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IN THE SUPREME COURT OF FLORIDA

KENNETH L. MAEWEATHER,

Petitioner,

v. CASE NO. 79,995

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court below, Maeweather v. State, ____ So.2d ____, 17 FLW D1431 (Fla. 1st DCA June 2, 1992). All proceedings were held in Columbia County before Circuit Judge Wallace Jopling. The record on appeal and two-volume transcripts labelled February 8 and 9, 1991, will be referred to as "R"; the sentencing transcript of February 27 will be referred to as "S."

II STATEMENT OF THE CASE

The state charged petitioner, Kenneth L. Maeweather, with possession of a firearm by a convicted felon **(R-77).** The state filed notice of intent to classify him **as** an habitual violent felony offender (R-95). At trial either February ***8*** or 9, 1991 (one volume of transcripts is labelled February ***8***, one is labelled the 9th, verdict form says February 8), a jury convicted him as charged **(R-110).** February **27,** the judge sentenced Maeweather **as** an habitual violent felony offender to 20 years in prison with a 10-year mandatary minimum (R-134-37). At sentencing, the state introduced evidence of the following convictions: uttering a forged check, **1981** (R-126); shooting into an occupied dwelling, 1983 (R-116); and attempted manslaughter, display of weapon during felony and aggravated assault with a deadly weapon, **all** in one episode in **1988** (R-120).

The First District Court of Appeal affirmed the judgments and sentences, Maeweather v. State, supra, but certified to this court a question similar to the one previously certified in Gayman v. State, 584 So.2d 632 (Fla. 1st DCA 1991), jurisdiction accepted Fla. no. **78,547:**

> WHETHER THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WERE VIOLATED BY THE TRIAL COURT'S USE OF THE SAME PRIOR CONVICTION AS THE BASIS FOR THE CHARGE OF POSSESSION OF A FIREARM BY A CONVICTED FELON AND FOR CLASSIFICATION OF THE APPELLANT AS A HABITUAL VIOLENT FELONY OFFENDER.

The court also certified two questions previously certified in Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), jurisdiction accepted Fla. no. 78,715:

> 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?

This appeal follows.

III STATEMENT OF THE FACTS

Richardson hearing. The day of trial, the court conducted a hearing on the allegation the state had failed to disclose two witnesses, Deputy Nolan and Joe Ramirez, until the day before trial. Nolan's testimony was cumulative and needs no further discussion. Ramirez' testimony was another matter. Petitioner argued, not only was Ramirez not disclosed, but also the state's theory of the case, as indicated by the evidence that was disclosed, was that Maeweather possessed the gun when he was arrested on September 9. Ramirez was not present when Maeweather was arrested and had no personal knowledge of the events of that day. Thus, his testimony was not relevant to the charge being tried (R-159).

The state conceded Ramirez' name did not appear on the discovery answer. The state argued that Deputy Alex Dyal mentioned Ramirez during a deposition and that constituted discovery under the rule. At deposition, Dyal detailed Ramirez' allegation that petitioner, Kenny Maeweather, had shot him in the head, The state argued there was no requirement the state "list a witness per se when that evidence has been disclosed through other means'' (R-161-62).

The state argued it could prove possession on a day other than the day of arrest. The state said Ramirez' testimony "would not be to the extent of actually proving a separate charge...but providing probable cause for the officers" to look for and arrest Maeweather, "So that would be the purpose of having his testimony, plus the fact that he would be able to

testify that the defendant was in possession of the firearm... So it goes to the very, very heart of the case" (R-164-65).

Defense counsel argued the basis for the charge was a gun found in the couch where Maeweather had been laying when he was arrested, and Ramirez was not involved in the arrest. Counsel argued that, had he known Ramirez was going to testify, he would have called witnesses who were present at the scene of the alleged shooting to testify that Maeweather did not shoot Ramirez or possess a gun. Defense counsel disputed whether the alleged shooting took place (R-165-67).

The state said Ramirez would testify Maeweather had sold him the gun (R-168). Defense counsel pointed out Maeweather was not on trial for battering Ramirez, and the firearm possession being tried was based on the gun found in the couch when Maeweather was arrested at Shirlene Crusaw's house. Counsel said it would severely prejudice Maeweather's case [if he had to defend against the Ramirez allegations] (R-169-71).

The court said it was concerned about Ramirez testifying about another offense which was not on trial, and the prejudicial effect of Ramirez' testimony as to another alleged shooting (R-171). The state said the judge could give a curative instruction. The state announced the defense was going to concede that Maeweather was a convicted felon. The state said it would ask about the (shooting) incident itself. Defense counsel objected again, saying a curative instruction would not wipe away what the jury heard of the incident, with which the defendant was not charged (R-172-74).

