IN THE SUPREME COURT OF FLORIDA

FRED REUBEN CLARKE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC00-305

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

CERTIFICATE OF FONT AND TYPE SIZE 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 5

ARGUMENT 8

ISSUE I

WHETHER THE PRISON RELEASEE REOFFENDER STATUTE VIOLATES SEPARATION OF POWERS AND THE SINGLE SUBJECT PROVISIONS OF THE FLORIDA CONSTITUTION? (Restated) 8

ISSUE II

WHETHER THIS COURT SHOULD ADDRESS THIS NON-JURISDICTIONAL ISSUE WHICH THE DISTRICT COURT AFFIRMED WITHOUT COMMENT AND, IF SO, WHETHER THE TRIAL COURT ERRED BY SENTENCING PETITIONER AS BOTH AN HABITUAL OFFENDER AND A PRISON RELEASEE REOFFENDER? (Restated) 10

ISSUE III

WHETHER THIS COURT SHOULD ADDRESS THIS NON-JURISDICTIONAL ISSUE WHICH THE DISTRICT COURT AFFIRMED WITHOUT COMMENT AND, IF SO, WHETHER THE TRIAL COURT ERRED IN SENTENCING THE PETITIONER AS AN HABITUAL VIOLENT FELONY OFFENDER WHERE IT RELIED UPON EXHIBITS PROVIDED BY THE PROSECUTOR WHICH WERE NOT MADE PART OF THE RECORD, AND THE PETITIONER NEITHER CHALLENGED THE VALIDITY OF THE CONVICTIONS, NOR OBJECTED TO THE SENTENCE IMPOSED ON THE GROUNDS RAISED ON APPEAL? (Restated) . . . 16

CONCLUSION 21

CERTIFICATE OF SERVICE 22

TABLE OF CITATIONS

CASES PAGE(S)

Blockburger v. United States,
284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) 12

Boler v. State,
678 So. 2d 319 (Fla. 1996) 14

Brooks v. State,
630 So. 2d 527 (Fla. 1993) 13,14

Burks v. State,
613 So. 2d 441 (Fla. 1993) 10,16

Critton v. State,
619 So. 2d 495 (Fla. 1st DCA 1993) 20

Daniels v. State,
595 So. 2d 952 (Fla. 1992) 14

Durden v. State,
743 So. 2d 77 (Fla. 1st DCA 1999) 5

Hale v. State,
630 So. 2d 521 (Fla. 1993) 13,14

Herrington v. State,
643 So. 2d 1078 (Fla. 1994) 19

Jackson v. State,
659 So. 2d 1060 (Fla. 1995) 13,14

Maddox v. State,
708 So. 2d 617 (Fla. 5th DCA 1998),
rev. granted,case no. 92,805 17

Missouri v. Hunter,
459 U.S. 359, 103 S. Ct. 673,
74 L. Ed. 2d 535 (1983) 12

Palmer v. State,
438 So. 2d 1 (Fla. 1983) 14

Quarterman v. State,
670 So. 2d 1169 (Fla. 3d DCA 1996) 19

Savoie v. State,
422 So. 2d 308 (Fla. 1982) 10,16

Smallwood v. Johnson,
73 F.3d 1343 (5th Cir. 1996) 13

State v. Enmund,
476 So. 2d 165 (Fla.1985) 15

State v. Gibson,
585 So. 2d 285 (Fla. 1991) 10,16

State v. Hodges,
616 So. 2d 994 (Fla. 1993) 11,17

State v. Rucker,
613 So. 2d 460 (Fla. 1993) 20

State v. Smith,
547 So. 2d 613 (Fla. 1989) 13

Stephens v. State,
572 So. 2d 1387 (Fla. 1991) 10,16

Trushin v. State,
425 So. 2d 1126 (Fla. 1st DCA 1982) 11,17

United States v. Nyhuis,
8 F.3d 731 (11th Cir. 1993) 12

Witte v. United States,
515 U.S. 389, 115 S. Ct. 2199,
132 L. Ed. 2d 351 (1995) 12

Woods v. State,
24 Fla. L. Weekly D83,
740 So. 2d 20 (Fla. 1st DCA 1999),
review granted, 740 So. 2d 529 (Fla. 1999) 4,5,8

FLORIDA STATUTES

F.S. 775.082 (8) 4

F.S. 775.082(8)(c) 13

F.S. 775.084 13

F.S. 775.084 (1)(b) 18

F.S. 924.051 11

OTHER

United States Const. Amend. V., cl. 2 12

Florida Constitution, Art. I, Section 9 12

Florida Rule of Appellate Procedure 9.210(b) 1

Florida Rule of Criminal Procedure 3.800(b) 17

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Fred Reuben Clarke, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of four volumes. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The Petitioner’s statement of the facts has little relevance to the issue which brings this case here for review. It omits facts relevant to the standards of review and the issues

presented. It is accepted subject only to the following relevant facts.

