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IN THE SUPREME COURT OF FLORIDA

KEITH JOLLY, :

Petitioner, :

v. : CASE NO. 79,121

STATE OF FLORIDA, :

Respondent. :

:

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
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STATEMENT OF THE CASE AND FACTS

The state charged Keith Lamar Jolly (petitioner) with armed robbery and armed kidnapping. Record (R.) at 1. A Duval County jury found Jolly guilty of the lesser included offenses of petit theft and false imprisonment. R.25-6;Transcript (T.) at 197.

Habitual offender sentencing

The state filed notice and asked the trial court sentence Jolly as an habitual violent felony offender for the false imprisonment conviction. R.10;T.214. The state introduced a 1987 conviction for armed robbery to prove Jolly qualified as an habitual violent felony offender. T.214;R.39-43. The defense argued against habitual violent sentencing, but did not contest the prior conviction. T.215. The trial court then found Jolly to be an habitual violent felony offender and, pursuant to the statute, sentenced him to 10 years imprisonment, with a 5 year minimum mandatory term. T.224;R.48.

Jolly appealed. Initially, the first district court of appeal affirmed in a per curiam decision without a supporting opinion. Subsequently, the district court granted Jolly's motion for certification. Jolly v. State, 16 FLW 3018 (Fla. 1st DCA Dec. 3, 1991). The district court certified as questions of great public importance, the two questions they certified to this court in Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991)(see certified question on page 5). Id.

The following facts are relevant to part II of the argument.

The state's evidence

At trial, John Stevens established the following facts. Stevens was working as a taxi cab driver on the evening of May 25th and early morning hours of May 26, 1990. T.25.

Between 9 and 10 p.m., Stevens was dispatched to room 174 of the Gator Lodge Motel. R.26. Stevens waited in the parking lot until Jolly and two women came out of room 174. R.26. The three got into the car, one woman sat in the front seat and the other sat in the back seat with Jolly. T.27. One of the women asked Stevens to take them to St. Augustine and Emerson. T.27. A Church's Fried Chicken restaurant is located there. T.28.

Once they arrived, Jolly paid the fare. The taxi cab was equipped with interior lights. T.28. Stevens was able to see Jolly when they exchanged money and when he handed Jolly his business card. T.29. Stevens testified that before this encounter, he had seen Jolly in his neighborhood. T.27.

Later, Stevens was dispatched again to the Gator Lodge Motel, room 174. T.30. The same three people again asked Stevens to drive them to St. Augustine and Emerson. T.30. However, this time one of the women paid the fare. T.30. Stevens was able to "get a look" at Jolly, who was wearing the same clothing. T.30-1.

Between 4:30 and 5:00 a.m., Stevens was dispatched to room 174 of the Gator Lodge Motel for the third time. T.31-2. This time Jolly was alone. T.32. Jolly sat in the front seat and directed Stevens to Callahan, a dead-end street about three to four blocks away from his earlier destination. T.32-3. While on

Callahan, Jolly drew a gun and pointed it at Stevens's face. T.34. Stevens could see the bullets inside the gun. T.34. A struggle ensued but as Stevens attempted to reach for the gun, he was restrained by his seat-belt. T.34-5. Jolly regained control of the situation and demanded Stevens's wallet. T.35. Stevens gave Jolly his billfold with $157 and about $4 he was carrying in his shirt pocket. T.35.

Jolly then instructed Stevens to get out of the car and into the trunk. T.35-6. Jolly locked Stevens inside the trunk. T.37. Stevens had a toolbox in the trunk. T.37. Using a wrench, Stevens was able to unfastened the trunk lid and free himself after about 20 minutes. T.38. Stevens immediately called for help. T.38.

Deputy Mark Doyle of the Jacksonville Sheriff's Office arrived on the scene. T.68-9. After Doyle interviewed Stevens, he had other officers go to the motel room. Eventually, one of the women was brought back to the crime scene. T.73. Stevens identified her as one of the women he had picked up earlier that night. T.73,39. After Doyle completed his investigation, he turned over all the information to Detective L.H. Goff. T.75.

A day later, Goff showed Stevens a photospread of six black men, containing a picture of Jolly. T.39,86-7. Initially, Stevens was not able to positively identify Jolly. T.87,40. The photospread consisted of duplicates of photographs. T.88. In a different room with better lighting, Goff showed Stevens the original photograph, T.41,88. This time Stevens made a positive identification. T.41,89.

Goff interviewed Jolly on August 10, 1990. T.102. Jolly told Goff that he did not rob Stevens, although he admitted being with the women that evening and having gotten a ride from Stevens. T.105.

