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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

FRANCIS GENE JEFFRIES,

Petitioner,

v.

CASE NO. 80,166

STATE OF FLORIDA,

Respondent,

\_\_\_\_\_ /

PETITIONER'S REPLY BRIEF ON THE MERITS

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REPLY BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner files this brief in reply to the arguments made by respondent in Issue I. Petitioner will rely on his initial brief as to Issue 11.

## ARGUMENT

### ISSUE I

ARGUMENT IN REPLY TO RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT 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.

Respondent does not dispute that petitioner was still serving a 1980 sentence from at the time of the instant offenses, which occurred on February 5, 1989 (S 9-10). Respondent does not dispute that petitioner was never released from his 1980 sentence.

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. Respondent's view 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 1980, he could not be sentenced as an habitual offender for a 1989 crime.

Respondent seems to believe that since the habitual offender statute is a recidivist statute, it need not be strictly construed in favor of the defendant. Not so. Respondent also seems to believe that because the legislature has graciously provided an exception for one who is able to remain conviction-free for five years, it need not be strictly construed in favor of the defendant. Again, not so.

Section 775.021(1), Florida Statutes, the statutory rule of lenity, contains no exceptions for habitual offenders. **As** this Court recently noted, in deciding that the mandatory minimum sentences called for when one conducts a drug transaction within 1000 feet of **a** school need not be imposed if the defendant is referred for drug treatment:

In construing these statutes, we begin with the principle that, where criminal statutes are susceptible to differing constructions, they must be construed in favor of the accused, **See** s775.021, Fla. Stat. (1989); Lambert v. State, 545 So.2d 838, 841 (Fla. 1989).

Scates v. State, 17 FLW s467 (Fla. July 23, 1992).

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 to be 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).

Using the Barnes language as applied to state prisoners, while the "underlying philosophy" of the habitual offender statute is to punish repeat offenders, "the current statute is clear and unambiguous" and contains no provision to punish someone in petitioner's position as an habitual offender.

Also please note this Court's admonition in Perkins v. State, 576 So.2d 1310, 1312-13 (Fla. 1991):

As we have stated,

The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary. See, Article 11, Section 3, Florida Constitution.

Brown [v. State], 358 So.2d [16] at 20 [(Fla. 1978)]; accord Palmer [v. State], 438 So.2d [1] at 3 [(Fla. 1983)]. This principle can be honored only if criminal statutes are applied in their strict sense, not if the courts use some minor vagueness to extend the statutes' breadth beyond the strict language approved by the legislature. To do otherwise would violate the separation of powers. Art. 11, §3, Fla. Const. (emphasis added).

To judicially rewrite the statute to make it fit a particular defendant's situation violates all principles of statutory construction and this Court's admonitions in State v. Barnes and Perkins. Strict construction of the statute leads to the inescapable conclusion that state prisoners who are still serving their sentences for more than five years do not qualify as habitual offenders.

It is up to the legislature, if it so chooses, and not to the courts, to correct this purported defect in the statute. It would be very easy for the legislature to add another sentence to the statute to **say**: "However, any state prisoner who has not yet served his entire sentence is subject to habitual offender sanctions." But in the meantime, petitioner's habitual offender sentences must be reversed.



**CONCLUSION**

Based upon the foregoing argument, reasoning, and citation of authority, as well as that contained in the initial brief, 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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Reply Brief of Petitioner has been furnished by hand delivery to Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, #006443, P.O. Box 747, Starke, Florida 32091, this 12<sup>th</sup> day of August, 1992.

  
P. DOUGLAS BRINKMEYER