The court found that Ramirez' name was mentioned in the deposition of the state witness in October; the defendant would have an opportunity to depose Ramirez before he testified; and, the intent of the state to call the witnesses was made known the day before trial. Therefore, the court found the state's violation was not willful but inadvertent, not substantial, and because the defense would be given an opportunity to depose Ramirez, would not have any adverse effect upon the ability of the defendant to present his case at trial (R-175).

The defense moved for a continuance to find witnesses to the shooting incident alleged by Ramirez, who would refute Ramirez' account (R-180-83). Petitioner argued that where the gun came from, in other words, Ramirez' testimony, was irrelevant to the charge that Maeweather possessed a gun when arrested. Having earlier argued it was not bound by the date on the information, the state pointed out that the date on the information is September 8; Maeweather was arrested September 9 (R-184-85).

When the defense asked, "are you going to allow the state to refer to and for Ramirez to testify to the incident that occurred, according to Ramirez, the night of September 8?," the court said: "Now I am going to wait and hear the questions on that and I will rule on that" (R-193-94).

Trial. Late in the afternoon of September 8, 1990, Columbia County Sheriff's Investigator Charles Tate arrested Maeweather. Tate had been looking for Maeweather and found him at a home at Hernando and Escambia Streets. This was Shirlene

Crusaw's home; Maeweather did not live there. When Tate arrived, a woman [Crusaw] let him in the apartment. Tate found Maeweather laying on his back on a couch in the living room. Maeweather's left hand was behind his head: his right hand was in the cushions of the couch. Tate drew his weapon and told Maeweather to let him see his hands, which Maeweather did. Deputy Nolan entered about this time and handcuffed Maeweather. Tate found a small, .38 revolver under the cushion where Maeweather's hand had been (R-7-8). At the jail, Tate asked where the weapon came from and Maeweather said he had got it a week before from the victim, Ramirez (R-14).

On cross, Tate denied that the woman said she would go inside the house and get Maeweather for him (R-17). Tate did not see Maeweather touch the gun, and it was not tested for fingerprints (R-19). Asked whether he told Maeweather that Ramirez had been shot in the head, Tate said yes (R-21).

Joe Rarnirez testified that, on September 8, he saw Maeweather in possession of a black .38. Rarnirez said Maeweather had sold him the gun earlier and then stole the gun back (R-25-27). In two unresponsive answers, Ramirez said, when Maeweather was carrying the gun, Maeweather threatened to kill him. Then, in response to the question, "did he take it [the gun] out," Ramirez said, "Yes, because I look for my gun and he say, I will kill you, mother fucker. I say, kill me" (R-30). The court permitted Rarnirez' testimony concerning Maeweather's possession of the gun the day before, sustained the objection to the previous possession (when it was sold), but gave no curative

instruction, although the jury had heard evidence that was ruled inadmissible (R-31-32).

After the state rested, Shirlene Crusaw testified for the defense that she was at Henry Crusaw's, the bar mentioned by Ramirez, the night of September 8. She saw Maeweather strike Ramirez. Maeweather did not have a gun then, nor at any time that evening. Maeweather spent the night at her house. She did not see him with a gun the next day, either (R-48-50).

When Tate came up and asked for Maeweather, Crusaw told him to wait and she would go call him. She did not give Tate permission to come in the house, but he came in right behind her. She called to Kenny down the hall. He jumped up off the sofa and stood up (R-51-53). A guy named Snake had slept on the couch the previous Friday night. She did not know who put the gun in the couch. Maeweather had hit Ramirez with a beer bottle (R-54-55).

Maeweather, testified in his own behalf. He has five felony convictions (R-59). He denied possessing the gun at the bar, but he did strike Ramirez that evening. When Tate arrived, his hand was not under the cushions. His hand was cut, and it was too sore to put under there (R-61-62).

IV SUMMARY OF ARGUMENT

The day before trial, the state disclosed for the first time that it intended to call Joe Ramirez as a witness at trial, Ramirez' testimony was irrelevant and prejudicial and should have been excluded. While the trial court conducted a Richardson inquiry, it was inadequate to protect petitioner's right to a fair trial – the court's findings were not supported by the record, and the court's failure to rule clearly on what Ramirez would be permitted to say contributed to the prejudice to Maeweather in the preparation of his defense. Thus, this cause must be reversed and remanded for new trial.