The introduction into evidence of Jolly's "mug shots"

At a bench conference during the direct examination of Goff, the defense attorney objected to the state introducing into evidence the photospread because "they are obviously muqshots, since they show the front and side." T.96. The trial court ruled that the photographs were not mugshots in that they contained no identifying marks such as "plaques in front of them, numbers and so forth". T.97. Nonetheless, the defense continued to argue that the photograph obviously indicated to the jury that Jolly had a record. T.97.

The defense also objected to the information contained on the back of the photographs. T.96. The photographs contained dates of birth, addresses and offenses. T.98-9. The trial court attempted to remedy the objection by marking off the information. T.98-9. The defense attorney responded: "[j]udge I appreciated that, but it would also show that obviously something was there." T.99. The trial judge then said: [w]ell, I'm going to do it this way, sir." T.99.

The photographs were subsequently introduced into evidence as state's composite exhibit #l. T.106. The photographs introduced were a copy of the original. T.llO.

CERTIFIED 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?

SUMMARY OF ARGUMENT

I.

Principles of statutory construction require that an offense for which the state seeks an enhanced punishment as a habitual violent felony offender must be an enumerated, 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" 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 and reaches the two certified questions, both should be answered in the affirmative. 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 but a single violent felony. The 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 and ex post facto.

II.

Although the district court has not certified the issue, in the interest of justice this court should exercise its discretion to review the trial court's error in admitting mug shots into evidence at Jolly's trial. The trial court erred reversibly in admitting into evidence six photographs, including one of Jolly. These photographs were mug shots given their front and profile nature and the prejudicial information they contained. The case law is clear that the admission of mug shots is error. The error here can not be considered harmless because the evidence of guilt was not overwhelming. The victim's testimony was contradicted, impeached and the jury rejected most of it. No evidence such as fingerprints, hair fibers or the gun, link Jolly to the crime. The jury was shown photographs containing highly prejudicial information and strongly suggesting that Jolly had a previous criminal record. Since Jolly did not take the stand or place his character in issue, this denied him a fair and impartial trial.

ARGUMENT

I. THE HABITUAL VIOLENT FELONY OFFENDER STATUTE MUST BE CONSTRUED TO REQUIRE THE INSTANT OFFENSE BE A VIOLENT AND ENUMERATED FELONY, OTHERWISE THE STATUTE IS UNCONSTITUTIONAL UNDER THE DUE PROCESS, DOUBLE JEOPARDY AND EX POST FACTO PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS.

In 1988, the legislature amended section 775.084, **Florida** Statutes and created a new classification: habitual violent felony offenders. Ch. 88-131, § 6, Laws of Fla. Section 775.084(1)(b) Florida Statutes (1989), now defines a habitual violent felony offender as one who has been convicted of any one of 11 violent felonies within the past five years, or has been released (also within the past five years) from a prison sentence served for one such felony, 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 has certified two questions, whether a sentencing scheme that permits enhancement of a sentence for a habitual violent felon violates constitutional **Due** Process and Double Jeopardy clauses when the instant offense (the offense for which the sentence is imposed) is nonviolent. Jolly addresses those questions below, however, this Court should first determine whether an alternative construction, one which avoids constitutional defects, is possible.

A, Statutory Construct on

The habitual violent felony statute suffers internal conflict. The statute's title invokes the term "habitual violent

felony offenders." The term is repeated in Section 775.084(1)(b). Webster's Third New International Dictionary, Unabridged (Merriam-Webster, Inc. 1986) gives as the first definition of "habitual": "of the nature of a habit : according to habit : established by or repeated by force of habit : customary." "Habit," in the meaning that is pertinent here, is defined as: "a settled tendency of behavior or normal manner of procedure : custom, practice, way." Hence, it is quite clear that "habitual" and "habit" have a meaning that implies that a behavior is repeated. Someone who smokes a cigarette once and never again, is not a habitual smoker. Similarly, using the normal meaning of the term, a "habitual violent felony offender" is not one who commits one violent crime, and no more. In the normal way the term "habitual" is used, an habitual violent felon is one who repeatedly commits violent felonies.

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 such 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).

Moreover, the statute must be construed in accord with the fundamental principle embodied in section 775.021(1), Fla. Stat. (1989):

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This Court has recently emphasized the importance of this rule of construction in Perkins v. State, 576 So.2d 1310 (Fla. 1991):

> One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. ... Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute. ... [T]o the extent that definiteness is lacking, a statute must be construed in the manner most favorable to the accused. ... The state's reliance on common law rules of construction such as ejusdem generis must yield to the rule of strict construction.

