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IN THE SUPREME COURT OF FLORIDA

ARRICES MERRIWEATHER,
Petitioner,
vs.
STATE OF FLGRIDA,
Respondent.

CASE NO. 79,572

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER

DAVID P. GAULDIN
ASSISTANT PUBLIC DEFENDER
FLA. BAR NO. 261580
SECOND JUDICIAL CIRCUIT
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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(continued)

IN THE SUPREME COURT OF FLORIDA

ARRICES MERRIWEATHER, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	Case No. 79,572

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

The record proper shall be referred to by the letter "R" followed by the appropriate page number. The transcripts shall be referred to by the letter "T" followed by the appropriate page number.

STATEMENT OF THE CASE

By information filed October 3, 1990, Petitioner was charged with one count of the possession of cocaine with the intent to sell on or between September 12-13, 1990. **(R-7).** An amended information was filed on October 23, 1990, but sworn-to by the prosecutor on January 9, 1991. **(R-17-18; T-77-78).** Count I became a conspiracy count, and the original count became Count 11. **(R-17-18).** The conspiracy count was subsequently dismissed by the prosecution. (T-53-54).

Petitioner proceeded to jury trial and on January 10, 1991, was found guilty of possession of cocaine with intent to sell. **(R-23).**

On February 20, 1991, Petitioner was sentenced as an habitual violent felony offender to twenty years in prison with a minimum five year mandatory term and credit for 161 days in jail. (R-45-46).

Notice of appeal was timely filed on February 28, 1991. **(R-58).**

On February 25, 1992, the Florida First District Court of Appeal issued its (written) opinion affirming Petitioner's conviction and sentence as an habitual violent felony offender, and certifying to this Court the following question of great public importance:

> **WHETHER THE HABITUAL VIOLENT FELONY OFFENDER PROVISIONS OF SUBSECTION 775.084(1)(b), FLORIDA STATUTES (1989), VIOLATES CONSTITUTIONAL RIGHTS CONCERNING DUE PROCESS, DOUBLE JEOPARDY, OR EX POST FACTO LAWS.**

STATEMENT OF THE FACTS

Jacksonville Sheriff's Office Detective Wilbur Pugh was working a "buy bust operation" with Detective Kim Varner during the evening of September 12 and morning of September 13, 1990. (T-102-103). Both were dressed in street clothes, and with Varner driving the pick-up truck that they were in, they went to the intersection of Florida Avenue and Pippen Street in the VanBuren area. (T-103).

A man later identified to the detectives as "Mr. Pickett" flagged them down, and asked them what they wanted. Pugh told them that they wanted a "twenty," which in drug parlance meant to Pugh twenty dollars worth of cocaine. (T-105-106).

Pickett told them to hold on or something like that, and then yelled to someone across the street that "he wants a 20." (T-106).

At this point, Varner saw Petitioner walking up the street, who yelled over to the first person standing on the corner ". . . to get the dope." (T-122). This third person (Roberson) walked over to a telephone pole, reached around the bottom of the pole, picked something up, and handed it to Petitioner. (T-123). Petitioner started walking towards the detectives' car. Varner watched the man's hand and did not see him put the object into either a pocket or the other hand. (T-125). Petitioner got right up to their vehicle, and when he opened his hand, Varner saw what he believed to be one piece of crack (cocaine) in a clear baggie. (T-125).

During this entire period of time, Pickett remained around their vehicle, and talked to Varner while the man (Roberson) was walking over to the telephone pole and removing whatever he removed from it. (T-125).

At this point, Varner saw two police cars (not part of the buy-bust operation) and he warned Pickett and Petitioner. (T-128). Varner called for take-down units to come arrest Appellant. (T-128).

Petitioner walked away, and about 12 feet behind the detectives' vehicle dropped the baggie on the ground. (T-129).

Varner grabbed Picket, another detective grabbed Petitioner, and Detective Richardson retrieved the baggie, after being told of its whereabouts by Varner. **(T-130).** Varner paid more attention to Pickett and Petitioner than the bag once it was dropped, so he didn't have his eyes on it during this period. (T-146).

The bag contained 11 pieces of crack cocaine and crumbs. The cocaine weighed 12.1 grams, **(T-167).**

Over the objections of defense counsel, Varner was allowed to testify that the number of loose pieces of crack cocaine found in the bag meant to him that it was held for sale, not just personal use. **(T-131-134).**

SUMMARY OF THE ARGUMENT

Petitioner was illegally sentenced as an habitual violent felony offender, even though he was not convicted of a violent felony in this case.

This was error because it violates Petitioner's right to due process and to be sentenced by a statute which achieves a rational purpose, violates his right to be free from double jeopardy (as he was twice punished for his previous violent felony), and violates his right not to be punished ex post facto (his violent felony was committed prior to the enactment of the habitual violent felony statute).

These issues are also pending in other cases before this Court. These cases are noted in the body of this brief.

The certified question should be answered in the affirmative.

ARGUMENT

ISSUE:

WHETHER THE HABITUAL VIOLENT FELONY OFFENDER PROVISIONS OF SUBSECTION 775.084(1)(b), FLORIDA STATUTES (1989), VIOLATES CONSTITUTIONAL RIGHTS CONCERNING DUE PROCESS, DOUBLE JEOPARDY, OR EX POST FACTO LAWS.

In Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), the Florida First District Court of Appeal found this statute constitutional. In Perkins v. State, 590 So.2d 421 (Fla. 1991), Case Number 78,613, this Court agreed to consider the constitutionality of the statute (but postponed its decision on jurisdiction).

In Tillman v. State, Case Number 78,715, this Court is presently considering the following 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 THROUGH 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?

