IN THE SUPREME COURT OF FLORIDA

CASE NO.: 1999-60

MARIO VENERO,

Petitioner,

VS.

STATE OF FLORIDA

Respondent

INITIAL BRIEF OF PETITIONER

ON REVIEW FROM THE DISTRICT COURT
OF APPEAL, THIRD DISTRICT OF FLORIDA
CASE NO.: 98-2037

Petitioner, pro-se:
Mario Venero, DC# 423893
Everglades Correctional Institution
P.O. Box 659001
Miami, Florida 33265-9001

TABLE OF CONTENTS

TABLE OF CASES AND STATUTES

CASES CONTINUED PAGE

STATUTES

CONSTITUTION

INTRODUCTION

The Petitioner was the defendant and the Respondent was the prosecution [State of Florida] in the lower court proceedings. The parties will be referred to as they stand in this court. References to the record on appeal will be by "R" and the appropriate page number.

STATEMENT OF THE CASE

On December 23, 1997, the State filed a four count information against the petitioner charging him with : Count One- Armed Cocaine Trafficking Over 400 Grams in violation of sections 893.135(1)(b)1c & 775,087, [1st DEG. FELONY] [LEVEL 9] Florida Statutes; Count Two- Carrying a concealed Firearm in violation of section 790.01(2), [3rd DEG. FELONY] [LEVEL 5] Florida Statutes; Count Three- Battery in violation of section 784.03 [MISD.] Florida Statutes; Count Four- Unlawful Possession of a Firearm/Weapon By a Violent Career Criminal in violation of section 790.235, Florida Statutes. The information alleged that on October 31, 1997, while armed with a firearm, the Petitioner was in actual or constructive possession of four hundred (400) grams or more of cocaine.

On June 2, 1998, a jury trial commenced in Dade County in the Eleventh Judicial Circuit before the Honorable Martin D. Kahn. On June 3, 1998, the jury returned a verdict of guilty on Counts one, two, and four.

On June 25, 1998, the trial court sentenced the Petitioner to a term of Natural Life on Counts one and four and to a term of fifteen years on count two, to be served concurrently. Petitioner was adjudicated a Violent Career Criminal and sentenced to an extended term pursuant to the provisions of section

775.084(a). Further,' it was ordered that the Petitioner serve a minimum term of ten years prior to release.

The Petitioner appealed the judgment and sentence to the District Court of Appeal, Third District of Florida. The Third per curiam affurmed the judgment and certified conflict with Thompson V. State, 708 So.2d 315 (Fla. 2d DCA), rev. granted, 717 So.2d 538 (fla. 1998) on Petitioner's constitutional challenge to his sentence under 95-182 Laws of Florida.

Petitioner motioned the Third District to certify question regarding Petitioner's constitutional challenge to double enhancement for the weapons violation. Third District denied certification motion on November 3, 1999. This petition for discretionary review follows.

STATEMENT OF THE FACTS

On October 31, 1997, Metro-Dade Police responded to the Days Inn on a complaint that a guest of the hotel was harrassing customers and was involved in a altercation with the Days Inn courtesy van driver.

The police met with the van driver who stated that Mr. Venero (Petitioner) was arguing with the manager and when he intervened Mr. Venero struck him. The-Police officer observed no injuries and the alleged victim displayed no apparent signs of any altercation. At no time did the alleged victim or hotel employees state the Petitioner threatened anyone with a gun or weapon or that he implied he possessed one or was going to retrieve one.

While the police were speaking with an employee of the hotel, Mr. Venero entered the lobby. At this point, Mister Venero had not committed any crime in the presence of the officers nor did the police claim they observed any bulges on the Petitioner that would cause them to believe Petitioner possessed a gun or weapon of any kind.

At that point, the police conducted an illegal pat down search of the Petitioner. Petitioner was not under arrest nor had he committed any crime in the presence of the police.

When the Petitioner arrived at the scene of the police

interviewing the hotel employee, he had a "fanny pack" slung across his shoulder. The police stated in their reports and depositions that for fear of safety, they wanted to search the Petitioner's fanny pack. The officer then patted Mr. Venero down and found a firearm in his waistband. Upon further search a large quantity of cocaine was found in the fanny pack. The Petitioner was arrested.

Petitioner moved to suppress the evidence found during the illegal search. After defense argument, the motion to supress was denied.

The Petitioner testified at trial he was "set-up."

The fruits of an illegal search were used to convict the Petitioner.

The trial court then sentenced Mr. Venero to Life in Prison pursuant to the "Evelyn Gort and All Fallen Officers Act." The sentence is illegal and unconstitutional.