Prior to trial, the State filed its notice of habitual offender status, relying upon a 12-17-91 burglary of a dwelling and a 5-19-92 aggravated battery. (V1, 27). The State also filed notice of its intention to seek prison releasee reoffender sentencing. (V1, 29). A notice of habitual violent felony offender status was filed relying upon a 12-17-91 aggravated battery. (V1, 51). Corrections Corporation of America sent notice to the court that the Petitioner's sentence expired on 9-25-97 and he was released from Bay Correctional Facility on that date. (V1, 53).

A sentencing hearing was conducted on 8 March 1999 at which time the State's motion for habitual violent felony offender and prison releasee reoffender status was considered. (V2). The following took place:

> MR. GRAMMAR: Okay, Your Honor, for the, as to the habitual violent felony offender Mr. Clarke was, had previously been sentenced for an aggravated battery, um, for which he was released from prison in 1997. That's case number 91-1949 and I would offer that as an exhibit along with that judgment and sentence. There's also a copy of the judgment and sentence from the, from the burglary of a dwelling and there's a copy of the complaint from another case. The burglary of a dwelling case, Your Honor, is not, other than the fact that he was in prison for both of those offenses does not make him a habitual violent felony offender. But he has now been convicted of battery on a law enforcement officer which is a crime of violence which puts him in the category of those who can be treated as habitual violent felony offender.
>
> As to the prison releasee reoffender Mr. Clarke's sentence expired from Bay Correctional Institution on --Bay Correctional Facility, excuse me, on September 25, 1997. This offense was committed on,

> excuse me, on March 7th, 1998 which is within three years of his release. And again this battery on law enforcement is the crime involving violence which puts it in the category of those that can be treated as prison releasee reoffender. (V2, 87-88).

The defense conceded the correctness of his release date, but argued that the prison releasee reoffender statute violated the single subject rule, separation of powers, cruel and unusual punishment, double jeopardy, vagueness, due process and equal protection. (V2, 88). The court denied the motion to declare the statute unconstitutional. (V2, 89). It found that the Petitioner met the criteria to be sentenced as a prison releasee reoffender since his release from custody was 9-25-97 and the battery on a law enforcement officer was committed 3-7-98. (V2, 89). It also found the Petitioner qualified as an habitual violent felony offender in that he had previously been convicted of the enumerated felony of aggravated battery on 12-17-91 in case number 91-1841 and the felony for which he was currently being sentenced was committed within five years of the date of the other conviction or within five years of his release from custody on 9-25-97. (V2, 89-90).

The court sentenced the Petitioner as an habitual violent felony offender and prison releasee reoffender without defense objection on any ground. (V2, 91). The court noted that with regard to the habitual violent statute, he could sentence up to ten years with no eligibility for release before five years on count one, while the prison releasee reoffender statute required a five year sentence. (V2, 93). The court sentenced the

Petitioner to five years on count one and time served on the remaining charges. (V2, 93).

On appeal to the District Court, the Petitioner presented three issues as restated by the Respondent:

1. Whether the trial court erred in sentencing the defendant as an habitual violent felony offender where it relied upon exhibits provided by the prosecutor which were not made part of the record, and the defendant neither challenged the validity of the convictions, nor objected to the sentence imposed on the grounds raised on appeal?

2. Did the trial court err by sentencing appellant as both an habitual offender and a prison releasee reoffender?

3. Does the prison releasee reoffender statute, F.S. 775.082(8) violate the single subject, separation of powers, cruel and unusual punishment, void for vagueness, due process, or equal protection provisions?

On November 1, 1999, the First District Court of Appeal issued its opinion as follows:

> We find appellant’s first two issues to be without merit and affirm them without discussion. On the third issue, we also affirm but certify the same question of great public importance as in Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 26, 1999), review granted, No. 95,281 (Fla. Aug. 23, 1999):
>
> > DOES THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, CODIFIED AS SECTION 775.082(8), FLORIDA STATUTES (1997), VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION?

SUMMARY OF ARGUMENT

ISSUE I

The Petitioner asserts that the prison releasee reoffender statute violates the separation of powers clause by improperly delegating the authority to prescribe punishment to the executive branch prosecutor and also contends that the statute violates the single subject rule. The State respectfully disagrees.

The issue presented is currently pending before this Court in Woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999), review granted, 740 So.2d 529 (Fla. 1999) in case number 95,281[1] and in Durden v. State, 743 So.2d 77 (Fla. 1st DCA 1999), rev. granted, case number 96,479. The State adopts its briefs in those cases and urges this Court to hold this case in abeyance pending resolution of Woods.

ISSUE II

This Court should decline to address this non-jurisdictional issue which the District Court affirmed without comment. If the merits are addressed, the dual use of the prison releasee reoffender and the habitual offender statute does not violate the double jeopardy clause's prohibition on multiple punishments because the legislature has authorized the use of these statutes in tandem. The double jeopardy clause does no more than prohibit cumulative punishments that are not statutorily authorized. The

[1] Oral argument was held on November 3, 1999.

prison releasee reoffender statute specifically refers to the habitual offender statute in a subsection. Thus, the legislature has authorized the use of these two sentencing statute in tandem with each other. Furthermore, the prison releasee reoffender is not being used to increase the length of appellant's sentence it only affects the minimum mandatory; it is the habitual offender statute that increases the statutory maximum. Moreover, in the instant case, the trial court sentenced appellant to five years pursuant to the habitual violent offender statute, the same term imposed under the prison releasee reoffender statute. The actual minimum mandatory term is thus not effected by dual sentencing. Therefore, no violation of the double jeopardy clause occurred by imposition of sentence under both the habitual violent felony offender statute and the prison releasee reoffender statute.

ISSUE III

This Court should decline to address this non-jurisdictional issue which the District Court affirmed without comment. If the merits are addressed, the Petitioner's claim that the trial court erred in sentencing him as an habitual violent felony offender because the State purportedly failed to prove the requite predicate convictions and enter them into evidence is unpreserved since he neither objected to the predicate offenses relied upon by the prosecutor below nor objected to the failure to introduce them into the record. Further, the claim is without merit. The State showed that the Petitioner had been convicted of an enumerated prior felony for which he was released from custody

within five years of the commission of the instant offense and that he has not been pardoned for any prior felony, and that he has not had a prior felony set aside in post-conviction proceedings. The existence of evidence that the Petitioner qualified for habitual violent felony offender sentencing is supported on the record by the PSI which Petitioner did not object to. Should this Court reach the merits, it must affirm the defendant's sentence.

ARGUMENT

ISSUE I

WHETHER THE PRISON RELEASEE REOFFENDER STATUTE VIOLATES SEPARATION OF POWERS AND THE SINGLE SUBJECT PROVISIONS OF THE FLORIDA CONSTITUTION? (Restated)

Merits

The Petitioner asserts that the prison releasee reoffender statute violates the separation of powers clause by improperly delegating the authority to prescribe punishment to the executive branch prosecutor and also contends that the statute violates the single subject rule. The State respectfully disagrees and notes that the District Court of Appeal certification of the question related solely to whether the statute violated the separation of powers doctrine. The State therefore takes the position that while this Court has the authority to consider any matter relating to the case, it should decline to address any matter outside the certified question. To do otherwise places the District Court in the position of becoming a court of intermediary review, rather than a court of last resort within Constitutional limitations.

The issue presented is currently pending before this Court in Woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999), review granted, 740 So.2d 529 (Fla. 1999) in case number 95,281[2] and in Durden v.

[2] Oral argument was held on November 3, 1999.

State, case number 96,479. The State adopts its briefs in those cases and urges the Court to hold this case in abeyance pending resolution of Woods.

ISSUE II

WHETHER THIS COURT SHOULD ADDRESS THIS NON-JURISDICTIONAL ISSUE WHICH THE DISTRICT COURT AFFIRMED WITHOUT COMMENT AND, IF SO, WHETHER THE TRIAL COURT ERRED BY SENTENCING PETITIONER AS BOTH AN HABITUAL OFFENDER AND A PRISON RELEASEE REOFFENDER? (Restated)

Preliminary statement

The Petitioner contends that imposition of both habitual violent felony offender and prison releasee reoffender sentences violated the prohibition against double jeopardy and asserts that because the error is fundamental his failure to preserve the alleged error below does not prevent him from raising it on appeal. This non-jurisdictional issue was affirmed without comment by the District Court and should not be addressed here.

