IN THE SUPREME COURT OF FLORIDA

EDGAR EUGENE STEPHENSON,
Petitioner,

v. CASE NO. 84,208

STATE OF FLORIDA
Respondent.
_____/

# PETITIONER'S REPLY BRIEF ON THE MERITS

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## SUMMARY OF ARGUMENT

The state did not attempt to refute Petitioner's main arguments. The state's entire argument rests on the premise that section 775.084 applies to anyone who is on parole within the previous five years. However, the language of that statute specifically states it does not apply to those defendants released from a prison sentence "on parole or otherwise." Although there was discussion that Mr. Stephenson's parole may have been revoked, this fact was disputed and there was no evidence to support it.

## II. THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN SENTENCING DEFENDANT AS THE RECORD DOES NOT SUPPORT THE FINDING HE HAD PREVIOUS CONVICTIONS

The State fails to cite any cases supporting its argument. More importantly, the state claims; "The record reveals that Petitioner meets the requirements for sentencing as a habitual violent felony offender," without giving any record citation. Why? Because there is none.

The presentence investigation report showed that Mr. Stephenson's previous felony convictions all occurred in 1981, eleven years previous to the alleged commission of this crime (TT. 148). There is absolutely no evidence in the record that Mr. Stephenson had prior felony convictions in the preceding five years.

## III. THE TRIAL JUDGE COMMITTED FUNDAMENTAL ERROR BY APPLYING THE HABITUAL OFFENDER STATUTE AS THERE WAS NO EVIDENCE THAT MR. STEPHENSON HAD BEEN CONVICTED OR RELEASED FROM PRISON WITHIN FIVE YEARS OF COMMITTING THE OFFENSE.

The state fails to address the central point of this argument, which is that section 775.084 requires that a defendant must have either committed a crime or be released from a prison sentence "on parole or otherwise" within five years of the commission of the enumerated felony. The presentence investigation report showed that Mr. Stephenson was paroled on 9/17/85. Although there was discussion that the parole may have been revoked on 12/20/89 (TT. 148), Mr. Stephenson disputed that he violated parole (TT. 145-46). His defense counsel explained:

> Between '81 and the occurrence of this incident in 1992, there was only one other allegation that he had engaged in any type of violent behavior, and that pertained to his sister. That charge was never -- was dropped. His sister filed a waiver and Mr. Stephenson would state that in fact he was not the individual who threatened her and he was not the individual who had the shotgun that was involved in that incident, but in fact her husband was the individual who had committed this particular allegation (TT. 145-46).

The judge stated:

> All I have to base any finding of that on is that the prosecutor's statement is that you called Tallahassee and this one indication in the PSI that says 12/20/89. Well, it says he was paroled 9/17/85. That would not qualify him.
>
> 1/20/89 parole revoked. But then apparently there's no indication of what happened there. I don't -- the allegation for which the revocation was supposed to have occurred, if it did, was not prosecuted. The defense attorney tells me that wasn't him that had the short-barrel shotgun. (TT. 148-49).

The State argues that the case of Frazier v. State, 595 So. 2d 131 (Fla. 2d DCA 1992), is distinguishable because in Frazier the

record was inconclusive as to whether certified copies of prior convictions were introduced into evidence. In this case, the record, shows that the state did not introduce into evidence any certified copies concerning the alleged revocation of parole.

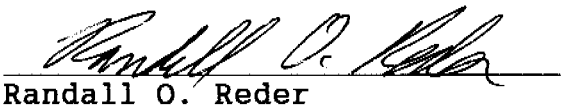
> MS. WILLIAMS: Only, Judge, that if that's the problem, I can get a certified copy from D.O.C. in Tallahassee. I didn't do that because I was not aware that there was any disagreement with the pre-sentence investigation. I don't think he is disputing the fact that he was on parole at that time. (TT. 150).

Hence, the state's position is that because Mr. Stephenson was on parole within the preceding five years he qualifies. That is not the case. Section 775.084 specifically provides that to qualify the crime must have been committed "within 5 years of the defendant's release, on parole or otherwise, from a prison sentence." By specifically using the phrase release <u>on</u> parole, instead of <u>from</u> parole, the statute clearly did not intend to apply to someone who had been on parole within the previous five years.

Hence, the error in this case is not harmless and the case of <u>State v. Rucker</u>, 613 So. 2d 460 (Fla. 1993) is not applicable. A remand for resentencing would not be a waste of valuable judicial resources. Instead, a remand would prove that Mr. Stephenson does not qualify as a habitual violent felony offender.

## CONCLUSION

The State failed to even try to contradict the arguments made in the initial brief, again relying on an erroneous interpretation of section 775.084. Since that statute specifically provides that it applies to those who had served time, and specifically excludes those released on parole, within the five previous years, it obviously does not apply to Mr. Stephenson. This Court should therefore reverse the sentence and remand for resentencing.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail on this 24th day of October, 1994 to Michelle Taylor, Assistant Attorney General, 2002 N. Lois Ave., Suite 700, Tampa, FL 33607-2366.

Randall O. Reder