The District Court of Appeal failed to follow established Federal and Florida Law, affirmed the judgment and sentence, and certified conflict. This petition for review follows.

SUMMARY OF THE ARGUMENT

The Petitioner will argue in this brief that that the trial court erred in denying his motion to suppress as to items seized during an illegal "pat-down" search where the Police had no probable cause to believe he was armed in violation to his Fourth Amendment Right. Petitioner will further argue that the Third District Court Appeal erred when it failed to reverse his conviction.

The Petitioner will further show that the prejudicial comments made by the prosecution during closing arguments denied him a fair trial,

The Petitioner contends that his sentencing is illegal and his status as a Violent Career Criminal is improper. He submits that he was improperly sentenced to Life in Prison for Possession of a Firearm by a Career Criminal.

GROUND I

IS THE EVELYN GORE ACT UNDER PUBLIC LAW 95-182 VIOLATIVE OF THE FLORIDA CONSTITUTION'S SINGLE SUBJECT RULE?

This question has been certified by the Third Ditrict Court of Appeal in **Venero v. State,** case no. 98-2037; which has taken the position that the Evelyn Gore Act under Public Law 95-182 is not unconstitutional thereby causing a conflict amoung District Courts on this issue! Petitioner submits that the Evelyn Gore Act under Public Law 95-182 is unconstitutional in violation of Article III, § 6, of the Florida Constitution.

In describing the implications of Public Law 95-182 against the prohibition of Article III, § 6, of the Florida Constitution, the **Thompson** Court pointed out that:

> ...chapter 95-182 embraces criminal and civil proviions that have no "natural or logical connection." **[State v. Johnson, 616** So.2d 1, at 4 (Fla. 1993)](quoting **Martinez v. Scanlan, 582** So.2d 1167, 1172 (Fla, 1991). Nothing in section 2 through 7 addresses any facet of domestic violence and, more particularly, any civil aspect of that subject. Nothing in sec-

[1] /The Third and First District Court of Appeals maintain that the law is not unconstitutional which conflicts with the Second and Fourth Districts position: compare **Higgs v. State, 695** So.2d 872 (Fla. 3d DCA 1997) and **Trapp v. State,** 736 So.2d 736 (Fla. 1st DCA 1999) versus **Thompson v. State,** 708 So.2d 315 (Fla. 2d DCA 1998) and **Scott v. State**. 721 So.2d 1245 (Fla. 4th DCA 1998)(adopting the **Thompson** window to challenge). .

> tions 8 through 10 addresses the subject of career criminals or the sentences to be imposed upon them. It is fair to say that these two subjects "are designed to accomplish separate and dissociated objects of legislative effort." State v. Thompson, 120 Fla. 860, 892-93, 163 So. 270, 283 (1935). Neither did the legislature state an intent to implement comprehensive legislation to solve a crisis. Cf. Burch v. State, 558 So.2d 1 (Fla. 1990).

Combining provisions for stiffer criminal penalties with civil remedies for domestic violence arguably involves logrolling, which is the evil sought to be prevented by article III, section 6. See Burch, 558 So.3d at 3. Combining provisions that may appeal to different constituencies causes legislators to vote for a provision which they might not necessarily support if it was dealt with separately. This insulates legislators from accountability for their actions thereby violating the intent of article III, section 6, Florida Constitution. Id. Trapp, 736 So.2d at 739.

This Court should accept jurisdiction to enforce the intent and purpose of article III, section 6, of the Florida Constitution and declare Public Law 95-182--The Evelyn Gore Act unconstitutional.

GROUND TWO

THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION TO SUPPRESS

In the case at bar, the Police conducted an illegal "pat down" search of the Petitioner without probable cause that was justified with a pretextual explanation resulting in illegally obtained evidence that was used at trial in violation of the Petitioner's Fourth Amendment rights.

When the Police arrived at the Days Inn, they were informed about an alleged altercation that had ended between the Petitioner and an employee of the hotel. The other participant stated to the Police that he and the Petitioner had swung at each other at the same time. The employee displayed no signs of a struggle. At that point the Police were not authorized to make an arrest as they had not witnessed the possible battery. Florida Statutes Section 901.15(1) would authorize an arrest for this alleged battery only if it was in the presence of the Officer, As no law enforcement officer witnessed the incident, any such arrest would have to be suppressed. It cannot be ignored that the Petitioner was found not guilty of the alleged battery.

The Third District should have reversed based upon Fourth Amendment principals under the exceptions created in Terry V. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed.2d. 889 (1968), its

progeny, and as codified in Florida Statutes Section 901,151.