Petitioner was punished twice for the same offense by first using his status as a convicted felon to convict him of possession of a firearm by a convicted felon, and then using his prior convictions to sentence him as an habitual violent felony offender. This was a double jeopardy violation.

Principles of statutory construction require that an offense for which the state seeks an enhanced punishment as an 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 as to comport 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 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 an 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.

V ARGUMENT

ISSUE I

THE TRIAL COURT ERRED REVERSIBLY IN ADMITTING THE TESTIMONY OF JOE RAMIREZ. FIRST, HIS TESTIMONY WAS IRRELEVANT TO THE CHARGE BEING TRIED; SECOND, THE STATE'S DISCOVERY VIOLATION WAS SUBSTANTIAL AND CAUSED PROCEDURAL PREJUDICE TO PETITIONER. THUS, ON EITHER GROUND, THE TRIAL COURT ERRED IN ALLOWING RAMIREZ TO TESTIFY.

Prior to trial, Maeweather demanded discovery pursuant to Rule 3.220, Florida Rules of Criminal Procedure. The demand was for, inter alia, the names and addresses of all persons known to the prosecutor to have information relevant to the offense charged (R-87).

The day before trial, the state disclosed for the first time to the defense that it intended to call two witnesses, Deputy Nolan and Joe Ramirez. The testimony of Nolan was cumulative and posed no problem to the defense, but the testimony of Ramirez was irrelevant and prejudicial and should have been suppressed. Further, while the trial court conducted a Richardson inquiry, the inquiry was inadequate to protect Maeweather's right to a fair trial, and this cause must be reversed for new trial. Richardson v. State, 246 So.2d 771 (Fla. 1971).

Maeweather was charged with possession of a firearm by a convicted felon. The charge was premised on a gun found in the couch on which he was laying when he was arrested. This is the way the offense is reported in the arrest affidavit and other police reports in the record (R-85). He was arrested on the basis of Joe Ramirez' allegation that Maeweather had shot him

in the head the day before. (This was apparently a minor wound.) Maeweather was not being tried for the alleged shooting of Ramirez, and in fact, it is inferable from the record that he was not charged with any offense related to the alleged shooting.

It is difficult to separate the issues of the irrelevance of Ramirez' testimony from the state's discovery violation, and the inadequacy of the Richardson inquiry, or more specifically, from the inadequacy of the court's rulings on the Richardson issue. Some of the court's findings were not supported by the record, and thus constituted an abuse of discretion, and the judge deferred ruling, and then failed to rule on, exactly what Ramirez would be permitted to say. The failure to rule was also an abuse of discretion and rendered the inquiry inadequate.

A. Relevance.

Nevertheless, the first problem was that the court admitted Rarnirez' testimony despite the fact it was irrelevant. According to Ramirez, Maeweather shot him in the head at a bar on September 8. Rarnirez complained to the police, and they arrested Maeweather the next day, at the home of Shirlene Crusaw. After the arrest, an officer found a gun in the cushions of the couch on which Maeweather had been laying. Defense counsel argued that Ramirez knew nothing of the events surrounding the arrest and discovery of the gun in the cushions, thus his testimony would be irrelevant to the crime charged.

In response, the state argued that Ramirez' testimony was relevant for two reasons - to explain why Maeweather was being arrested, and to prove that Maeweather possessed the gun on another occasion. The prosecutor argued both that the state was not bound by the date on the information, and that the information actually alleged possession on September 8, the day of the alleged shooting and the day before the arrest (R-185).

Neither of these reasons justified the admission of Ramirez' testimony. The reason why Maeweather was being arrested was irrelevant to the charge of possession of the gun in the couch. The jury could not properly be informed of this. Such testimony would constitute evidence of an irrelevant, collateral bad act. In other words, it was Williams rule evidence. Williams v. State, 110 So.2d 654 (Fla.), cert. denied 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959), codified as section 90.404(2), Fla. Stat.

Evidence of other crimes not being tried is generally inadmissible, and is allowed only when it serves certain narrow purposes. Most of these narrow purposes are defined by the Williams rule. The rule permits the introduction of similar fact evidence to prove a material fact in issue, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, but specifically holds such evidence inadmissible when relevant solely to prove bad character or propensity.