Id. at 1313-1314.

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). This defect goes to the first of the two certified questions, As noted above, the label "habitual violent felony offender" purports to enhance the punishment of those who habitually commit violent felonies. § 775.084(1)(b), Fla. Stat. This is the object the statute seeks to attain. However, as applied by the trial court, the statute does not require the instant offense to be an enumerated violent felony. Here, the state established only one prior violent felony - armed robbery - plus the instant, offense of false imprisonment. 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.

The first district court of appeal rejected 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 held that, "[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. Jolly 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. 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.

2. Double Jeopardy and ex post facto

The state and federal constitutions forbid twice placing a defendant in jeopardy for the same offense, U.S. Const., amend. V. Fla. Const., art. 1, § 9. 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 Jolly a violation of these constitutional protections. This goes to the second of the certified questions.

To punish a defendant as an 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 instant 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: the enhanced punishment is not for the new offense, to which the statute pays little heed, but instead for the prior, violent felony. The exclusive focus on the 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 Jolly's 1987 armed robbery conviction, the statute's use violates prohibitions against ex post facto laws. U.S. Const. Art. I, § 10, cl. 1; Fla. Const. art. I, § 10.

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, 482 U.S. 423,430, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). The amendment to the habitual offender statute applies in the instant case to Jolly's pre-amendment offense. Jolly is disadvantaged by it to the extent that he is deprived of the limitation of the statutory maximum for the instant offense, is deprived of eligibility for a guideline sentence, and is required to serve a mandatory minimum term. On its face, application of the amendment to Jolly 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, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948). In Gryger the Court stated:

> 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 these 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, 588 So.2d 1089 (Fla. 1st DCA) (Zehmer, J., concurring). This distinction is the point at which the amended statute runs afoul of the *ex* post facto and double jeopardy clauses.

The first district court of appeal did not meaningfully address this distinction in Ross, supra, or in Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), rev. pending, No. 78,613. In Perkins, the Court rejected the same arguments made here, on the authority of Washington, Cross and Reynolds, concluding that "the reasoning of these cases is equally applicable to this enactment." Id. at 1104. Perkins thus left unaddressed the constitutional implications identified by Judge Zehmer in Henderson, supra.

The 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 to section 775.084(1)(b) is being punished more for the prior offense than for the current one. As stated by Judge Zehmer in Hall, this then is a second punishment for the prior offense, and barred by the state and federal constitutions. 588 So.2d at 1089.

C. Conclusion

For these reasons, Jolly'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 the statute violates constitutional due process, double jeopardy and ex post facto provisions. In such case, the certified questions should be answered in the affirmative. 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.

II. THE TRIAL COURT ERRED REVERSIBLY IN ADMITTING "MUG SHOTS", INCLUDING ONE OF JOLLY, SINCE THIS IMPROPERLY CALLED TO THE JURY'S ATTENTION JOLLY'S PRIOR UNRELATED ARREST, THEREBY DENYING HIM A FAIR AND IMPARTIAL TRIAL.

Although the district court certified questions relating only to Jolly's sentence, this court has jurisdiction to review "any issue arising in the case that has been properly preserved and properly presented." Tillman v. State, 471 So.2d 32,34 (Fla. 1985). In the interests of justice, this court should exercise its discretion to review the trial court's error in admitting mug shots into evidence.

The defense attorney objected to a set of *six* photographs which detective Goff had shown Stevens, the alleged victim. T.96. The trial court erred reversibly in allowing the state to introduce these photographs into evidence. First, these photographs are mug shots. Second, the case law is clear that introduction of mug shots into evidence is error. Third, given the entire record and surrounding circumstances here, the error was not harmless and requires reversal.

A. State's Composite Exhibit #1 are mug shot photographs.

The defense attorney argued that the photographs were "obviously mugshots, since they show the front and side." T.96. The trial court disagreed, and ruled that the photographs were not mugshots since they contained no identifying marks such as "plaques in front of them, numbers and so forth." T.97.

The trial court's conclusion is not supported by the record or the case law. The photographs, introduced into

evidence as state's composite exhibit #1(SCE.1), are obviously mug shots.

The exhibit consists of six double-shot photographs, with a front and profile view of individuals, one those being Jolly. SCE.l. As the defense attorney argued (T.97), the front and profile photographs leads any jury to conclude that Jolly has a criminal record. In Barnes v. United States, 365 F.2d 509 (D.C. Cir. 1966), the court stated:

> The double-shot picture, with front and profile shots alongside each other, is *so* familiar from "wanted" posters in the post office, motion pictures and television, that the inference that the person involved has a criminal record, or has at least been in trouble with the police, is natural, perhaps automatic.

