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IN THE SUPREME COURT OF FLORIDA

MICHAEL LENARD HALL,

Petitioner,

v. CASE NO. 79,237

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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1 ARGUMENT

ISSUE 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 **AN ENUMERATED VIOLENT FELONY; A CONTRARY CONSTRUCTION RENDERS THE STATUTE VIOLATIVE OF CONSTITUTIONAL DUE PROCESS AND DOUBLE JEOPARDY PRINCIPLES.**

The state eschews dictionary definitions in favor of **a** hypothesis that legislatures are immune to rules of English usage (State's Brief (SB), 15-16). In reply, petitioner would point out that "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 the state over whether the legislature intended one prior violent felony plus one felony of any character to qualify an **offender** as habitually violent under the statute. If, however, the legislature did **so** intend, the statute suffers the constitutional flaws detailed in the initial brief.

Despite its earlier distaste for dictionaries, the state turns to the lexicographer's art for a definition of propensity which, though once removed, is to its advantage (SB-19). 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.

The state 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, the state 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 the state, simply do not speak to a statute that characterizes an offender solely by the nature of his prior offense.

Two more points should be noted: First, the state claims petitioner relied on a concurring opinion from Judge Zehmer in another case (SB-21). Contrary to the state's assertion, that concurring opinion was not in another case, it was in this very case. Hall v. State, 588 So.2d 1089 (Fla. 1st DCA 1991). Second, the state argued that, as appellant could have been sentenced as an habitual felony offender, he did not show that his classification as a violent offender "elevated his sentence

at all" (SB-25). This is an inaccurate statement of fact. Appellant received a 10-year mandatory minimum sentence. Mandatory minimum sentences apply only to habitual violent offenders, thus, appellant's sentence was elevated due to his improper classification as a violent offender.

ISSUE II

THE STATE HAS FAILED TO DEMONSTRATE A COGNIZABLE JURISDICTIONAL DEFECT.

Having failed despite extraordinary efforts to convince the district court in Tillman to decertify the questions forming the jurisdictional basis for this cause, the state persists in its efforts to avoid review by this court. Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), review pending Fla. S.Ct. no. 78.715.

The state 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 the state acknowledges, it made no claim in the district court that the statutory construction and constitutional arguments were not preserved in the trial court (SB-5). 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, the state 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 the state (SB-5). The state's conduct to this point gave

petitioner no indication it had reversed its position following a waiver in the district court. Had the state first made this claim below, the district court 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.

The state's claim is meritless as well as unpreserved. In its paean to the contemporaneous objection rule in the context of constitutional error, the state 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.

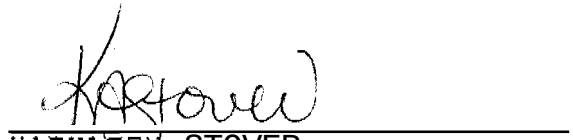
With one exception, the cases cited by the state in support of its position are either civil in nature or deal with trial error (SB-6-7). The exception, Eutzy v. State, 458 So.2d 755 (Fla. 1984), is a death penalty case. Much of the law made in death cases does not transfer easily to issues in non-death 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.

The state urges this court to decline review. Petitioner suggests that, until this court addresses the issues herein, the district court will continue to certify the same questions. It has already done so in this case, as well as Tillman and Jolly v. State, 590 So.2d 2 (Fla. 1st DCA 1991), review pending, no. 79,121. The questions will persist until they are resolved. Under these circumstances, the court would act improvidently in declining review.

II 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,
NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Edward C. Hill, Jr., Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. Michael L. Hall, no. 108550, Holmes Correctional Institution, P.O. Box 190, Bonifay, Florida 32425, this 10 day of April, 1992.

KATHLEEN STOVER