The use of similar fact evidence to establish a fact at issue in a criminal trial is fraught with the danger of

convicting a person not for the crime charged, but for his criminal propensities or bad character. Courts must be concerned that "the jury may choose to punish the defendant for the similar rather than the charged act, or the jury may infer that the defendant is an evil person inclined to violate the law." Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 1499-1500, 99 L.Ed.2d 771, 780 (1988). The Florida Supreme Court has said:

> There is no doubt that this admission [to prior unrelated crimes] would go far to convince [persons] of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded.

Jackson v. State, 451 So.2d 458, 461 (Fla. 1984) (quoting with approval Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976), review denied 348 So.2d 953 (Fla. 1977)).

Otherwise admissible evidence is be excluded if its prejudicial impact substantially outweighs its probative value. § 90.403, Fla.Stat. To limit prejudicial impact, collateral crime evidence should not be allowed to become a feature of the trial of an unrelated crime. Williams v. State, 117 So.2d 473 (Fla. 1960).

The Florida Supreme Court has said the controlling rule of admissibility is relevance, but the rule of relevance has limitations. In Bryan v. State, 533 So.2d 744 (Fla. 1988), cert.

denied 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989), a capital case, the court said:

> The only limitations to the rule of relevancy are that the state should not be permitted to make the evidence of other crimes the feature of the trial or introduce the evidence solely for the purpose of showing bad character or propensity, in which event it would not be relevant, and such evidence, even if relevant, should not be admitted if its probative value is substantially outweighed by undue prejudice. (emphasis in original)

The facts of Bryan are very instructive in the instant case. Applying the above standard to evidence that Bryan had earlier used the murder weapon in a bank robbery, the supreme court said that, while other evidence of how Bryan came to possess the gun was admissible, "any evidence of the bank robbery ... was substantially outweighed by the danger of unfair prejudice," Bryan, 533 So.2d at 747.

While the Bryan court found the evidence of the bank robbery to be harmless, the evidence here of the alleged shooting incident was not harmless. For one thing, the bank robbery in Bryan was a less serious crime than the first-degree murder being tried, while here, the allegation that Maeweather shot Ramirez in the head is much more serious, and much more prejudicial, than the status offense - possession of a firearm - being tried.

As to the state's claim that it was not limited to the date in the information: This may be true under some circumstances, but it does not give the state permission to ambush the defendant in the preparation of his defense. Petitioner

knew of the existence of Ramirez and his claim of the alleged shooting, It was not in the fact that Ramirez was unknown to him that he was misled in the preparation of his defense. Nor was it so much in the date that petitioner was misled. Rather, he was misled as to the incident being tried.

Maeweather reasonably believed, based on the police reports, that he was charged with possession of a firearm at the time of his arrest, for which the witnesses would be mainly the police officers, and as to which, Ramirez' testimony was irrelevant. It was a wholly different charge to claim that he was being tried for possessing the firearm at the time Ramirez was shot, As defense counsel pointed out, if he had known that incident was going to be tried, he would have sought out witnesses who were present at the bar that night, who would have disputed Ramirez' version of events. According to defense counsel, witnesses existed who would have denied that any shooting incident occurred. There is no question but that the defense was misled by the presence of the police reports and the absence of Ramirez' name from the witness list as to how the possession, or as to possession on what day, was being tried. This was a substantial discovery violation.

B. Discovery violation/Richardson inquiry

Even if this court could accept Ramirez' testimony as relevant to some purpose, although petitioner doubts this, then the court must move on to the next issue, which is the discovery violation. When there is a discovery violation, the trial court is required to conduct a Richardson inquiry, The Florida

Supreme Court has delineated the requirements of the Richardson inquiry thus:

> Richardson states that although the trial court has discretion in determining whether the state's noncompliance with the discovery rules resulted in harm or prejudice to the defendant, such discretion could be exercised only after the court made an adequate inquiry into all of the surrounding circumstances. At a minimum, the scope of this inquiry should cover such questions as whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and, most importantly, whether the violation affected the defendant's ability to prepare for trial. (cites omitted) (emphasis added)

Brown v. State, 515 So.2d 211, 213 (Fla. 1987), quoting State v. Hall, 509 So.2d 1093, 1096 (Fla. 1987).

The failure to conduct a Richardson inquiry is per se reversible error. Smith v. State, 500 So.2d 125 (Fla. 1986); Brown; Hall. Lee expressed this principle as the failure to conduct an adequate inquiry was per se reversible error. Lee v. State, 538 So.2d 63 (Fla. 2d DCA 1989). The trial court here conducted a Richardson inquiry, but it was inadequate.

