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IN THE SUPREME COURT OF FLORIDA

FRANCIS GENE JEFFRIES,

Petitioner,

v. CASE NO. 80,166

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
2ND JUDICIAL CIRCUIT

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BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and will be referred to as petitioner in this brief. A two volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. A two volume trial transcript will be referred to as "T." A one volume sentencing transcript will be referred to as "S." Attached hereto as an appendix is the decision of the lower tribunal.

II STATEMENT OF THE CASE

By amended information filed November 9, 1989, petitioner was charged with attempted escape and possession of a weapon by a prisoner (R 1). The cause proceeded to jury trial on February 28, 1991, and at the conclusion thereof petitioner was found guilty as charged (R 169). Petitioner's timely motion for new trial (R 176) was denied by written order filed March 14, 1991 (R 194).

On April 1, 1991, petitioner was adjudicated guilty and sentenced as an habitual offender on each count to 20 years in prison, to run concurrently, but consecutively to his present sentence (R 211-15).

On April 4, 1991, a timely notice of appeal was filed (R 217). On June 28, 1991, the Public Defender of the Second Judicial Circuit was designated to represent petitioner.

On appeal, petitioner argued he was entitled to a jury instruction on the defense of necessity. The lower tribunal affirmed on this issue, finding insufficient evidence to support the instruction. Appendix at 1-2. Petitioner also argued that he could not have been classified as an habitual offender by the very terms of the statute. The lower tribunal affirmed on this issue as well, but certified the question. Appendix at 2.

On July 13, 1992, a timely notice of discretionary review was filed.

III STATEMENT OF FACTS

Correctional officer Dale Pfalzgraf went into petitioner's cell at Florida State Prison on January 27, 1989, and shook the window screen. It was secure (T 41-44).

Correctional officer Billy Coleman testified that on February 5, 1989, he went into petitioner's cell. The screen over petitioner's window was loose, and the T-shaped bars came right out of the window. A person could climb out of the window. He found toothbrushes which had been melted down to hold razor blades and a rope made out of sheets colored blue. Both of the items are not permitted in the prison (T 30-39).

Prison inspector Ron Davis determined that the entire window screen had been cut around the framing and a T-shaped section of the bars had also been freshly cut. Photos of the area were entered into evidence without objection, as were the two items of alleged contraband (T 45-65).

Over objection, the witness was permitted to testify that the toothbrush with the razor blades could fit between the frame and the window screen. Petitioner had been assigned that cell on January 18 (T 66-73).

Captain Donald P. Bryant testified that the objects found in petitioner's cell were not authorized (T 73-76). The state rested (T 76). Petitioner's motion for acquittal was denied (T 79-81).

Clinical psychologist Harry Krop testified that petitioner was insane at the time of the offenses. He had been suffering from delusional paranoid disorders for 10 years, according to

medical records. Petitioner believed he had holes in his head and metal in his body. He believed someone was blowing dust from light bulbs into his body. He believed DOC officers were conspiring to poison him and throw glass at him. He believed his life was in danger (T 84-99).

Over objection on cross examination, Dr. Krop was permitted to testify that petitioner understood the criminal process and was not suicidal (T 109-11). Petitioner believed he was justified in trying to escape to save himself from death in the prison (T 125).

Prison psychological specialist Robert Miller testified that prior to February 5, petitioner thought people were throwing ground-up glass into his cell and placing it in his food. Petitioner had made the same complaint many times over five years (T 131-36).

Petitioner, age 54, testified that other inmates were blowing light bulb glass on him. After he moved into that cell, it continued to be done through little tubes. It made him real nervous, gave him headaches, and sick to his stomach. He cut the window screen and the bars. He wanted to stay in the psychiatric wing instead of going to Chattahoochee. He once had a mask to place over his mouth but it was taken away. His ears had been eaten up by the light bulb dust. He wanted to leave his cell and get a five gallon can of gasoline from the paint shed and burn up the people who were doing these things to him. The window had been cut for three or four days, and he could have left at any time. He was afraid of being

harmed by the light bulb glass. He wished he could bring some of the dust to court (T 137-46).

