

IN THE SUPREME COURT OF FLORIDA

Case No. SC00-724

**DOUGLAS ISOM,**

Petitioner,

vs.

**STATE OF FLORIDA,**

Respondent.

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PETITIONER'S INITIAL BRIEF ON THE MERITS

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## **INTRODUCTION**

The Petitioner, DOUGLAS ISOM, was the appellant in the Third District Court of Appeal and the defendant in the trial court of the Eleventh Judicial Circuit, in and for Dade County. Petitioner appeared in proper person in the Third District Court of Appeal and in his Jurisdictional Brief to this Honorable Court. Petitioner is represented by undersigned counsel in this Brief on the Merits, as appointed by this Honorable Court.

In this brief, the Petitioner, Douglas Isom will be referred to as “Isom” or “Petitioner” and the State of Florida will be referred to as “Respondent.”

References to the Record will be made by document and by referencing the page numbers within each document where the cited material may be found. References to the Appendix will be made by reference to the letter A, then by document and by referencing page numbers within the document: for example, [A-order, p. 2.]

## **CERTIFICATE OF TYPE SIZE AND STYLE**

Counsel for Petitioner hereby certifies that 14 point Times New Roman is the font used in this brief.

## STATEMENT OF THE CASE AND FACTS

Petitioner, DOUGLAS ISOM, was convicted of trafficking, and conspiracy to traffic, in cocaine, and was sentenced to life in prison as an habitual offender. On direct appeal, Isom's convictions were affirmed but the habitual offender sentence was reversed and the cause remanded for resentencing. *Isom v. State*, 619 So.2d 369 (Fla. 3<sup>rd</sup> DCA 1993).

On remand, a successor judge reimposed a life sentence under the habitual offender statute which was in effect at the time Petitioner's offense was committed, and entered a written departure order. On appeal, the Third District Court of Appeal affirmed without written opinion. *See Isom v. State*, 690 So.2d 613 (Fla. 3<sup>rd</sup> DCA 1997).

Petitioner then filed motions for post-conviction relief under Florida Rules of Criminal Procedure 3.800(a) and 3.850, which were denied and appealed to the Third District Court of Appeal. On rehearing, the Third District affirmed and held that any scoring errors were harmless, and that Isom's argument regarding the habitual offender sentence was barred as law of the case. *Isom v. State*, 750 So.2d 734 (Fla. 3<sup>rd</sup> DCA 2000) [A-Third District opinion, 2/2/00].<sup>1</sup>

Specifically, the Third District first held that any scoresheet error in

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<sup>1</sup>Hereafter A-3<sup>rd</sup> DCA, 2/2/00, p. *n*.



calculating sentencing guidelines was harmless, where Isom received a life sentence as an habitual offender at two sentencing hearings and committed ten prior felonies during an escalating pattern of criminal conduct. The second part of the Third District's holding was that the law of the case barred Isom's argument that the trial court failed to find that the habitual offender sentence was necessary to protect the public, resulting in an illegal sentence, *Isom, supra* [A-3<sup>rd</sup> DCA, 2/2/00].

Isom then served notice to invoke the discretionary jurisdiction of this Court and this Court accepted jurisdiction.

## SUMMARY OF THE ARGUMENT

The trial court's miscalculations of the scoresheet were not harmless error but in fact resulted in an illegal sentence. The Third District Court's opinion which is being reviewed by this Court assumed, "for present purposes," that Isom's claims of scoresheet error are correct *Isom v. State*, 750 So.2d at 735 [A-3<sup>rd</sup> DCA, 2/2/00, p. 3]. First, the trial court on resentencing impermissibly cited Petitioner's status as an habitual offender as a reason to impose a departure sentence [A-order, p.4].<sup>2</sup> Second, the scoresheet counted an offense for which the Petitioner was awaiting trial, but had not been convicted, at the time he was charged with the instant offense [A-scoresheet].<sup>3</sup> The Third District Court conceded that the points for "legal restraint" associated with the earlier offense should not have been scored. *Isom v. State*, 750 So.2d at 735, n.2 [A-3<sup>rd</sup> DCA, 2/2/00, p.3, n.2]. However, the earlier offense should not have been scored at all, as Petitioner had not been convicted for it at the time he was charged for the instant crime. Without that offense, there is no close temporal relationship between offenses and no pattern of criminal activity justifying a departure

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<sup>2</sup> The resentencing order is not part of the limited record before this Court, but is included in the Appendix to this brief [A-order].