In the inquiry, the state has the burden of establishing that the previously undisclosed evidence did not prejudice the right of the defendant to a fair trial. Cumbie v. State, 345 So.2d 1061 (Fla. 1977). The purpose of the inquiry is to determine if procedural, rather than substantive, prejudice occurred. Hatcher v. State, 568 So.2d 472 (Fla. 1st DCA 1990), review denied 577 So.2d 1328 (Fla. 1991); Lee. The standard of appellate review for Richardson violations is abuse of discretion. Hatcher; Wilkerson v. State, 461 So.2d 1376 (Fla. 1st

DCA 1985). Since the court's findings here were not supported by the record, they constituted an abuse of discretion, and the court's ruling must be reversed.

As to willfulness, the state claimed it was not obliged to list Ramirez as a witness because his name had been revealed in the deposition of a police officer. First of all, the state is mistaken. The state indeed has a duty to affirmatively list witnesses, Rule 3.220, Florida Rules of Criminal Procedure, and Hall, supra, and also has a continuing duty to disclose new information. Rule 3.220(f); Neimeyer v. State, 378 So.2d 818 (Fla. 2d DCA 1980). Assuming the state honestly believed it had sufficiently complied, even though it was mistaken, then the omission would probably be classified as inadvertent, but this is hardly the end of the matter.

The judge found the omission was trivial. He gave no basis for this conclusion. The judge also said that, because the defense would be given an opportunity to depose Ramirez before he testified, there was no prejudice to petitioner. This was not the point, and the opportunity to depose Ramirez was not sufficient to overcome the prejudice of the state's discovery violation. The state's violation substantially interfered with Maeweather's preparation of his defense.

Maeweather was misled in the preparation of his defense by the state's seeming to either change its theory of the case, or to proceed on two different theories - one, that he possessed the gun in the couch when he was arrested; two, that he possessed the gun when he shot Ramirez - at the same time. This

state of affairs put Maeweather at a tremendous disadvantage in preparing for trial, as the actual events of the trial bore out.

Courts have several times recognized how the state may mislead the defense, or destroy the intended defense, through discovery violations. For example, in Hatcher's trial for leaving the scene of an accident involving injury, the trial court allowed the state to call two undisclosed witnesses on rebuttal. Hatcher, supra. Hatcher's car lost a tire, which then struck another vehicle, causing the accident. Hatcher said he thought he had blowout, and did not realize he had actually lost the tire until he stopped the car some distance down the road. He said he did not know until two days later that the accident had occurred. The rebuttal witnesses testified they saw Hatcher the same day, told him of the accident and asked him to return to the scene, but he refused,

The First District Court said:

> The court's conclusion that the failure to disclose the witnesses was not willful is questionable; however, the court's finding that no prejudice occurred is clearly in error.

Hatcher, 568 So.2d at 474. This court said the state had, in effect, changed its theory of the case after the defendant had testified, and that "[p]rejudice to the defendant is unavoidable under these circumstances." Id.

In Copeland v. State, 566 So.2d 856 (Fla. 1st DCA 1990), Copeland and the sexual battery victim's husband were both blood type B secretors. The victim and her husband had had

sexual intercourse about 48 hours before the sexual battery occurred. When defense counsel deposed the state's serology expert, the shared blood type was not yet known, but counsel asked the expert whether, if the husband's blood type were the same as defendant's, he could be excluded. The expert led counsel to believe that, if the blood types were the same, the husband could not be excluded as the source of semen found in the victim's vagina.

At trial, however, the expert said that, based on experiments she had devised and conducted, she could determine the age of sperm, and that the sperm taken from the victim's vagina had been placed there more recently than 48 hours. This testimony was extremely prejudicial to the defense that the serology tests could not identify Copeland as the source of the sperm, since they could not exclude the husband as a possible source, since he was also, like Copeland, a type B-secretor. Defense counsel objected on two grounds, that the sperm-age tests and results had not been disclosed, for which the court failed to conduct a Richardson inquiry, and that the sperm-age tests devised by the serologist did not meet the standard of general acceptance in the scientific community. The First District reversed for new trial on both grounds. While the discovery violation here was in failing to name a witness, as in Copeland, the failure to disclose evidence denied petitioner the right to a fair trial.