Upon cross examination, the prosecutor asked petitioner if he had filed a motion to remove the public defender (R 57-59). Counsel objected to the question because it was irrelevant and asked for a mistrial. The prosecutor argued that petitioner's motion alleged that he wanted to present a defense of insanity and necessity, and this was relevant to the credibility of Dr. Krop. The court denied the motion for mistrial and ruled that the matter was relevant to the credibility of petitioner (T 150-55).

The prosecutor was permitted to show in front of the jury that petitioner wanted counsel to present an insanity and necessity defense (T 156-57). On redirect examination, petitioner testified that he was upset with his attorney because she wanted to present an insanity defense and petitioner did not want to go to Chattahoochee or have anyone think he was crazy. He withdrew the motion after he had filed it (T 158-60).

Psychiatrist Umesh Mhatre testified in rebuttal that he reviewed petitioner's mental health records briefly and interviewed him. He testified over objection that petitioner understood the charges and the adversarial process (T 162-67). He further testified that petitioner stated that the screen and bars had been already cut by someone else. He did not believe that petitioner had any mental illness at the time of the crime, but only an antisocial personality (T 167-73).

Dr. Mhatre had not reviewed petitioner's medical records nor spoken with prison psychological specialist Robert Miller to confirm that petitioner had complained about the light bulb dust for 10 years (T 177-78; 187).

The state rested, and petitioner's renewed motion for acquittal (T 190) was denied (T 195).

Petitioner requested a special jury instruction (R 133-34) on the defense of necessity. The request was denied (T 190-95), and renewed after the jury was instructed (T 214). After 45 minutes of deliberation, the jury returned its guilty verdicts (T 216).

The category 9 sentencing guidelines scoresheet contained a total of 372 points and called for a recommended range of 17-22 years on both offenses (R 197).

The state had filed notice of intent to classify petitioner as an habitual violent and/or habitual offender (R 107). At sentencing on April 1, 1991, the prosecutor related petitioner's prior convictions, and stated that petitioner was only still serving a 35 year sentence from Walton County for burglary with an assault (s 9-10).

The state asked the court to take judicial notice of petitioner's prior convictions (s 10). They are found in the record as follows:

> a 1981 Union County conviction for attempted escape, case no. 80-223, for which petitioner received a 90 day sentence (R 179-83);
>
> a 1964 Bay County conviction for escape, case no. 64-98, for which

> petitioner received a one year sentence (R 184);
>
> a 1980 Walton County conviction for burglary of a structure and assault, case no. 80-23 for which petitioner received a 35 year sentence (R 185-86);
>
> a 1971 Santa Rosa County conviction for statutory rape, case no. 71-1-90, for which petitioner received a 10 year sentence (R 187-91); and
>
> a 1971 Escambia County conviction for kidnapping, case no. 71-1578, for which petitioner received a 10 year sentence (R 192-93).

Petitioner's counsel argued that petitioner did not have a prior conviction within 5 years of the instant offenses, and should not be classified as an habitual offender (S 13). The court disagreed, found petitioner to be an habitual offender, and imposed the sentences noted above (T 15-20). The lower tribunal affirmed them on authority of Smith v. State, 584 So.2d 1107 (Fla. 2nd DCA 1991), but certified the question.

IV SUMMARY OF ARGUMENT

Petitioner will attack his habitual offender sentences, on a ground which is different from the usual ones. He did not qualify at all for habitual offender treatment under the express terms of the applicable statute because his last prior felonies were in 1980 and 1981, more than 5 years before the instant offenses, and he had never been released from prison. The lower tribunal and the Second District in Smith both rewrote the habitual offender statute to cover the situation where a state prisoner does not have the necessary prior convictions within the last five years. This the courts cannot do, since the habitual offender statute must be strictly construed, and because this Court has construed it according to its literal meaning. The proper remedy is to **vacate** the habitual offender sentences and remand for resentencing under the guidelines.