<sup>3</sup> The sentencing scoresheet is not part of the limited record before this Court, but is included in the Appendix to this brief [A-scoresheet].

sentence [A-scoresheet].

Third, the scoresheet was inaccurate as to the degree and recommended sentence for the petitioner's next most recent offense [A-scoresheet]. This mistake created the false impression that the instant offense showed an escalating pattern justifying a departure sentence; in fact, the instant offense did not escalate from the next most recent offense and no departure sentence was justified. When all reasons for a departure are invalid, the court can not again impose a departure sentence.

The trial court impermissibly sentenced Isom to life in prison as an habitual offender without making a written finding that doing so was necessary for the protection of the public, as the habitual offender statute in effect at the time of the offense required [A-order, pp. 1 - 5]. Law of the case doctrine does not apply to an illegal sentence, where to apply it would result in manifest injustice.

The trial court on resentencing violated the *ex post facto* clause of the United States Constitution by imposing a departure sentence using criteria which were not in effect at the time of Petitioner's instant offense [A-order, pp. 3 - 4].

These mistakes have resulted in an illegal sentence and in a failure to afford Isom due process of law under Amendments V and XIV of the United States Constitution. Petitioner respectfully requests that this honorable Court reverse the

Third District Court of Appeal and remand to the trial court with instructions to sentence Isom to the guidelines sentence range of twelve to seventeen years.

## ARGUMENT ONE

THE TRIAL COURT IMPOSED AN ILLEGAL SENTENCE WHEN, UPON RESENTENCING, IT RELIED SOLELY ON IMPERMISSIBLE CRITERIA TO SUPPORT A DEPARTURE SENTENCE.

The trial court in resentencing Isom in this case relied for its departure from sentencing guidelines on three invalid reasons which will be argued in this section of the brief, all of which, taken together, result in imposition of an illegal sentence and a denial of Petitioner's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

**A. Using “habitual offender” status as a ground for departure.** The first ground the trial court gave on resentencing for departing from the sentencing guidelines was the habitual offender status of Isom. This Court specifically found in *Whitehead v. State*, 498 So.2d 863 (Fla. 1987) that it could not conclude “that the habitual offender statute may be used in and of itself as a legitimate reason to depart from the guidelines.” *Whitehead*, 498 So.2d at 864. The trial court on resentencing relied on Isom's habitual offender status as well as the two other grounds discussed below in Parts B and C of this Argument. As will be argued, both of the other two reasons given for departure are illegitimate, leaving the

habitual offender status to stand alone as a ground for departure. This Court has said a trial court cannot so rely.

**B. Scoring offense for which Isom had not been convicted.** The trial court erroneously scored Petitioner for legal constraint at the time of his offense. In fact, Petitioner was being held in jail awaiting trial at the time. The Third District Court of Appeal, in its decision under review in this case, admitted that the points were added in error, as this circumstance was not within the definition of legal constraint under the guidelines in effect at the time of the instant offense [A-3<sup>rd</sup> DCA 2/2/00, p.3 n.2]. Nevertheless, the Third District found the scoring error to be harmless, as ““the record reflects that although the appellant’s point total would have been lower, the trial court would have nevertheless imposed the departure sentence, which was supported by valid reasons,”” *Isom v. State*, 750 So.2d 734 at 735 (*quoting Rubin v. State*, 734 So.2d 1089 (Fla. 3<sup>rd</sup> DCA 1999)) [A-3<sup>rd</sup> DCA 2/2/00, p.4].

However, the scoring error affected not only the score itself, but also served as the springboard for the departure sentence, demonstrating that the sentence was, indeed, not “supported by valid reasons.” The offense for which Petitioner was awaiting trial was scored when it should not have been. At that time the offense was simply an arrest, not a conviction, and as such was not eligible to be scored under Florida Rules of Criminal Procedure 3.701(d)(3) (1988).

During the resentencing, the trial court used this untried case to find that there was a temporal proximity between it and the instant offense, establishing a pattern of criminal activity [A-order, p. 4]. Without the prior offense, there is no temporal proximity between the instant offense and the erroneously scored one. The next most recent offense for which Isom was convicted was some ten years prior to the instant offense [A-order, p. 3].