In Jones v. State, 514 So.2d 432 (Fla. 4th DCA 1987), the state charged Jones with the murder of Anthony Tyson following

a shooting incident. Victor Hendley witnessed the shooting. The state filed a discovery response which identified Hendley as a witness, and furnished a statement by Hendley that he heard the victim say, "Man, you done shot me." During opening statements, the prosecutor told the jury Hendley would testify the victim made a statement, which identified Jones ("Red") as the person who shot him. Petitioner moved for mistrial on the basis of the discovery violation. The colloquy which followed did not make it clear when the state became aware that Hendley's statement had changed. The court held that "a material discovery violation occurred when the state did not inform appellant" that Hendley would testify that Tyson identified Jones as the person who had shot him. 514 So.2d at 435. The court also found the Richardson hearing had been inadequate and reversed for new trial.

While the instant case is perhaps not quite as clearcut as Hatcher, in that the disclosure did occur before trial, the combination of the anticipated testimony of Ramirez, and the judge's failure to rule on exactly what Ramirez would be permitted to say prejudiced Maeweather in the preparation of the case for trial. Anticipating that Ramirez would be asked about the shooting incident, defense counsel asked Deputy Tate about it (R-21). Then, as it turned out, the state did not actually ask Ramirez about the shooting, but only about Maeweather's possession of the gun. But, at the point of his cross-examination of Tate, defense counsel's expectation that Ramirez' testimony would mention the shooting was reasonable, thus

rendering his attempt to cushion the shock of this revelation for the jury by the cross-exam of Tate a reasonable strategy.

There are a few things to be said about this situation. First, the state precipitated the cross of Tate about Ramirez by its assertion that it would call Ramirez to testify. Second, the trial court did not help anything by failing to rule on exactly what Ramirez would be permitted to say. Both these errors were further exacerbated by the state eliciting from Ramirez that Maeweather had sold him the same gun. The judge ruled this was inadmissible, but the jury had already heard it, and no curative instruction was given (R-31-32). Third, Ramirez' actual trial testimony, which was relatively bland, could still have been attacked by the testimony of other witnesses who were present in the bar that night, if the defense had known before trial that Ramirez would be called as a witness.

Fourth, the fact that Ramirez' testimony related only to a completely collateral matter is quite clear when one considers that, had the state been permitted to question Ramirez more about the shooting, this trial easily could have deteriorated into a trial of the relative merits of Ramirez' claim about the alleged shooting incident. This, of course, has no relevance whatever to the issue of whether Maeweather possessed the gun found in a couch when he was arrested.

C. Conclusion

The trial court's error in admitting Ramirez' testimony was multi-faceted. First, the testimony was irrelevant to the

charge being tried. The court should not have permitted the state to change its theory of the case, see Hatcher, or add a second theory of possession on a different day under completely different circumstances, whichever way the court wants to view this situation.

If possession at the point of arrest was the charge being tried, then Ramirez' testimony, and that of all the patrons of the bar present at the time of the alleged shooting incident, was irrelevant. If possession at the point of shooting Ramirez was the charge being tried, then the testimony of the officers who arrested Maeweather was irrelevant or nearly so, and the testimony of persons present at the bar during the incident was crucial. The court should not, under any circumstances, have allowed the state to ambush petitioner with this last-minute, alternate-day, alternate-theory approach.

The real reason the state sought the admission of Ramirez' testimony was to show Maeweather's propensity for crime - the shocking crime of shooting someone in the head, a crime far more serious than the rather innocuous firearm possession charge being tried. This was not proper, and the trial court should have excluded the testimony on the ground of irrelevance.

Second, if, nevertheless, the court considered the evidence admissible for some purpose permitted by the Williams rule, then the evidence should have been excluded on the basis of the discovery violation. The state disclosed Ramirez as a

witness only the day before trial. There were two major errors in the Richardson inquiry.

First, since Ramirez' testimony would completely change the focus of the case, failure to disclose him was a substantial violation, and most importantly (Brown, supra), it severely prejudiced Maeweather's ability to prepare for trial. The trial court's findings to the contrary were not supported by the record, and thus, were an abuse of discretion. The burden was on the state to prove lack of prejudice to petitioner, Cumble, supra, but the state introduced no such evidence, thus utterly failing to carry its burden. The trial court further exacerbated the error by denying petitioner's motion for continuance for the purpose of locating witnesses who would dispute Ramirez' testimony.

Second, the judge's failure to rule clearly on what Ramirez would be permitted to say also severely hampered Maeweather in his defense. Defense counsel's broaching of the subject of the alleged shooting on cross-exam of Tate, before Ramirez testified, seems to be very poor judgment on the part of defense counsel, but for his reasonable expectation that the subject was coming up anyway, and he preferred to be the one to bring it up, perhaps to soften the blow a little.

This cause must be reversed and remanded for new trial.