Petitioner will also ask this Court, because it already has jurisdiction over the case due to the certified question, to **reverse** for a new trial, Petitioner will argue that the lower court erred in denying his request for a special jury instruction on the defense of necessity. Petitioner presented evidence that he was in fear of bodily injury or death at the prison from other people blowing light bulb glass dust on him. **As** weak or improbable **as** it may be, petitioner was entitled to have the jury instructed on his theory of defense. The proper remedy is to reverse the judgment and sentence and remand for a new trial.

V ARGUMENT

ISSUE I

UNDER THE REQUIREMENTS OF THE HABITUAL OFFENDER STATUTE, SECTION 775.084(1)(A)2., FLORIDA STATUTES (1988 SUPP.), THAT THE OFFENSE FOR WHICH A DEFENDANT IS BEING SENTENCED BE COMMITTED WITHIN FIVE YEARS OF HIS RELEASE FROM A PRISON SENTENCE IMPOSED AS A RESULT OF A PRIOR CONVICTION, A DEFENDANT, WHO IS STILL IN PRISON UNDER THE SENTENCE IMPOSED FOR SUCH PRIOR CONVICTION AT THE TIME HE COMMITS A NEW OFFENSE, CANNOT BE SENTENCED AS AN HABITUAL OFFENDER.

Petitioner was serving a 35 year sentence from 1980 from Walton County for burglary with an assault at the time of the instant offenses, which occurred on February 5, 1989 (S 9-10). At sentencing, the state asked the court to take judicial notice of petitioner's prior convictions (S 10). They are found in the record as follows:

> a 1981 Union County conviction for attempted escape, case no. 80-223, for which petitioner received a 90 day sentence (R 179-83);
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Petitioner's counsel argued that petitioner did not have a prior conviction within 5 years of the instant offenses, and should not be classified as an habitual offender (S 13). The court disagreed, found petitioner to be an habitual offender,

and imposed 20 year habitual offender sentences (R 211-15; T 15-20). The court found petitioner to be an habitual offender because:

> [T]he case that you are being sentenced on occurred within five years of the sentence that you're currently serving, you being a DOC prisoner at the time of the commission of the offense that you're being sentenced on at the time ... . (T 16-17).

Petitioner again contends that he did not qualify as an habitual offender because he did not have a prior conviction within 5 years prior to February 5, 1989, and he had not been released from prison since the prior sentence was imposed in 1980. The court's finding that state prisoners can be habitual offenders even if they do not have a conviction within 5 years is not the law because it is not within the statute.

The operative statute provides:

> The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later ... .

Section 775.084(1)(a)2., Florida Statutes (1988 Supp.). Thus, for one to be an habitual offender, he must have had a prior felony conviction within 5 years or he must have been released from prison within 5 years. Since petitioner was never released from prison since his last felony conviction, and since his last felony convictions occurred in 1981 and 1980, he

could not be sentenced as an habitual offender for a 1989 crime.

Penal statutes must be strictly construed in favor of the defendant. Section 775.021(1), Florida Statutes: Rogers v. Cunningham, 117 Fla. 760, 158 So. 430 (1934). The courts may not read into a penal statute an element which the legislature did not place there:

> The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary.

Brown v. State, 358 So.2d 16, 20 (Fla. 1978), citing art. 11, §3, Fla. Const., and quoted with approval recently in Schmitt v. State, 590 So.2d 404, 414 (Fla. 1991).

This Court has strictly construed the habitual offender statute. See, e.g., State v. Barnes, 595 So.2d 22, 24 (Fla. 1992) (allowing prior convictions non-sequential):

> While we agree that the underlying philosophy of a habitual offender statute may be better served by a sequential conviction requirement, we agree with the district court that the current statute is clear and unambiguous and contains no sequential conviction requirement. Under these circumstances, this Court has no authority to change the plain meaning of a statute where the legislature has unambiguously expressed its intent. (emphasis added).