Id, at 510. Common sense dictates that front and profile photographs, like those introduced here, are "mug shots" taken of defendants who have been previously arrested. As the defense attorney argued (T.97), it is within the common knowledge of the jury that such photographs are mug shots. During final instructions Judges instruct juries to evaluate the evidence by using their "common sense." Fla. Std. Jury Instrc. (Crim.) 2.04. The trial court so instructed Jolly's jury. T.185. Hence, on the basis of the front and profile shots alone, this court must conclude that these photographs are mug shots,

Yet, the front and profile shot is not the only factor making these photographs - mug shots. Behind the photographs is information suggesting they are mug shots. SCE.l. Two of the photographs have pre-printed labels containing boxed spaces

for information like "NICKNAME/ALIAS"; "COMP/SCARS"; and "ARREST FOR". SCE.1. Jolly's photograph is one these with the pre-printed labels, Some of the other photographs have notations of recent dates which could have easily lead jurors to conclude they are arrest dates. For example, photograph #5 has this notation: **"DOA 7-26-88".** SCE.l. Any juror could figure out that "DOA" stands for date of arrest. Moreover, two photographs contain notations of criminal offenses. SCE.l. Photograph #4 contains a "robbery" notation, while photograph #5 contains an "armed robbery" notation. SCE.1. The trial court attempted to blot out this information by scratching through it with a black pen. T.98-9;SCE.1. However, this provided no remedy since both notations remained legible. SCE.l.

The trial court noted that the individuals were not photographed carrying placards with numbers. **T.97.** Yet, the information behind the photographs produce the same harmful effect. The trial court's attempt to blot out this information did not lessen the harmful effect since highly suggestive dates, numbers and references to other criminal activity remained. ***See*** Walker v. State, **473 So.2d** 694,698 (Fla. 1st **DCA** 1985) (No reversible error occurred where "photographs were taped so that dates and numbers were 'cropped out,' and the photographs made no explicit reference to prior criminal activity.")

B. It is error to admit muq shots into evidence.

In D'Anna v. State, 453 So.2d 151 (Fla. 1st DCA 1984), the court stated: "The law is, of course, clear that the admission into evidence, or even the mere mention of 'mug shots' constitutes error." Id. at 152 (citations omitted), Here, not only were the mugshots admitted into evidence (T.106), Stevens referred to them as "mug shots", over defense objection. T.41.

When a jury is shown the defendant's mug shots, the defendant's right to a fair and impartial trail is violated since the jury has been made aware of his arrest for an unrelated crime. See Duncan v. State, 450 So.2d 242,245 (Fla. 1st DCA 1984). It is particularly offensive were as here, the defendant has not placed his character in issue. In United States v. Harrington, 490 F.2d 487 (2d Cir. 1973), the court stated:

> If, at his trial, a defendant does not take the witness stand in his own defense, and if he has not himself been responsible for causing the jury to be informed about his previous convictions, he is entitled to have the existence of any prior criminal record concealed from the jury.

Id. at 490. Jolly did not take the stand in his own defense, nor did he place his character at issue. Thus it was error for the jury to have been informed of his prior criminal record through the mug shots.

C. The error in admitting the mugshots was not harmless.

While the introduction of mug shots constitutes error, reversal is not automatic. D'Anna, supra at 152, citing Loftin

v. State, 273 So.2d 70,71 (Fla. 1973). "Rather, the reviewing court must examine 'the entire record and surrounding circumstances,' Loftin, supra at 71, to determine whether the error must be considered harmless." D'Anna. In State v. DiGuillo, 491 So.2d 1129 (Fla. 1986), this Court assigned the state the burden of showing an error harmless. "The question is whether there is a reasonable possibility that the error affected the verdict.'' Id. at 1139. In considering the harmfulness of the error, the D'Anna court mentioned the following factors: the evidence of in-court identification of the defendant; whether the photographs were "cropped", hiding the photographing agency's identity; whether a curative instruction was given; the extent to which the mug shots reference a defendant's past criminal history, Id. Applying these standards and factors here, this Court should conclude that reversal for a new trial is required.