ISSUE II

THE USE OF THE SAME PRIOR FELONY RECORD, BOTH TO CONVICT PETITIONER OF POSSESSION OF A FIREARM BY A CONVICTED FELON, AND ALSO TO SENTENCE HIM TO AN EXTENDED TERM AS AN HABITUAL VIOLENT OFFENDER, VIOLATED DOUBLE JEOPARDY PRINCIPLES.

The question here is whether Maeweather was punished twice for the same offense by first using his status as a convicted felon to convict him of possession of a firearm by a convicted felon, and then using his prior convictions to sentence him as an habitual violent felony offender.

A similar issue was raised in Gayman v. State, 584 So.2d 632 (Fla. 1st DCA 1991), jurisdiction accepted Fla. no. 78,547, in which the defendant's theft offense was reclassified as felony petit theft, and then, this felony conviction was used to justify an habitual felony offender sentence. The First District court affirmed the judgment and sentence, but certified a question. Gayman is pending in this court.

While the instant case does not involve actual reclassification of the offense from misdemeanor to felony, as does the felony petit theft situation, it is similar in that the prior conviction is both an element of the offense and also the basis for imposing an enhanced sentence. This is also a double jeopardy violation. The prior conviction is necessary to prove the offense, that is, the prior record creates the offense of possession of a firearm by a convicted felon, just as prior record creates the felony offense of petit theft. The further use of the same prior conviction to enhance the sentence under

the habitual offender statute violates double jeopardy principles.

The situation is even worse for petitioner in a way in that, without the prior offense, there is no crime at all of possession of a firearm by a convicted felon, while without the prior record in the theft situation, the defendant could still be convicted of petit theft, even if he could not be convicted of the enhanced offense of felony petit theft. The double sentencing effect is in creating the offense, which would not exist without the prior record, and then using the same prior conviction to enhance the sentence.

A related issue is whether a felony may be reclassified for use of a firearm and a minimum mandatory sentence also be imposed for use of the firearm, In Williams v. State, 517 So.2d 681 (Fla. 1988), the Florida Supreme Court said the arguably dual enhancement was permissible. That question is different from the one here, however, since those two provisions operate independently. The minimum mandatory did not increase the statutory maximum, as do both both uses of the prior record here, and the minimum mandatory may be imposed whether or not the offense is reclassified. Here, the offense must be created by use of the prior record before habitual offender sentencing could apply.

Relying on this court's 1978 decision in State v. Harris, 356 So.2d 315 (Fla. 1978), the First District said in Gayman, supra, that, in defining felony petit theft, the legislature

had created a substantive offense, which was distinguishable from the habitual offender statute. 356 So.2d at 316.

While Harris appears to address the issue here, petitioner believes it did not actually do so. Rather, this court was primarily concerned with the effect on due process and the presumption of innocence of requiring the state to charge in the information and prove at trial that the defendant had prior convictions. Apparently believing this procedure undermined the presumption of innocence, the court resolved this issue by ordering that prior convictions are not to be charged in the information, nor is the jury to be informed of them. Rather, prior convictions are to be proved in a separate procedure similar to that used in an habitual offender sentencing. 356 So.2d at 317. Harris also said some things that apply only to the felony petit theft situation, and not here. Harris does not resolve the issue here.

Petitioner requests this court reverse his sentence for a sentence for a non-habitual offender sentence, as his present sentence violates double jeopardy principles.

ISSUE III

THE HABITUAL VIOLENT FELONY PROVISIONS OF SECTION 775.084, FLORIDA STATUTES (1989), MUST BE CONSTRUED TO REQUIRE THAT THE OFFENSE FOR WHICH A SENTENCE IS IMPOSED UNDER THOSE PROVISIONS BE AN ENUMERATED VIOLENT FELONY; A CONTRARY CONSTRUCTION RENDERS THE STATUTE VIOLATIVE OF CONSTITUTIONAL DUE PROCESS AND DOUBLE JEOPARDY PRINCIPLES,

In 1988, the legislature amended section 775.084, Florida Statutes, creating among other changes a new classification, habitual violent felony offender. Ch. 88-131, § 6, Laws of Fla. Section 775.084(1)(b), Florida Statutes (1989), now defines an habitual violent felony offender as one who has committed one of 11 named violent felonies within the past five years, or been released from a prison sentence for one of these crimes within the past five years, and then commits a new felony. Section 775.084(4)(b) provides enhanced penalties far those who qualify, including mandatory minimum terms.

