABLE JURISDICTIONAL DEFECT,

Having failed despite extraordinary efforts to convince the court of appeal to decertify the questions forming the jurisdictional basis for this cause, respondent persists in its efforts to avoid review by this Court.

Respondent couches a preservation argument in terms of jurisdiction. The certified questions give this Court jurisdiction. Preservation of the claims made in these proceedings is a separate question, one which the state grasps with unclean hands. Its 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. (AB5) Neither the court nor petitioner "failed to notice" the matter, as stated by respondent. While making its stock response to petitioner's argument, the state simply failed to bring the question of preservation to anyone's attention. Nonetheless, respondent audaciously faults petitioner for not raising in this Court, and for the first time in these proceedings, a matter on which the burden squarely falls on respondent. (AB5) The state's conduct to this point gave petitioner no indication it had reversed its ground following a waiver in the court of appeal. Had the state first made this claim below, the court of appeal would have been alerted 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.

Respondent's claim is meritless as well as unpreserved. In its paean to the contemporaneous objection rule in the context of constitutional error, respondent has neglected to note 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). If this Court finds either 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.

With one exception, the cases cited by respondent in support of its position are either civil in nature or deal with trial error. (AB6-7) The exception, Eutzy v. State, 458 So.2d 755 (Fla. 1984), is a death penalty case. Much of the law made in

death cases does not transfer easily to issues in non-death cases. Moreover, as counterweight to Eutzy, petitioner notes that in Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla. 1978), this Court held that trial counsel need not object to a trial court's findings on mitigating circumstances before the issue can be raised on appeal.

Respondent urges this Court to decline review. Petitioner Suggests that until this Court addresses the issues herein, the court of appeal will continue to certify the same questions. It has already done so in at least one other case, Jolly v. State, 16 FLW D3018 (Fla. 1st DCA Dec. 3, 1991), rev. pending, No, 79,121. The questions will persist until they are resolved. Under these Circumstances, the Court would act improvidently in declining review.

CONCLUSION

Based on the arguments contained herein and in the initial brief, petitioner requests that this 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 Sara D. Baggett and James W. Rogers, Assistant Attorneys General, The Capitol, Tallahassee, Florida, 32399, on this 27th day of January, 1992.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER