IN THE SUPREME COURT OF FLORIDA

CASE NO, : 99-60

MARIO VENERO,
Petitioner,

vs.

STATE OF FLORIDA
Respondent.

REPLY BRIEF

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

Petitioner, pro se:

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Respondent, counsel:

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CERTIFICATE OF TYPE AND LINE

Petitioner certifies that this Reply Brief is typed with 10 pitch with Times New Roman typeset with 2 line space except where quotations are indented where 1 line space is used.

PRELIMINARY STATEMENT

Petitioner, MARIO VENERO, the Appellant below and Defendant in the trial court shall be referenced herein as the Petitioner unless quoted differently from the record: the STATE OF FLORIDA shall be referenced herein strictly as the Respondent; and the Third District Court of Appeal and Trial Court shall be referenced herein by name as indicated.

The letter R symbolizes references to the record on appeal from Venero v. State, 741 So.2d 1189 (Fla. 3d DCA 1999) and references to an appendix are designation for attachments as excerpts from the record on appeal.

SUMMARY OF ARGUMENT

Petitioner respectfully submits that jurisdiction should be granted:

1. Establishing the window period for application of the unconstitutionality of the Gore Act:

2. Bring uniformity with United States and Florida Supreme Courts' precedence warranting suppression of evidence under the facts demonstrating an illegal detention and search:

3. Prevent further "double dipping" enhancement with use or possession of a weapon where the weapon is an essential element to the multiplicous charges; and:

4. Deter further prosecutorial misconduct by commenting on evidence not produced or argued by the defense which shifted the burden of proof constituting fundamental error.

GROUND I

IS THE EVELYN GORE ACT UNDER PUBLIC LAW 95182 VIOLATIVE OF THE FLORIDA CONSTITUTION'S SINGLE SUBJECT RULE?

This Court recently answered the certified question from the Second District Court of Appeal holding that the Evelyn Gore "Act" is unconstitutional as violative of the single subject'rule in **State v. Thompson,** 25 Fla. Law Weekly S1 (Fla. 12/22/99). However, this Court did not establish an applicable window period for challenging the issue nor for retroactively under Florida Rule of Criminal Procedure 3.850(b)

The **Court** in **Thompson v. State,** 708 So.2d 3 15, at 317 n. 1 (Fla. 2d DCA 1998) set the window for October 1, 1995 closing on May 24, 1997, and in **Salter v. State, 73 1** So.2d 826 (Fla. 4th DCA 1999) set the window for October 1, 1995 closing on October 1, 1996. Petitioner's offense was committed on October 3 1, 1997 and if this Court opens the window to include this date he will be entitled to the benefit of this Court's holding in **Thompson**; if not, he concedes that relief will not be available to him.

GROUND II

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

Correctly applying the law to the facts of this case, it is manifestly clear that the officer did not have reasonable cause to detain, and search Petitioner. Respondent expresses a litany of evils purportedly exhibited by Petitioner which support its position that the officer was justified in detaining, then searing Petitioner; after which the weapon and cocaine were discovered.

Contrary to Respondent's position, as a guest staying at the hotel, Petitioner cannot be charged with loitering or trespassing; nor, as the jury found, was Petitioner guilty of battery; the charge was a pretext for the illegal detention, and search of Petitioner. The officer's justification for detaining, and then searching, Petitioner are material to this Court's analysis of the situation,

> PROSECUTOR: Q. He was not under arrest at the time you patted him down?
>
> OFFICER: A, No, he was not.
>
> Q. Did the people at the hotel, either the manager or the driver or whoever you spoke to, say that, that man threatened them with a gun?
>
> A. I don't remember anything about that.
>
> Q. Well, when you get there and you say that you're conducting an investigation, did anyone say this man took out a gun or pointed a gun at anyone?
>
> A. No, I don't recall that,
>
> Q. Did anyone say that he spoke about shooting anyone or doing anything with a gun?

A. Not to me.

Q. Okay, so basically you patted him down eventhough he wasn't under arrest, you just patted him down for what reason?
A. For my safety....

Id. R. 26; Appendix A,

There is no articulated reason given for the pat-down search of Petitioner, nor his detention, aside from the fact that he carried a fanny pack. This was not relevant to the criminal investigation, and it is not illegal for a person to carry a fanny pack. See **Coladonato v. State,** 348 So.2d 326, 327 (Fla. 1977)(suppress the stereo equipment obtained when Petitioner was detained on a policeman's bare suspicion that illegal activity was afoot). At the time this officer encountered Petitioner he was unsure who was the victim and the facts did not justify detention or the search:

PROSECUTOR: Q. How did he threaten Mr. Lopez?

OFFICER: A. I don't recall the exact wording that he used.

Q. Fighting words?

A. Yes, fighting words, like, come on, let's finish this, that type of words,

Q. 'So what did you do at this point?

A. I asked Mr. Venero to -- you know, to stop where he was at, not to further -- further walk towards us. I told -- asked him to calm down. And I observed that he had a black fanny pack on his shoulder, which I took an, immediate concern that it might be a weapon since we use fanny packs off duty, you know, we normally keep our weapons in that. I did a cursory search of his waistband' to

[1] The immediate search of the waist, after securing the fanny pack, demonstrates that the fanny pack was a pretextual reason to conduct an unlawful search of his persons where no one had reported the use or threatened use of a weapons,

> see if he had any weapons or anything, let him calm down a little bit. Because the two guys had just been fighting. I thought one might have a weapon because the victim, Sergio Lopez, when we first arrived, I didn't know he was the victim at the time, and when I was getting his story I patted him down also for weapons. I patted Mr. Venero down, he had a 380 in his waistband, semiautomatic.
>
> Q. Could you see that by looking at him?
> A. No, I could not. He had a loose shirt.