The First District Court of Appeal has certified two questions, asking whether a sentencing scheme that permits enhancement of a sentence for an habitual violent felon violates constitutional due process and double jeopardy clauses when the offense for which the sentence is imposed is nonviolent. Petitioner addresses those questions below, First, however, this court should determine whether an alternative construction which avoids these potential constitutional defects is possible.

A. Statutory Construction

The habitual violent felony provisions suffer internal conflict. The statute's title invokes the term "habitual violent felony offenders." The term is repeated in section 775.084(1)(b). The word "habitual" denotes an act of custom or habit, something that is constantly repeated or continued. Oxford American Dictionary (1980 ed.) However, section 775.084(4)(b) defines an 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 an habitual violent felony offender sentence for a single, prior crime of violence.

Courts have a duty to reconcile conflicts within a statute. In re Nat'l Auto Underwriters Assn., 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). If doubt over the meaning of the law remains, the court must apply a strict scrutiny standard and resolve the ambiguity in favor of the defendant. State v. Wershow, 343 So.2d 605 (Fla. 1977). This result is consistent

with the rule of lenity, a creature of statute in Florida. § 775.021(1), Fla. Stat. (1989). The rule, which requires the construction most favorable to the accused when different constructions are plausible, extends to the entire criminal code, sentencing provisions included. Cf. Bifulco v. United States, 447 U.S. 381, 387, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980) (federal rule of lenity applies to interpretation of penalties imposed by criminal prohibitions).

Applying these principles, this court should find that the current 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 current 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 current 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 current 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 current offense to be an enumerated violent felony. Here, the state established only one prior violent felony - robbery -

plus the current, nonviolent gun possession. 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 an 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 rejected a similar due process argument in Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991), aff'd, ____ So.2d ____, 17 FLW S367 (Fla. June 18, 1992). 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." 579 So.2d at 878. Petitioner 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. In a guideline departure case, Judge Cowart of the Fifth District Court 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), review dism., 581 So.2d 1309 (1991) (Cowart, J., dissenting). The manner in which Ross puts the word "propensity" to use sparks the same concern, 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

The state and federal constitutions both forbid twice placing a defendant in jeopardy for the same offense. U.S. Const., am. v; **Fla.** Const., art. 1, § 9. The First District Court 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. This goes to the second of the certified questions.

To punish a defendant as an habitual violent felony offender, the state need show only that he has one prior offense within the past five years for a violent felony enumerated in 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: the enhanced punishment is not for the new offense, to which the statute pays little heed, but instead for the prior, violent felony. The almost exclusive focus on this 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 it did here, 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, 68 S.Ct. 1256, 92 L.Ed. 1683 (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 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 double jeopardy arguments. See generally, Reynolds v. Cochran, 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. In another opinion on the same issue, Judge Zehmer said in his concurring opinion:

> I view the imposition of the extent of punishment for the instant criminal offense based on the nature of the prior conviction as effectively imposing a second punishment on defendant solely based on the nature of his prior offense, a a practice I had thought prohibited by the Florida and United States Constitutions.

Hall v. State, 588 So.2d 1089, 1089 (Fla. 1st DCA 1991)(Zehmer, J., concurring), review pending, no. 79.237. As for how this section was distinguishable from other recidivist statutes, Judge Zehmer said:

> This new statutory procedure is entirely different from the former concept of enhancing sentences of habitual offenders having prior offenses without regard to the nature of the prior felony, which has been upheld in this state and all other jurisdictions.

Id. This distinction is the point at which the amended statute runs afoul of constitutional double jeopardy clauses.

The First District Court did not meaningfully address this distinction in Ross or in Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), review pending, no. 78,613. In Perkins, the district 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 the instant case.

The amended statute also differs from recidivist schemes focused on repetition of a particular type of crime. In United States 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. 868 F.2d at 1394-1395. In contrast to the statute at issue here, the federal 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 current 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 section 775.084(b), Florida Statutes, is being punished more for the prior offense than for the current one. In effect, as noted by Judge Zehmer in Hall below, this then is a second punishment for the prior offense, barred by the state and federal constitutions. 588 So.2d at 1089 (concurring opinion).

C. Conclusion

For these reasons, petitioner'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 current conviction for which sentence is being imposed be an enumerated felony, or the statute violates constitutional due process and double jeopardy 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.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court reverse his conviction and remand for new trial, or in the alternative, reverse and remand for resentencing within the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to James W. Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. Kenneth L. Maeweather, inmate no. 541206, Mayo Correctional Institution, P.O. Box **448**, Mayo, Florida 32066, this 14 day of July, 1992.

KATHLEEN STOVER