047

IN THE SUPREME COURT OF FLORIDA

WILLIAM JOSEPH PENTON, :

Appellant, :

v. : CASE NO. 80,709

STATE OF FLORIDA, :

Appellee. :

_____/

APPELLANT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

WILLIAM JOSEPH PENTON Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 80,709

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I ARGUMENT

ISSUE I:
THE HABITUAL OFFENDER STATUTE UNDER WHICH MR. PENTON WAS SENTENCED VIOLATED HIS CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

Petitioner acknowledges that this Court's recent decision in Tillman v. State, 17 FLW S707 (Fla. November 19, 1992) resolves this issue against petitioner. However, petitioner notes that the decision is not yet final because it is pending on that petitioner's motion for rehearing (case no. 78,715). Thus resolution of the issue here awaits the final decision in Tillman.

ISSUE II:
THE TRIAL COURT ERRED IN SENTENCING MR. PENTON TO CONSECUTIVE MINIMUM MANDATORY SENTENCES, AND THE FIRST DISTRICT PROPERLY REMANDED FOR RESENTENCING TO CONCURRENT MINIMUM MANDATORY SENTENCES.

The State raises this issue in its reply brief although the State did not seek review of this issue from the First District's decision. Here the State wants this Court to reverse its own very recent decision in Daniels v. State, 595 So.2d 952 (Fla. 1992). The State's argument either ignores or misapprehends the basis of this Court's decision in Daniels. It presents no logical grounds for a result different from Daniels.

Initially the State argues that the dispositive factual issue is whether Penton's offenses were part of a single episode, and asserts that they were not. However, the First District, in directing that Mr. Penton be resentenced to concurrent minimum mandatories, must have found that the offenses were part of a single episode. Thus the factual issue has been resolved in Mr. Penton's favor. The evidence supports this conclusion, because the offenses were part of a continuous effort to apprehend Mr. Penton after a traffic stop (R 52-61).

The State then attacks this Court's interpretation of section 775.021, Florida Statutes in Daniels. Focusing on subsection (2) of that statute, the State argues that the authority for consecutive sentences should apply to all offenses. This argument misses the crux of Daniels. Daniels recognizes that enhancement minimum mandatories, such as for firearms or for habitual offenders, are just that, enhancement, not part of the

actual sentence. Both State v. Boatwright, 559 So.2d 210 (Fla. 1990) and State v. Enmund, 476 So.2d 165 (Fla. 1985), which the State refers to, addressed the consecutive minimums for two types of capital felonies, capital sexual battery and first degree murder, respectively. For each of those offenses the penalty is life with no possibility of parole for twenty-five years. This resulting twenty-five year minimum is inherent in the penalty for those offenses. In contrast, enhancement minimums are a modification of a penalty already prescribed for an offense.

The State also points out that Palmer v. State, 438 So.2d 1 (Fla. 1983), which Daniels cites, rested on an earlier version of section 775.021. However, the State fails to refer to any revised language that is significant or persuasive. As Daniels recognized, the two versions are substantially similar. Palmer cited in a footnote the version of sec. 775.021(4) current at that time:

> (4) Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

Palmer, 438 So.2d at 3, n.1. The version in effect at the tim Daniels was decided and at the time Mr. Penton committed the instant offenses and was sentenced contains a very similar (4)(a):

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or

> acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

Sec. 775.021(4)(a), Fla.Stat. (1991).

No language in the revised subsection lends any support to the State's argument. On the contrary, the final sentence of the newer (4)(a) demonstrates the legislature's intent, as Daniels noted, to address Carawan v. State, 515 So.2d 161 (Fla. 1987).

The State argues also that the rules of construction in section 775.021 should be applied to all criminal statutes because of subsection (2) of that statute. Subsection (2) states that 775.021 should be applied to offenses defined by other statutes, unless the code otherwise provides. This language is not relevant, because the minimum mandatories here are enhancements or modifications of existing penalties, not distinct penalties for distinct offenses. Nothing in section 775.021 changes the result of Daniels.

Petitioner asks this Court first not to even consider this argument in which the State seeks to revisit an already settled issue. If the Court does consider this issue, petitioner asks the Court to follow its well-reasoned decision in Daniels and to affirm the First District's order for resentencing to concurrent minimum mandatories.

II CONCLUSION

Based upon the argument, reasoning, and citation of authority contained herein and in petitioner's initial brief on the merits, petitioner requests that this Court reverse his habitual offender sentence and affirm the First District's direction that he be resentenced to concurrent minimum mandatories.

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 Attorney General's Office, Criminal Appeals Division, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, William Joseph Penton, this 23rd day of December, 1992.

JOSEPHINE L. HOLLAND