The State acknowledges that this Court has discretionary authority to consider issues other than those upon which jurisdiction is based where such other issues are fully briefed and dispositive of the case, Savoie v. State, 422 So.2d 308, 312 (Fla. 1982), but notes that the District Court below affirmed on this claim without comment. Clearly the instant issue is not dispositive of the case and the State therefore asserts that this Court should decline to address this issue. See: Stephens v. State, 572 So.2d 1387 (Fla. 1991) and State v. Gibson, 585 So.2d 285 (Fla. 1991)(Court declined to address other issues raised by the parties which lay beyond the scope of the certified question.); Burks v. State, 613 So.2d 441, 446 fn.6 (Fla. 1993) ("We decline to address the other issues raised in the appeal

because they are unnecessary to the resolution of the certified question.”); State v. Hodges, 616 So.2d 994 (Fla. 1993) (The Court declined to address the second certified question in which claimant made a new argument for the first time on the grounds that it would require resolution of extensive factual matters, citing, Trushin v. State, 425 So.2d 1126 (Fla. 1982).)

Preservation

Because the use of dual sentences does not violate double jeopardy, the Petitioner’s failure to raise this sentencing issue below bars review. F.S. 924.051.

Merits

The dual use of the prison releasee reoffender and the habitual offender statute does not violate the double jeopardy clause’s prohibition on multiple punishments because the legislature has authorized the use of these statutes in tandem. The double jeopardy clause does no more than prohibit cumulative punishments that are not statutorily authorized. The prison releasee reoffender statute specifically refers to the habitual offender statute in a subsection. Thus, the legislature has authorized the use of these two sentencing statutes in tandem with each other and therefore, no violation of the double jeopardy clause occurred.

The trial court imposed a five year habitual violent felony offender sentence, noting that it could, in fact, impose up to ten years and also imposed a five year prison releasee reoffender sentence. The Petitioner never raised any objection to the

sentences for any reason. Imposition of both statutes has not in any fashion increased the amount of time the Petitioner is required to serve.

Federal & Florida Constitutions

The Fifth Amendment to the Federal Constitution provides:

> nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;

U.S. CONST. AMEND. V., CL. 2.

The Due process clause of the Florida Constitution provides:

> No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Art. I, § 9, FLA. CONST. These constitutional provisions protect persons against multiple punishments for the same offense as well as multiple prosecutions. Witte v. United States, 515 U.S. 389, 390-92, 115 S.Ct. 2199, 2202, 132 L.Ed.2d 351 (1995). However, where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those statutes violate Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), a court's task of statutory construction is at an end and the prosecutor may seek, and the trial court may impose, cumulative punishment under such statutes. Missouri v. Hunter, 459 U.S. 359, 368-69, 103 S.Ct. 673, 679-80, 74 L.Ed.2d 535 (1983); United States v. Nyhuis, 8 F.3d 731 (11th Cir. 1993)(following other circuits and holding that Double Jeopardy Clause does not bar punishment for criminal conduct that has already been considered and used as the basis for a sentence

enhancement in an earlier prosecution); Smallwood v. Johnson, 73 F.3d 1343 (5th Cir. 1996) (noting that the double enhancement of defendant's offense - offense was upgraded from misdemeanor to felony based on prior convictions, which triggered operation of state habitual offender enhancement statute - did not violate double jeopardy clause of Fifth Amendment because the legislature intended for upgrade statute and enhancement statute to be applied in conjunction); State v. Smith, 547 So.2d 613 (Fla. 1989). Thus, the issue is whether the legislature intends the prison releasee reoffender statute and the habitual offender statute to be alternatives or cumulative methods of punishment.

The prison releasee reoffender statute, § 775.082(8)(c), Fla. Stat. (1997), provides:

> Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

The prison releasee reoffender statute specifically refers to the habitual offender statute. Thus, the legislature specifically indicated that they intended the prison releasee reoffender to work in tandem with the habitual offender statute. Thus, no double jeopardy violation occurs when a trial court sentences a defendant as both a prison releasee reoffender and a habitual offender.

While Jackson v. State, 659 So.2d 1060 (Fla. 1995), Brooks v. State, 630 So.2d 527 (Fla. 1993) and Hale v. State, 630 So.2d 521 (Fla. 1993) have prohibited dual minimum mandatory sentences to be imposed consecutively, both minimum mandatory sentence may be

imposed. They just must run concurrently. Palmer v. State, 438 So.2d 1 (Fla. 1983)(prohibiting the "stacking" of consecutive mandatory three-year minimum sentences); Daniels v. State, 595 So.2d 952 (Fla. 1992)(prohibiting the imposition of consecutive life in prison with a fifteen-year minimum mandatory sentences); Hale v. State, 630 So.2d 521 (Fla. 1993)(prohibiting consecutive habitual offender minimum mandatory sentences); Brooks v. State, 630 So.2d 527 (Fla. 1993)(prohibiting consecutive violent habitual offender minimum mandatory sentences); Jackson v. State, 659 So.2d 1060 (Fla. 1995)(holding violent habitual offender and firearm minimum mandatory sentences may be imposed but must run concurrently with one another if they arose from a single criminal episode); Boler v. State, 678 So.2d 319 (Fla. 1996)(holding the mandatory minimum sentence of 25 years for first-degree murder had to run concurrently with the three-year minimum mandatory term under the enhancement statute for use of a firearm during the commission of a felony). The rationale underlying these cases was the lack of specific legislative authorization for the imposition of consecutive minimum mandatory sentences. Boler v. State, 678 So.2d 319 (Fla. 1996)(noting the lack of specific legislative authorization in the enhancement statutes). The direct holding of these cases does not apply because the Petitioner's sentences were not imposed consecutively. However, they also stand for the proposition that enhancement sentences may not be used in conjunction with one another to lengthen a defendant's sentence in the absence of

explicit statutory authority. But the prison releasee reoffender statute does explicitly authorize the imposition of both prison releasee reoffender sanctions and habitual offender sanctions. State v. Enmund, 476 So.2d 165 (Fla.1985)(approving consecutive twenty-five-year minimum mandatory sentences for two murders committed in the same criminal episode because the legislative allows dual minimum mandatory sentences to be imposed consecutively). Furthermore, the prison releasee reoffender statute is not being used to increase the length of the sentence; it merely increases the length of the minimum period of time that the Petitioner will have to spend in jail. The maximum sentence is increased by use of the habitual violent offender statute, not the prison releasee reoffender statute.

Moreover, the prison releasee reoffender sentence has no actual affect on the length of the Petitioner's sentence, since the court imposed a five year term under either form of sentencing. Thus, no double jeopardy violation occurred when the trial court sentenced the defendant as both a prison releasee reoffender and a habitual offender.

ISSUE III

WHETHER THIS COURT SHOULD ADDRESS THIS NON-JURISDICTIONAL ISSUE WHICH THE DISTRICT COURT AFFIRMED WITHOUT COMMENT AND, IF SO, WHETHER THE TRIAL COURT ERRED IN SENTENCING THE PETITIONER AS AN HABITUAL VIOLENT FELONY OFFENDER WHERE IT RELIED UPON EXHIBITS PROVIDED BY THE PROSECUTOR WHICH WERE NOT MADE PART OF THE RECORD, AND THE PETITIONER NEITHER CHALLENGED THE VALIDITY OF THE CONVICTIONS, NOR OBJECTED TO THE SENTENCE IMPOSED ON THE GROUNDS RAISED ON APPEAL? (Restated)

Preliminary Statement

The Petitioner's claim that the trial court improperly imposed an habitual violent felony offender sentence because it did not prove or introduce into evidence proof of his prior qualifying convictions is not preserved for review and is without merit. This non-jurisdictional issue was affirmed without comment by the District Court and should not be addressed here. The State acknowledges that this Court has discretionary authority to consider issues other than those upon which jurisdiction is based where such other issues are fully briefed and dispositive of the case, Savoie v. State, 422 So.2d 308, 312 (Fla. 1982), but notes that the District Court below affirmed on this claim without comment. Clearly the instant issue is not dispositive of the case and the State therefore asserts that this Court should decline to address this issue. See: Stephens v. State, 572 So.2d 1387 (Fla. 1991) and State v. Gibson, 585 So.2d 285 (Fla. 1991)(Court declined to address other issues raised by the parties which lay beyond the scope of the certified question.); Burks v. State, 613 So.2d 441, 446 fn.6 (Fla. 1993) ("We decline to address the other

issues raised in the appeal because they are unnecessary to the resolution of the certified question.”); State v. Hodges, 616 So.2d 994 (Fla. 1993) (The Court declined to address the second certified question in which claimant made a new argument for the first time on the grounds that it would require resolution of extensive factual matters, citing, Trushin v. State, 425 So.2d 1126 (Fla. 1982).)