Id. R. 136-137; Appendix B-C.

The arrest could not justify the search, and, in turn, the search could not justify the arrest; where an arrest is unlawful, subsequent search is unlawful and it cannot be made legal by the proof it produces, **Cf. Bailey v. State,** 319 So.2d 22, 25-26 (Fla. 1975). It, therefore, follows that because the officer could not articulate specific factual reasons for detaining Petitioner when he told him to stop, he was from that point not free to leave, and then for the search of Petitioner, the illegal detention when no criminal conduct was apparent and subsequent search violated the Fourth Amendment protections. **Kehoe** v. **State,** $21 So.2d 1094, at 1095-96 (Fla. 1988); **Terry v. Ohio, 392** U.S. 1, 21-22, 88 S.Ct. 1868, : 1880, 20 L.Ed.2d 889 (1968)(justifying the particular intrusion the police officer must be able to point to specific and articuble facts).

Under Florida Statutes § 901-15 1(5), and these facts the officer did not witness any crime, detained Petitioner without probable cause that he had, was, or would commit a crime, and detained and searched him because he had a fanny pack, the Trial Court erred in refusing to suppress the illegally obtained gun and cocaine under the fruit of the poisonous tree doctrine of **Wong Sun v. United States, 371** U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Under the United States Supreme Court decision in **Florida v.**

Royer, 460 U.S. 491, at 500, **103 S.Ct. 1319,** at 1325, 75 L.Ed.2d 229 (1983), this Court should accept jurisdiction to enforce the holding that "In the name of investigating the police may not carry out a full search of the person or other effects."

GROUND III

THE TRIAL COURT ERRED IN ITS SENTENCING OF THE PETITIONER?

The issue pertaining to the propriety of enhancing Petitioner's sentences based upon a weapon does not balance upon the analysis of the charges arising from a single criminal episode, as argued by Respondent, but relates to the double dipping in using the weapon to reclassify the trafficking charge under Florida Statutes § 790,235 -- allowing a minimum mandatory fifteen (15) year term, and enhancing the degree of felony under Florida Statutes § 775.084(4)(c) -- which also carries a minimum mandatory term.

Under this Court's holding in **State v. Maxwell, 682** So.2d 83 (Fla. 1996), separate convictions are permissible for carrying a concealed weapon, possession of a weapon by a convicted felon, and armed trafficking. Petitioner does not dispute this principle, but instead submits double dipping the weapon to enhance the crimes is contrary to this Court's holdings in **Whitehead** v. **State,** 498 So.2d 863 (Fla. 1986); **Gonzalez v. State,** 585 So.2d 932 (Fla. 1991). On this issue, in this case, the Court should accept jurisdiction to bring uniformity among the Districts to conform with this Court's prior holdings concerning the propriety of "double dipping" weapon enhancements.

GROUND IV

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

It is submitted that the defense broached the subject of a witness named "Marlene", however, as pointed out on appeal and in the initial brief, the defense never once mentioned during its argument that Marlene was a witness it had available. Further, Respondent maintained that because Petitioner made it appear that there was a witness who could corroborate that he checked into the hotel without a fanny pack and therefore by implication without the gun or cocaine thus supporting his theory that the police planted evidence, it was alright for the prosecutor to argue on Petitioner's failure to produce a Marlene to corroborate this appearance. See Answer Brief at page 16.

The case of **Thomas v. State,** 726 So.2d 369 (Fla. 4th DCA 1999), is distinguished from the instant case because the Court gave an immediate curative instruction and the defense was one where Thomas supported being in the area by dropping off a busboy. The **Court** in **Thomas** in no way condoned the prosecutor's comment on the defense's failure to call a witness which shifted the burden to the defense; this was cured by an instruction immediately after the comment.

The principle of exclusion to the rule permitting such a comment is where a defendant asserts defenses such as alibi, self-defense, defense of others, or relies on facts that could be elicited from a witness who was not equally available to the State. **Id.** 726 So.2d at 370. There is nothing in the record to indicate that Petitioner utilized any one of these defenses, nor that the witness Marlene was not equally available to the State, as

required. Under these facts, circumstances, and given that the Trial Court did not give a curative instruction, the comment on the defense's failure to call Marlene is fundamental error because it shifted the burden of proof onto defense; reversal for a new trial should be granted.

CONCLUSION

WHEREFORE, based upon the foregoing facts, arguments and authorities, Petitioner submits that this Court's invocation of jurisdiction is proper, if not necessary, for uniformity to be brought under prior precedence under the facts and circumstances presented.

RELIEF SOUGHT

PETITIONER respectfully prays that this Court to accept jurisdiction, schedule full briefing of the issues, or grant relief as is deemed proper and just.

DECLARATION/CERTIFICATE OF SERVICE

HAVING READ the foregoing statement of this Reply Brief I swear under penalties of perjury all stated is true and correct and certify that a true and correct copy has been furnished by U.S. Mail to: Fredericka Sands, Asst. Atty. General, 444 Brickell Ave., Suite 950, Miami, FL 33 13 1, this 21st day of February 2000.

Mario Venero

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