Courts have held harmless the error of introducing mug shots where an in-court identification of the defendant is strong. See e.g., Fuster v. State, 480 So.2d 173,175 (Fla. 3d DCA 1985). However, this analysis is not applicable here. Although Stevens's in-court identification of Jolly was unequivocal, his testimony was impeached and inconsistent. For example, during his deposition Stevens gave his age as 48, but in trial he said he was 55. T.58-9. Detective Doyle testified that Stevens reported the robber took $125(T.82), yet Stevens testified he reported $157 stolen. T.60 Stevens testified that he had previously seen the robber (T.27), yet Doyle

testified that Stevens never reported this. T.79-80. Moreover, Goff testified there was no evidence such as fingerprints, hair fibers or even the gun, linking Jolly to the crime. T.108. The only evidence was Stevens's testimony.

Consequently, the jury rejected much of Stevens's testimony by returning verdicts of petit theft and false imprisonment. R.25-6;T.197. The state had charged Jolly with armed robbery and armed kidnapping, R.1. Hence, the jury rejected Stevens's testimony that Jolly had robbed him, with or without a firearm or that Jolly even committed an assault. R.25. The jury also rejected Stevens's testimony that Jolly kidnaped him, with or without a firearm. R.26.

Thus, this Court should not view Stevens's in-court identification as establishing overwhelming evidence of guilt, DiGuillo, since his testimony was impeached, inconsistent and the jury's verdict rejected most of it. Here, there is clearly a reasonable possibility that the mug shots affected the jury's ultimate verdict. Id.

The trial court attempted to blot out information from the photographs. T.98-9;SCE.1. Courts have held that where prejudicial information has been removed from a mug shot reversible error does not occur. See e.g. Manacebo v. State, 350 So.2d 1098 (Fla. 3d DCA 1977). In Walker supra, "the photographs were taped so that dates and the numbers were 'cropped out,' and the photographs made no explicit reference to prior criminal activity. Id. at 698. Such is not the case here.

As argued above, photograph #4 contains a "robbery" notation, while photograph #5 contains an "armed robbery" notation. SCE.1. The trial court attempted to blot out this information by scratching through it with a black pen. T.98-9;SCE.1. However, both notations remained legible. SCE.l. Jolly's photograph contains a similar scratch through yet the information on his photograph is not legible. This could only have caused the jury to speculate that the notation on Jolly's photograph was also of a previous robbery or other crime. Clearly, the trial court's attempt to remedy the problem failed. "If anything, by emphasizing that something was being hidden, the steps taken here to disguise the nature of the picture may well have heightened the importance of the picture and the prejudice in the minds of the jury." Barnes at 511.

The jury could have speculated that Jolly's photograph was from a previous arrest since his photograph has an entry that states: "DATE OF PHOTO: 6-12-87". SCE.l In Houston v. State, 360 So.2d 468 (Fla. 3d DCA 1978), the court reversed because the photographs were mug shots "showing a date prior to the date of the crimes charged." Id, at 469, This Court should reverse here as well for that same reason. The photographs here were not properly "cropped" and, to a great extent, suggest that Jolly had a previous criminal history. Thus reversible error exists.

Jolly was denied a fair and impartial trial since evidence of a prior unrelated arrest was given to the jury. Given the

jury's ultimate verdict and the nature of the information contained on the photographs, there is every reasonable possibility that this error *affected* the jury's verdict. DiGuillo.

Hence this court should quash the opinion of the district court and order this cause be reversed and remanded for a new trial.

CONCLUSION

Based on the foregoing arguments, Jolly requests that this Court quash the district court's opinion and order this cause be reversed and remanded for a new trial. Alternatively this Court should order Jolly's sentence be vacated and remanded for a guidelines sentence.

CERTIFICATE OF SERVICE

I certify that a copy *of* the foregoing has been hand delivered to Charles T. Faircloth, Assistant Attorney General, Tallahassee, Florida, on 17 January 1992.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

KEITH JOLLY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 77,121

APPENDIX OF THE INITIAL BRIEF OF PETITIONER ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

KEITH JOLLY,)

Appellant,)

v.)

STATE OF FLORIDA,)

Appellee.)

CASE NO, 90-3500

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PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

Opinion filed December 3, 1991.

An Appeal from the Circuit Court for Duval County. John Southwood, Judge,

Nancy A. Daniels, Public Defender, and Abel Gomez, Asst. Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Charles T. Faircloth, Js., Asst. Attorney General, Tallahassee, for Appellee.

ON MOTION FOR CERTIFICATION

PER CURIAM.

Appellant's motion for certification is granted, and we certify to the Florida Supreme Court the same questions certified in Tillman v. State, 16 F.L.W. D2542 (Fla. 1st DCA September 30, 1991).

JOANOS, C.J., and SMITH and ALLEN, JJ., CONCUR.