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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
	:	
Petitioner,	:	
	:	
v.	:	CASE NO. 79,883
	:	
ROBERT GLOVER,	:	
	:	
Respondent.	:	

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SUPPLEMENTAL BRIEF OF RESPONDENT.

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

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SUPPLEMENTAL BRIEF OF RESPONDENT

I PRELIMINARY STATEMENT

This brief is submitted pursuant to this Court's order of **October 15, 1992**, granting Respondent's motion for leave to file a supplemental brief, and is directed to the question of whether **the** rules of construction in Section **775.021**, Florida Statutes, apply to the penalty provisions in Section **775.0849** Florida Statutes.

II ARGUMENT

ISSUE PRESENTED

WHETHER THE RULES OF STATUTORY CONSTRUCTION IN SECTION 775.021, **FLORIDA STATUTES**, APPLY TO THE PENALTY PROVISIONS IN **SECTION 775.084, FLORIDA STATUTES**.

Chapter 775 of the **Laws** of Florida is **the** general penalty provision for all offenses. It is referred to as the "Florida Criminal **Code**," See Chapter 74-383, s.1, Laws of Florida; and Section 775.011(1), Florida Statutes. The chapter includes not only the classification of crimes and applicable penalties for each classification **but** also **provides** rules of construction to interpret and apply all criminal statutes. Section 775.021(1), Florida Statutes, specifically provides that

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. [Emphasis added].

Section 775.084, Florida Statutes, is part of the Florida Criminal **Code**. Nonetheless, Petitioner argues that the rules of construction contained in Section 775.021(1) are inapplicable to the habitual offender statute (and all other sentencing statutes). The language of **the** code itself belies this contention. Section 775.021(1) plainly applies to the provisions of this code, as well as to *offenses* defined in other statutes. Since "this code" encompasses all subsections of Chapter 775, it necessarily applies to the enhancement provisions in Section 775.084.

Section 775.021(1) consists of two rules of construction: the principle **that** penal statutes should be strictly construed according to their **plain** meaning, and the rule of lenity which requires that any ambiguity in the language of a statute **be** resolved in favor of the accused. Petitioner advances two theories why these rules of construction do not apply to sentencing statutes. Both arguments are legally fallacious.

Petitioner first maintains that the rationale for the rule of strict construction is **due process**, and although one accused of a crime is entitled to the presumption of innocence and must **be** accorded due process, once the person is convicted, there is no presumption of innocence, and **thus** no rationale for applying **this** rule of construction. This position utterly ignores that due process is a mandatory component of all sentencing proceedings. Although a convicted defendant is not **be** entitled to the full panoply of rights afforded an accused during a guilt **phase** of **the** trial, he/she is nonetheless entitled to fair notice and

all the procedural safeguards required **by** the Fourteenth Amendment to ensure a fair sentencing proceeding. Eutsey v. Stater 383 So.2d 219 (Fla.1980). As noted in Eutsey, the state is not required to prove the defendant's status as a habitual offender beyond a reasonable doubt, and there is no right to a trial **by** jury in a sentencing proceeding. This is not *the* equivalent of abrogating all due process rights in the sentencing phase.

Section 775.012, Florida Statutes, provides a statement of the six general purposes of the Florida Criminal Code. Each of these are founded on principles of due process. In particular, subsection (2) states as **one** objective to give fair warning in understandable language of the nature of the conduct proscribed and of the sentences authorized upon conviction. This purpose would have little substance if the rule of strict construction was deemed inapplicable to the penalty provisions of the code.

Petitioner further contends that the rule of lenity is restricted "to the accused" in **the** guilt phase and thus cannot be extended to the sentencing **phase**. This contention strains both the law and logic. While a defendant is no longer accused of a crime **once** he or **she has been** convicted at the guilt **phase, the** defendant remains an accused habitual offender until the state satisfies the notice provisions and **meets its** burden of proving the requisite prior convictions at sentencing. Until then, the defendant remains an "accused" and is thus entitled to the **same** procedural safeguards, constitutional **and** statutory, at sentencing. This includes the benefit of the rule of lenity. See, e.g., Carawan v. State, 515 So.2d 161, **165** (Fla.1987), quoting,

Albernaz v. United States, 450 U.S. 333, 342, 101 S.Ct. 1137, 1144, 67 L.Ed.2d 275 (1981)(rule of lenity is "a principle of statutory construction which applies not only to interpretations of **the** substantive ambit of criminal prohibitions, but also to **the** penalties they impose.").

This Court **has** often applied the rules of statutory construction to sentencing statutes,           , **e.g.** Scates v. State, 17 FLW 5467 (Fla. July 23, 1992)(rule of lenity applicable to the minimum mandatory provisions in Section 893.13(1)(e), and Flowers v. State, 586 So.2d 1058 (Fla. 1991)(rule that statute should be construed most favorably to accused applies to sentencing guidelines), and it should not depart from that sound tradition in the instant case. **It** is noteworthy that in both Scates and Flowers, the rule of lenity was applied to penalty provisions outside Chapter 775. It would defy both precedent and logic to find these **same** rules of construction inapplicable to the penalty provisions in Chapter 775. See Barnes v. State, 595 So.2d 22 (Fla. 1992), where state argued, and this Court **agreed**, that a strict construction of habitual offender statute **did** not require that prior convictions **be** sequential.

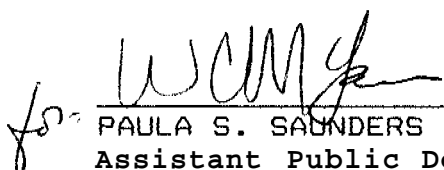
In sum, **both** the rule of strict construction and **the** rule of lenity in Section 775.021(1) apply to **the** penalty provisions in Chapter 775 and should **be applied** to **the** resolve the issue now before **the** Court.

III CONCLUSION

For all the foregoing reasons, Respondent contends that the rules of statutory construction in Section 775.021, Florida Statutes, apply to the habitual offender provisions in Section 775.084, and urges this Court to apply those rules in resolving the issue in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Supplemental Brief of Respondent has been furnished by U.S. Mail to Mr. James Rogers, Assistant Attorney General, 2020 Capital Circle, SE, Suite 211, Tallahassee, Florida, 32301; and a copy has been mailed to respondent, on this 26 day of October, 1992.

for   
PAULA S. SAUNDERS