The seizure at issue has two determining factors: 5901.151 (2), did the officer, under the facts and circumstances within his knowledge, have reasonable belief that the Petitioner committed or was committing a crime; and, §901.151(5), did the officers have probable cause to believe the Petitioner was armed with a dangerous weopon? The Petitioner submits-they did not and the evidence illegally obtained should have been suppressed.

The facts are undisputed. No one saw the Petitioner with a weapon before the Police arrived. No one claimed that the Petitioner indicated he was going to retrieve a weapon and return. The Police testified they had no information that the Petitioner was armed. The Police testified that they did not see any bulges in the Petitioner's clothing that might indicate the presence of a weapon. The Police without probable cause immediately patted down the Petitioner upon sight. On the facts of this case, there was, submittedly, no facts supporting a determination of probable cause/reasonable belief that the Petitioner was armed. See, **W.R.A v. STATE, 497** So. 2d 1320 (Fla, 3rd DCA 1986); **Robinson V. State,** 527 So.2d 944 (Fla. 3rd DCA **1988);Coleman V. State;24** Fla.L. Weekly D160(FLA. 2d DCA 1999).

The existence of a Fourth Amendment violation turns on an objective assessment of the officer's actions inlight of the facts and circumstances confronting him at the time. **Kehoe v. State,** 521 So.2d 1094, 1096 (Fla. **1988); Scott V. United States,**

436 U.S. 128, 136 S.CT. 1717, 1723, 56 L.Ed.2d 16 (1978). "Detentions may be investigative yet violative of the Fourth Amendment absent probable cause." **Florida V. Royer, 460** U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983).

Viewing the facts of the instant case shows the officer's search of the Petitioner was justified with a pretextual explanation. The lower Court's failure under these circumstances and facts to suppress the firearm and cocaine seized renders the Fourth Amendment right to privacy nothing more than an empty promise condemned in **Mapp V. Ohio, 367** U.S. 643, 660, 81 S.Ct. 1684, 1694, 6 L.Ed.2d 108 (1961). The officer'sprofessed reason, for safety purposes, has been held to be an insufficient basis to circumvent the probable cause requirement of **Terry V. Ohio,** supra, and §901.151. **See, Hunt V. State,** 700 So.2d 94 (Fla. 2d DCA 1997); **Smith V. State,** 592 So.2d 1239 (Fla 2d. DCA 1992); **Harris V. State, 574 So.** 2d. 243 (Fla. 1st DCA 1991); **M.A.H. V. State, 559** So.2d 407 (Fla. 1st DCA 1990); **L.D.P. V. State, 551** So.2d 1257 (Fla. 1st DCA 1989); **Gibson V. State, 537 So.** 2d 1080 (Fla. 1st DCA 1989).

It is clearly established that an arrest is not justified by what! a subsequent search discloses. **See, Johnson V. United tates,** 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed.2d 436 (1974); **Russell V. State,** 266 So.2d 92 at 93 (Fla. 3rd DCA 1972). Further, the United States Supreme Court has expressed: **"In the name of investigating** the police may not carry out a full search of the

person . , . or other effects." Royer, 460 U.S. at 500, 103 S.Ct. at 1325, Therefore, the officer's uncorroborated statement that he feared for his own safety, without some factual foundation, is pretextual, violative of the Fourth Amendment, and mandates, suppression of the firearm and cocaine seized in this case. Kehoe, 521 So.2d at 1095-96; Terry, 392 U.S. at 21-22, 88 S.Ct. at 1880 (justifying the particular intrusion the police officer must be able to point to specific and articuble facts).

The lower court's basis for denying the motion to supress was that "there was a reasonable basis for him to do a perfunctory pat down" (T-28). For the above reasons, the Petitioner disagrees because the record fails to reveal any objective testimony of facts in the officer's knowledge, such as bulges in clothing or body language to justify the search and seizure of the Petitioner,

GROUND THREE

THE TRIAL COURT ERRED IN ITS SENTENCING OF THE PETITIONER

The sentence the Petitioner received in the instant cases constitutes an illegal sentence and should have been reversed by the Third District.

On Count 4, the Petitioner's sentence was improperly enhanced to a Life Felony. The Petitioner submits that §790.235, Florida Statutes, already enhances the penalty for possession of a firearm by "any person who meets the violent career criminal criteria" to a felony of the first degree. Any subsequent enhancement for the same offense would be prohibitive of double jeopardy. In the instant case this is exactly what happened. First the Petitioner's charge was enhancedto a first degree felony by §790.235, then it was again enhanced to a life felony and the Petitioner received a Life Sentence.

In determining whether a reclassification is permitted, a court looks 'to the statutory elements of the offense. See; **Traylor V. State,** 710 So.2d 173 (Fla. 3rd DCA 1998).