In Trott v. State, 579 So.2d 807 (Fla. 5th DCA 1991), the defendant entered a plea to a 1990 crime and agreed to an habitual offender sentence of as much as 27 years. He received that sentence, but as an habitual violent offender. His prior record included a 1972 conviction for armed robbery and a 1985

conviction for auto theft. The state argued that Trott had agreed to an habitual violent offender sentence and could not attack it on appeal. The court disagreed and held that Trott could not agree to an illegal sentence. The sentence was illegal because:

> [I]t does not establish an habitual violent felon status because the previous violent felony was neither committed nor the offender released from confinement within five years from the present offense.

Id. at 808; emphasis added. While petitioner was not declared an habitual violent offender like Mr. Trott, the principle is the same -- one must have a prior conviction within 5 years, or be released within 5 years, to satisfy the clear language of the statute.

In Allen v. State, 487 So.2d 410 (Fla. 4th DCA 1986), the defendant was released from prison on probation, and committed another crime more than 5 years after his release from prison but within 5 years of the termination of his probation. The state argued that the termination of his probation was the operative date. The court rejected that view, strictly construed the statute, and held under the plain meaning of the 1983 statute, which is the same as the 1988 statute quoted above, that he did not qualify as an habitual offender because his new crime did not occur within 5 years of his release from prison.

The lower tribunal followed Allen in Lewis v. State, 577 So.2d 686 (Fla. 1st DCA 1991). The entire opinion on this issue is:

> [W]e reverse the petitioner's designation as a [sic] habitual violent felony offender, finding that there was insufficient evidence that petitioner's imprisonment for the prior felony ended less than five years before he committed the present felony.

Id. at 687.

It may be incongruous to exclude as habitual offenders those who are able to complete 5 years' probation after release from prison without committing another new crime, but that is what the statute says in "clear and unambiguous" terms, and neither this Court nor the lower tribunal has the power to rewrite the statute. State v. Barnes, supra.

It may likewise be incongruous to exclude as habitual offenders those who are able to serve a state prison sentence for at least 5 years without committing another crime while in prison, But the legislature has done so by the plain wording of the statute quoted above, and this Court has no power to rewrite the statute to make it applicable to petitioner's situation. State v. Barnes, supra.

The Second District apparently does not share this view. In Smith v. State, 584 So.2d 1107 (Fla. 2nd DCA 1991), the court judicially rewrote the statute and replaced the word "within" with the words "no later than" to uphold an habitual offender sentence for a prisoner who had not been released from his prior sentence before committing a new crime.

The lower tribunal adopted the Smith view in the instant case, Smith was wrongly decided and the lower tribunal was wrong to adopt it. To judicially rewrite the statute to make

it fit a particular defendant's situation violates all principles of statutory construction and this Court's admonition in State v. Barnes. The strict construction of the statute by the Fourth District in Allen and the Fifth District in Trott comply with this Court's view in State v. Barnes. Petitioner did not qualify as an habitual offender, and so his sentences must be reversed.

ISSUE II

THE TRIAL COURT ERRED IN DENYING PETITIONER'S REQUESTED JURY INSTRUCTION ON THE DEFENSE OF NECESSITY BECAUSE HE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT THAT REQUEST.

Petitioner was prosecuted on a theory that his removal of the the window screen and bars constituted an attempted escape. Petitioner requested a special jury instruction on defense of necessity:

> If you find from the evidence that the Defendant, Francis Gene Jefferies [sic], had reasonable grounds to believe that there was a real, imminent, and impending danger to him of death or serious bodily harm if he did not leave or attempt to leave the place from which he was confined and that he left or attempted to leave because of such danger, rather than with the intent to avoid lawful confinement, you should find him not guilty of the crime of attempted escape. (R 134).