Preservation

The Petitioner, at the trial court level, did not argue below that any of his prior convictions and sentences could not be used as predicate offenses for violent career criminal sentencing, nor did he contend the State failed to prove these conviction or enter into evidence copies of the predicate convictions. (V2, 84-94). He also did not file a motion to correct his sentence pursuant to Florida Rule of Criminal Procedure 3.800(b) on these grounds. Accordingly, his claim that the prior offenses were not sufficiently proven is not preserved and his sentence should be affirmed. See Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), rev. granted, case no. 92,805 (no fundamental error in the sentencing context).

Merits

While the State contends that the Petitioner’s claim is unpreserved, arguments about preservation are academic since the claim is without merit. The Petitioner was properly declared to be an habitual violent felony offender.

F.S. 775.084(1)(b) provides that a defendant may be qualified as an habitual violent felony offender where he has been previously convicted or released from confinement on an enumerated offense. Aggravated battery is one of the qualifying offenses.

As proof that the Petitioner qualified as an habitual violent felony offender, the record shows that the State submitted exhibits relating to the prior aggravated battery conviction to the court. The record also contains a copy of the Petitioner's PSI which shows a conviction for aggravated battery, a second degree felony, in case number 91-1949 on 8-17-91. (V1, 15). This document also shows that he was released from custody on that offense on 9-15-97, a fact which is confirmed by written letter from the corrections corporation responsible for the his confinement. (V1, 15, 66).

At the sentencing hearing, the Petitioner did not challenge the validity of the prior qualifying offense and indeed conceded that the release date within five years of the instant offense was accurate. (V2, 88). Thus, the State contends that any argument on this issue is both waived and without merit.

The legislature intended that the trial court make specific findings of fact when sentencing a habitual violent felony offender. "The Florida Supreme Court has held, however, that the failure to make such findings of fact is harmless error where evidence of timely prior convictions, which have not been pardoned or set aside, is easily discernible from the record,

thus allowing meaningful appellate review." Herrington v. State, 643 So.2d 1078 (Fla. 1994); Quarterman v. State, 670 So.2d 1169 (Fla. 3d DCA 1996). Here, it is clear that the failure to include the exhibits relied upon by the prosecutor and trial court is clearly a mere oversight. Significantly, despite this omission, the record without doubt provides the evidence required, in that the PSI, to which no objection was posed, also shows that the Petitioner was convicted of a qualifying offense for which he was released from custody within five years of commission of the instant offense. Thus, the Court is able to conduct meaningful appellate review and reversal is not warranted.

Finally, even if the fact that the record does not contain the certified conviction, reversal and imposition of a guideline sentence is not necessary. In view of the prison releasee reoffender sentence of five years, correction of the habitual violent felony offender sentence is unnecessary as the amount of actual time to be served by the Petitioner does not change. Should the Court nevertheless consider correction of any alleged error necessary, remand would be appropriate to allow the certified copies to be introduced and entered into the record and the court could reimpose the habitual offender sentence.

Harmless Error

The failure to make the predicate findings required by the habitual violent felony offender statute are subject to harmless error analysis, particularly where the State offers unrebutted evidence that a defendant has the requisite predicate

convictions. State v. Rucker, 613 So.2d 460 (Fla. 1993); Critton v. State, 619 So.2d 495 (Fla. 1st DCA 1993). Based upon the fact that the court clearly was presented with copies of the predicate objection to which no objection was made, and the fact that the PSI also reflected the fact the Petitioner qualified for sentencing as an habitual offender, any alleged error is harmless. This Court must affirm.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal should be approved, and the convictions entered in the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Robert Friedman, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this _______ day of March, 2000.

____
Giselle Lylen Rivera
Attorney for the State of Florida

IN THE SUPREME COURT OF FLORIDA

FRED REUBEN CLARKE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC00-305

APPENDIX

Fred Reuben Clarke v. State, 1st DCA opinion dated November 1, 1999.

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