Essentially, the questions being considered in Perkins and Tillman are encompassed in the certified question in this case and Petitioner's circumstance. See also Simmons v. State, 17 FLW D1013 (Fla. 1st DCA 1992). Petitioner was sentenced as an habitual violent felony offender even though he had been convicted of a non-violent felony. At the very least, this

violates Petitioner's rights to Due Process and the prohibition of Double Jeopardy.

DUE PROCESS: If a construction of the statute which does not require the instant offense to be an enumerated offense 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) and State v. Barquet, 262 So.2d 431 (Fla. 1972).

The label "habitual violent felony offender" purports to enhance the punishment of those who habitually commit violent felonies, Section 775.084(1)(b), Fla.Stat. This is the object that the statute seeks to obtain. However, as applied by the sentencing judge and the appellate court, the statute does not require the current offense to be one of the eleven enumerated violent felonies.

Here, the sentencing judge relied upon one violent prior felony (strong-arm robbery, R-51) plus the present, non-violent felony of possession of cocaine with the intent to sell or deliver. This record does not present a continued pattern of violent crime or an escalation of violent crime; quite the opposite, in fact. Petitioner went from a violent crime to a non-violent crime, a de-escalating pattern from violent, personal crimes, to non-violent, non-personal crimes (which, under the guidelines, might be an entitlement to a downward departure).

Petitioner's case, however, does not begin to scratch the absurd limits to which the statute can be extended under the lower court's interpretation. For instance, a defendant may be convicted of attempted aggravated assault--a misdemeanor--in 1986, then could be sentenced to 30 years with a 10-year mandatory minimum term in 1991 as an habitual violent felony 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.

This scenario is not the mere musings of a an ethereal legal theorist. 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. Case Number 78,179. There, 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.

Petitioner has no quarrel with this proposition, except that the court's use of the ward "propensity" does 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 might be shown.[1] 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 puts the word to "propensity" to use sparks the same concern. By any objective measure, one violent offense does not establish a propensity. Moreover, the expressed legislative intent is to punish habitual violent conduct, not merely a loosely defined propensity. The failure

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[1] Even two points on a curve do not describe it, and hence do not a pattern necessarily make. Take for instance two collinear points. These two points could lie on a straight curve (i.e., a straight line) or on the opposite sides of, **say**, a parabola. The function defining a parabola (y=x-squared, for instance) is quite different than the function describing **a** straight line (y=mx + b). The point is, a mere two prior points do not necessarily imply a linear relationship (although they may appear to do **so** initially), nor can it definitely be said that a pattern can be discerned from merely two points.

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

DOUBLE JEOPARDY:

The state and federal constitutions both forbid twice placing a defendant in jeopardy for the same offense. U.S. Const., amend, V. Fla.Const., art. 1, s.9. The 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 constitutional protections.

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 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 (or really, no) heed, but instead for the prior, violent felony. The almost exclusive focus on this prior offense renders the 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 habitual or amended habitual offender statute--the case here[2] --the statute's use also violates prohibitions against ex post facto laws.

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 crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.

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

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[2]The date on which Petitioner committed the offense which was used as the "violent" felony was May 19, 1988, with his conviction for that crime on August 15, 1988.

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. 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 Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), rev, pending, Case Number 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.

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(b), Florida Statutes, is being punished more for the prior offense than for the current one. In effect, this is a second punishment for the prior offense, barred by the state and federal constitutions.

EX POST FACTO:

Chapter 88-131, which created the violent habitual felony offender statute, became effective October 1, 1988. [Section 9 of that Chapter.] The violent felony for which Petitioner was severely and doubly punished occurred on May 19, 1988, with judgment entered on August 15, 1988, or (with both dates) before the passage of the act that punished him.

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, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987).

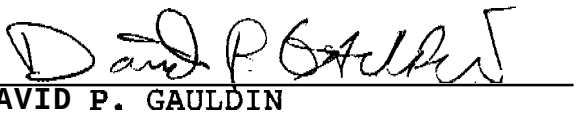
The application of this statute to Petitioner deprives him of the limit of the statutory maximum for his current offense, deprives him of eligibility for a guidelines sentence, and requires him to serve a mandatory minimum term. On its face, application of the statute to Petitioner creates an ex post facto violation prohibited by Miller.

CONCLUSION

Based on the foregoing arguments and authorities, the certified question should be answered in the affirmative in all three respects, the statute should be declared unconstitutional, and Petitioner's case should be remanded to the trial court for a guidelines sentence (perhaps a downward departure from the guidelines to reward Petitioner for the de-escalating pattern of his conduct and the trauma which he has suffered as a result of having been sentenced under an unconstitutional statute).

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by hand delivery to James W. Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida; and a copy has been mailed to Petitioner, Arrices Merriweather, this 1ST day of May, 1992.

DAVID P. GAULDIN

IN THE SUPREME COURT OF FLORIDA

ARRICES MERRIWEATHER, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. 79,572

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

ARRICES MERRIWEATHER,

Appellant,

vs.

STATE OF **FLORIDA,**

Appellee,

NOT **FINAL UNTIL TIME EXPIRES TO** FILE **REHEARING MOTION AND DISPOSITION THEREOF IF FILED**

CASE NO. 91-813

Opinion filed February 25, 1992.

An Appeal from the Circuit Court for Duval County.
R. Hudson Olliff, Judge.

Nancy A. Daniels, Public Defender; David P. Gauldin, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Charles T. Faircloth, Jr., Assistant Attorney General, Tallahassee, for Appellee.

SHIVERS, Judge.

Arrices Merriweather appeals his conviction and sentence as a habitual violent felony offender. We affirm,

Merriweather first argues the trial court abused its discretion by failing to remove a venireman for cause, thereby forcing defense counsel to exhaust his peremptory challenges. His position is not preserved because defense counsel did not expressly request additional peremptories, and he has not shown