The request was denied (T 190-95), and renewed after the jury was instructed (T 214). This was reversible error, because the defendant is always allowed to have his jury instructed on his theory of defense, and especially under the facts of this case.

This Court has jurisdiction to address this issue and grant a new trial because it has accepted review of the certified question. In both State v. Smith, 573 So.2d 306 (Fla. 1990) and Bunney v. State, 17 FLW S383 (Fla. July 2, 1992), this Court examined issues after it had disposed of the certified questions, and granted new trials.

The lower tribunal has held that a defendant is entitled to have the jury instructed on his theory of defense, "regardless of how weak or improbable it may be." Solomon v.

State, 436 So.2d 1041 (Fla. 1st DCA 1983) (emphasis added). The lower tribunal failed to follow Solomon here and recognize that petitioner had presented sufficient evidence to support his necessity defense. Even though reasonable people may have found it to be somewhat incredible, the judge had no right to remove it from the jury's consideration.

In consistent fashion, the courts have long maintained that a defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is *ally* evidence to support such an instruction. Gardner v. State, 480 So.2d 91 (Fla. 1985) (voluntary intoxication); Smith v. State, 424 So.2d 726, 732 (Fla. 1983) (withdrawal, but harmless): Bryant v. State, 412 So.2d 347, 350 (Fla. 1982) (independent act of codefendant): Motley v. State, 155 Fla. 545, 20 So.2d 798 (1945) (self defense); Wynn v. State, 580 So.2d 807 (Fla. 3rd DCA 1991) (self-help recovery of property); Eberhardt v. State, 550 So.2d 102 (Fla. 1st DCA 1989) (voluntary intoxication); Morrison v. State, 546 So.2d 102 (Fla. 4th DCA 1989) (duress); Terwillinger v. State, 535 So.2d 346 (Fla. 1st DCA 1988) (entrapment); Ambrister v. State, 462 So.2d 43 (Fla. 1st DCA 1984) (necessity); Wentzel v. State, 459 So.2d 1086 (Fla. 2nd DCA 1984) (excusable homicide); Mungin v. State, 458 So.2d 293 (Fla. 1st DCA 1984) (self defense, necessity, and duress); Muro v. State, 445 So.2d 374 (Fla. 3rd DCA 1984) (necessity); Holley v. State, 423 So.2d 562, 564 (Fla. 1st DCA 1982) (self defense); Hudson v. State, 381 So.2d 344, 346 (Fla. 3d DCA 1980) (alibi); Laythe v. State, 330 So.2d

113, 114 (Fla. 3d DCA 1976) (withdrawal); and Koontz v. State, 204 So.2d 224 (Fla. 2nd DCA 1967) (coercion),

In Muro v. State, supra, the defendant was arrested and placed in the Key West jail. He was beaten by other inmates and taken to a hospital, from which he eloped. His defense at trial was that he had escaped from the hospital because he was afraid of further injury if was returned to the jail. His jury instruction on the defense of necessity was denied. The court reversed.

In Mungin v. State, supra, the defendant, a prison inmate, was charged with possession of a contraband knife. His proffered theory of defense was that he picked up the knife when another inmate dropped it after trying to stab Mungin with it. The lower tribunal held this evidence of a necessity defense should have been heard by the jury.

In Ambrister v. State, supra, the defendant was charged with carrying a concealed firearm after he was stopped by the police, who suspected a drug deal. His defense was that he had the gun because he thought he had been set up for a robbery. The lower tribunal held this evidence of a necessity defense supported an instruction to the jury.

The same is true in the instant case. Petitioner's jury never was instructed on his theory of defense. It was left with petitioner's testimony where he admitted cutting the window screen and bars, because he was afraid of being harmed by the light bulb glass dust (as improbable as that may be),

but had no instruction under which to evaluate the facts contained in that testimony.

