IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,647

HAROLD WILLIAMS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONERS ON THE MERITS

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TABLE OF CONTENTS

PAGE(s)

INTRODUCTION 1

ARGUMENT

II.

THE THIRD DISTRICT'S DECISION READING "*AN* OFFENSE" AS "*ANY* OFFENSE" VIOLATES THE FUNDAMENTAL RULE OF CONSTRUING CRIMINAL STATUTES. 2

CONCLUSION 5

CERTIFICATES OF FONT SIZE AND SERVICE 6

TABLE OF CITATIONS

CASES **PAGE(s)**

Lamont v. State
610 So. 2d 435 (Fla. 1992) 2

State v. Emmund,
698 So. 2d 1318 (Fla. 3d DCA 1997) 3

State v. Hamilton
660 So. 2d 1038 (Fla. 1995) 2

Thompson v. State
695 So. 2d 691 (Fla. 1997) 2

Wallace v. State
724 So. 2d 1176 (Fla. 1998) 2

OTHER AUTHORITIES

Florida Statutes (1997)
§ 775.084(1)(c)1 4
§ 775.084(1)(c)1.a-g 4

Senate Bill 168, § 2 (Fla. 1995) 3

Senate Staff Analysis and Economic Impact Statement,
CS/SB 168 (Fla. Feb. 14, 1995) 3

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INTRODUCTION

This brief is in response to the second argument in the brief filed by the State, the Appellee in this case. Both parties are adopting the briefs in *State v. Thompson*, Case No. 92,831, for their respective argument on the first issue. In this brief, the symbol "R." will indicate the record on appeal. All emphasis is supplied unless the contrary is indicated.

ARGUMENT

II.

THE THIRD DISTRICT'S DECISION READING "*AN* OFFENSE" AS "*ANY* OFFENSE" VIOLATES THE FUNDAMENTAL RULE OF CONSTRUING CRIMINAL STATUTES.

The state quotes the holding of the District Court of Appeal, but immediately abandons any attempt to defend the lower court's "an means any" rationale. The state does not contest that this expansive statutory construction borrowed from insurance law violates the rule of lenity in criminal cases. *See, e.g.*, *Thompson v. State*, 695 So. 2d 691, 693 (Fla. 1997); *State v. Hamilton*, 660 So. 2d 1038, 1044-45 (Fla. 1995); *Lamont v. State*, 610 So. 2d 435, 437-38 (Fla. 1992). The state also does not contest that the District Court of Appeal's decision directly conflicts with this Court's recent holding in *Wallace v. State*, 724 So.2d 1176 (Fla. 1998), describing the crucial difference between "any" and "an" in a criminal statute.

Instead, the state merely repeats its arguments in the District Court of Appeal.[1] The state cites the introductory dicta describing the statute in *State v. Emmund*, 698 So.

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[1] The state's erroneous factual assertions can be dealt with summarily. The state asserts that Mr. Williams has four previous convictions for burglary (State's brief at 10). The state actually proved only two burglaries, however: 89-46386B and 87-13126. The state never proved that Mr. Williams was the defendant in the other two cases mentioned: 91-16982 and 89-46525. Even a cursory review of the transcript reveals that the assistant state attorney mentioned these two other case numbers, but never offered any proof that Mr. Williams was the defendant in those cases (R. 214, 216-17).

2d 1318 (Fla. 3d DCA 1997), as though it decided whether "an offense" can be judicially broadened to mean "any offense." (State's brief at 9). To the contrary, *Emmund* prohibited the state from calling a defendant a "violent career criminal" in front of a jury because it was unduly prejudicial. *See id*. at 1319-20. Dicta aside, *Emmund* is simply not relevant.

Additionally the state cites language in a legislative staff report (State's brief at 9). The language in the staff report, however, refers to language in an early version of the bill, language that was substantially different than what the legislature ultimately enacted. Under this early language, the label was "career criminal," not "violent career criminal." *See* Senate Bill 168, § 2 (Fla. 1995); Senate Staff Analysis and Economic Impact Statement, CS/SB 168 at 2 (Fla. Feb. 14, 1995). A "career criminal" was a defendant who committed a burglary, robbery, other forcible felony, or firearm offense and "has been convicted as an adult three or more times previously for forcible felonies." S.B. 168 at § 2; *see also* Senate Staff Analysis at 1-2. Note that under this early draft of the law, all of the priors had to fall within one category of offenses: forcible felonies.

The statute that was ultimately enacted contained many more qualifying offenses than just forcible felonies. *See* § 775.084(1)(c)1.a-g, Fla. Stat. (1997). Nevertheless, this statute retained the requirement that the three predicate convictions must be for the same offense: "The defendant has previously been convicted as an adult three or more times for *an offense* in this state or other qualified offense that is:" *See* § 775.084(1)(c)1, Fla.

Stat. (1997). The definition then goes on to list seven specific offenses or groups of offenses.

The statutory language actually enacted is clear: the defendant must be convicted three or more times of the same crime or type of crime. Moreover, the rule of lenity requires interpreting this statute narrowly. The District Court of Appeal ignored this well-established law and instead dramatically expanded the scope of the statute by allowing the imposition of these extreme sanctions for defendants with three previous convictions, even if the convictions are not for the same crime. This Court should exercise its discretion to decide this issue because the District Court of Appeal's decision directly conflicts with so many decisions of this Court and other appellate courts, as discussed in the petitioner's initial brief on the merits. The state's failure to address this point implicitly concedes the existence of this conflict.

CONCLUSION

For the reasons stated in the initial brief and this reply brief, Mr. Williams respectfully requests that this Court quash the opinion of the Third District Court of Appeal and reverse Mr. Williams' sentence as a violent career criminal with directions to remand the case to the circuit court for resentencing.

Respectfully submitted,

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CERTIFICATES

I hereby certify that this brief is printed in 14 point CG Times, a font similar to Times Roman.

I hereby certify that a true and correct copy of the foregoing was delivered by mail to Lara J. Edelstein, Assistant Attorney General, 110 S.E. 6th Street, Fort Lauderdale, Florida 33301, this 15th day of November 1999.

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