In order to violate §790.235 and receive a penalty for possession of a firearm greater than any penalty for a similar offense by a non-recidivist [lst DEG. Felony vs. 3rd DEG. Felony] an element of that offense is meeting the "violent career criminal criteria."

Asmeeting that criteria is an essential element of that offense, using that element again under 775.084(4)(c) to enhance that already enhanced first degree felony to life would constitute "double dipping" as prohibited by this Court in **Whitehead V. State,** 498 So.2d 863, 866 (Fla. (1986). Also see **Gonzalez V. State,** 585 So.2d **932** (Fla.1991); **Harrelson V. State, 624** So.2d **828** (Fla. 1st DCA 1993).

This issue deserves more than the cursory review given to it by the Third District as this practice is an ongoing judicial dilemma that squanders precious judicial resources.

The Petitioner submits the Court cannot permit an enhancement based on elements that the court already considered. **Whitehead V. State,** at 866, In short, had the legislature intended to punish the habitual offender twice for the same conduct to avoid a double jeopardy bar, it would have provided sentencing courts jurisdiction to do so by specifically authorizing it by statute. Given the absence of such authority, the rule lenity as set forth in the statute applies here.

Additionally, Florida's Constitution in Art. 1, Section 9 prohibits double punishments, This double jeopardy protection applies both to successive punishments as well as successive prosecutions. See, **North Carolina V. Pearce, 395** U.S. 711, 89 S.Ct. 2772 (1969). Further, the "same evidence" test enunciated in **U.S. V. Blockburger, 284** U.S. 299, **304, 52** S.Ct. 180 (1932) and **U.S. V. Dixon, 509** U.S. 689, 696, 113 S.Ct. 2849, 2856 (1993)

cannot be obeyed here where the firearm mandatory provision is used to invoke additional punishment under the habitual offender status.

GROUND FOUR

THE PROSECUTION'S COMMENTS DURING CLOSING ARGUMENT DENIED THE PETITIONER A FAIR TRIAL

During the initial closing (T-248-271), the prosecution made improper comments that resulted in unfair prejudice for the Petitioner. Said comments denied the Petitioner a fair trial and created bias against the Petitoner.

Defense counsel did not mention the alleged woman the Petitioner testified that he had checked into the hotel with: MARLENE,

During its closing, the State commented:

> Marlene. We talked about the girl who checked him into the hotel. Where is she? Said she is at home. If she had something to offer, to say that it wasn't his, she was there with him--; We were there, you know, he was cheating on his girlfriend, we were just going to have sex or something. Where is Marlene? How come we haven't heard from her? (T-331).

The Petitioner submits that this was error and required the Third District to reverse his conviction for a new trial.

It was error for the State to comment upon a missing witness, particularly where the defense had not raised the issue, Petitioner did not raise the defense of alibi, self-defense or other defense of another. See **Janiga v.State,** 713 So.2d 1102 (Fla. 2d DCA 1998). Marlene, who left before the Petitioner's arrest, was not shown to have been in a position to see anything. **See, Knowles v. State,,?4** Fla.L.Weekly D787 (Fla. 4th DCA 1999).

The State's comment may have lead the jury to believe that the Petitioner had the burden of proving his innocence, and, thus was error. See **Bates v. State,** 649 So.2d. 908 (Fla, 1st. DCA 1995).

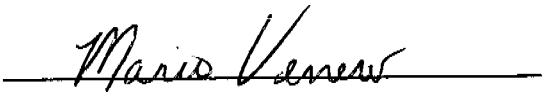
The Petitioner submits that, under the circumstances of this case, where the defense had not raised the issue, the State's comment as to the missing witness, Marlene, was reversible error.

CONCLUSION

Based on the foregoing facts, arguments and authorities, Petitioner respectfully requests this Court to Vacate his convictions and sentences and remand this cause for appropriate proceedings.

DATE: January 8, 2000

Respectfully submitted,



Mario Venero, Pro-se
DC# 423893
Everglades C.I.
Miami, Florida 33265-9001

IN THE SUPREME COURT OF FLORIDA

MARIO VENERO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No.:

UNNOTARIZED OATH

Under the penalty of perjury, I MARIO VENERO, Declare that the facts contained in the foregoing Initial Brief are true and correct, (92.525 Fla. Stat, (1999)).

Dated this 8th day of January, 2000, at Miami, Florida

Mario Venero

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this foregoing Initial Brief has been furnished to the Office of th Attorney General for Florida, The Capitol, Tallahasse, Florida 32399, by U.S. Mail Delivery on this 8th day of January, 2000.

Mario Venero

Mario Venero