The lower tribunal inexplicably found that petitioner had not presented sufficient evidence to support the necessity defense. It ignored the testimony of clinical psychologist Harry Krop that petitioner truly believed someone was blowing dust from light bulbs into his body. He believed DOC officers were conspiring to poison him and throw glass at him. He had been delusional for 10 years. He believed his life was in danger (T 84-99). And petitioner believed he was justified in trying to escape to save himself from death in the prison (T 125).

The lower tribunal likewise ignored the testimony of prison psychological specialist Robert Miller, who testified that prior to February 5, petitioner thought people were throwing ground-up glass into his cell and placing it in his food. Petitioner had made the same complaint many times over five years (T 131-36).

The lower tribunal likewise ignored the testimony of petitioner, who, testified that other inmates were blowing light bulb glass on him. After he moved into that cell, it continued to be done through little tubes. It made him real nervous, gave him headaches, and sick to his stomach. He cut the window screen and the bars. He wanted to stay in the psychiatric wing instead of going to Chattahoochee. He once had a mask to place over his mouth but it was taken away. His ears had been eaten up by the light bulb dust. He wanted to

leave his cell and get a five gallon can of gasoline from the paint shed and burn up the people who were doing these things to him. The window had been cut for three or four days, and he could have left at any time. He was afraid of being harmed by the light bulb glass. He wished he could bring some of the dust to court (T 137-46).

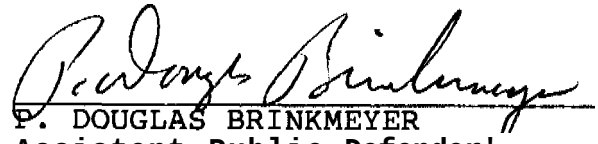
Under the instructions given, the jury had no alternative but to find petitioner guilty, Petitioner's jury never was instructed on his theory of defense, for which there was ample evidentiary support, This Court must reverse for a new trial.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that the habitual offender sentences be vacated and guidelines sentences be ordered. In addition, petitioner requests that this Court reverse the judgment and sentence and remand for a new trial.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Initial Brief of Petitioner has been furnished by hand delivery to Andrea D. England, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, #006443, P.O. Box 747, Starke, Florida 32091, this 22nd day of July, 1992.

P. DOUGLAS BRINKMEYER

PD

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF **FLORIDA**

FRANCIS GENE JEFFRIES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

CASE NO.: 91-1123

Opinion filed June 23, 1992.

An Appeal from the Circuit Court for Bradford County. Elzie Sanders, Judge.

Nancy A. Daniels, Public Defender; P. Douglas Brinkrneyer, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Andrea D. England, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Appellant, a prisoner serving a thirty-five year sentence for a 1980 conviction for burglary with assault, was convicted of attempted escape and possession of a weapon by a prisoner and sentenced as an habitual offender. We affirm, finding that appellant did not present sufficient evidence

warranting a jury instruction on the defense of necessity, and that the trial-court correctly ruled appellant to be an habitual offender based upon the reasoning of ~~Smith v. State~~, 584 So.2d 1107 (Fla. 2d DCA 1991). However, we certify the following question as one of great public importance:

> UNDER THE REQUIREMENT OF THE HABITUAL OFFENDER STATUTE, SECTION 775.084(1)(a)2., FLORIDA STATUTES (1988 SUPP.), THAT THE OFFENSE FOR WHICH A DEFENDANT IS BEING SENTENCED BE COMMITTED WITHIN FIVE YEARS OF HIS RELEASE FROM A PRISON SENTENCE IMPOSED AS A RESULT OF A PRIOR CONVICTION, CAN A DEFENDANT, WHO IS STILL IN PRISON UNDER THE SENTENCE IMPOSED FOR SUCH PRIOR CONVICTION AT THE TIME HE COMMITS A NEW OFFENSE, BE SENTENCED AS AN HABITUAL OFFENDER?

ERVIN, SMITH AND KAHN, JJ., CONCUR.