In order to justify a departure sentence, it was necessary under the law then in effect to find that “the defendant’s prior records...and the current criminal offense for which the defendant is being sentenced indicate an escalating pattern of criminal conduct.” *Fla. Stat. sec. 921.001(8)* (1987). This Court has previously considered circumstances under which temporal proximity of crimes has been used as the basis to establish an escalating pattern of criminal conduct to impose a departure sentence.

In *State v. Jones*, 530 So.2d 53 (Fla. 1988), this Court considered a situation in which a departure sentence had been imposed against Jones when he pled guilty to three crimes. The reason the trial court gave was, in pertinent part, that the defendant was “a continuing threat to the community due to the fact that the temporal proximity of the commission of the crimes evinces a total disregard of the property rights of others.” *Jones*, 530 So.2d at 54. The First District Court of Appeal certified the question whether this reason was a valid and sufficient ground for departing from sentencing guidelines. Although the Supreme Court answered in the affirmative, it found that Jones’ record did not support such a departure. *Jones*, 530 So.2d at 55, 56. Similarly, Petitioner Isom’s record, in which no pattern of criminal conduct or temporal proximity of offenses can be shown within the past twenty years [A-order, pp. 2 - 3], does not support departure based on temporal proximity.

Even if the trial court could support its claim of temporal proximity, this Court stated in *State v. Simpson*, 554 So.2d 506 (Fla. 1989) that

before ... temporal proximity of the crimes can be considered as a valid reason for departure, it must be shown that the crimes committed demonstrate a defendant’s involvement in a continuing and persistent pattern of criminal activity as evidenced by the timing of each offense in relation to prior offenses and the release from incarceration or other supervision.



*Simpson*, 554 So.2d at 509. This Court in *Jones*, *supra*, stated, “If the trial court’s order fails to recite a specific pattern of criminal conduct, then a defendant’s pattern of criminal activity and the timing of the commission of the offenses cannot constitute clear and convincing reasons for departure from the presumptive guidelines sentence.” *Jones*, 530 So.2d at 55. The resentencing order contained in the Appendix to this brief did not, and cannot, set forth sufficient valid grounds to base a departure from the guidelines sentence on temporal proximity of offenses.

The pattern of criminal activity based on temporal proximity was cited as a basis for departure; therefore, this basis for departure was invalid.

**C. Miscalculating prior offense giving illusion of escalating pattern.**

The remaining reason the trial court gave for the departure sentence on resentencing was that there is an escalating pattern of criminal conduct [A-order, p. 4]. This reason is invalid because the next most recent offense for which Petitioner had been convicted at the time, a 1978 conviction for possession of a firearm while engaged in a criminal offense and robbery, was incorrectly scored as a third degree felony [A-scoresheet]. Scored correctly, the 1978 conviction would be a first degree felony punishable by imprisonment for a term of years not exceeding life, *Fla. Stat. sec. 812.13* (1977). The instant offense is a first degree felony but one which did not involve violence, and is punishable by a minimum of

15 years. Under criteria applied consistently by this Court, the instant offense, coming ten years after a more serious crime, does not represent an escalating pattern.

This court stated in *Barfield v. State*, 594 So.2d 259 (Fla. 1992) that an “escalating pattern” may be shown in

three ways: 1) a progression from nonviolent to violent crimes; 2) a progression of increasingly violent crimes; or 3) a pattern of increasingly serious criminal activity. Under this third category, “increasingly serious criminal activity” is indicated when the current charge involves an increase in either the degree of crime or the sentence which may be imposed, when compared with the defendant’s previous offenses.

Here, Isom’s prior history, taken together with the instant offense, fits within none of the *Barfield* possibilities. Under the first *Barfield* prong, the instant offense was nonviolent and the 1978 offense was violent in that a firearm was in the possession of Isom during the commission of the offense. The second prong does not apply, because the instant offense is not violent. Under the third prong, the trial did not and could not establish that Isom had an escalating pattern of criminal activity, as the instant offense was not greater in degree than the 1978 one, and carries a lesser presumptive sentence (fifteen years) than the 1978 firearm-possession offense (up to life). Far from showing an escalating pattern,

Isom's history shows a de-escalating pattern. *Compare Taylor v. State*, 601 So.2d 540 (Fla. 1992) (escalating pattern shown by increasingly serious crimes). This, the third ground for departure, is also invalid.

When all of the reasons stated by the trial court in support of departure are found invalid, resentencing following remand must be within the presumptive guidelines sentence. *Shull v. Dugger*, 515 So.2d 748 (Fla. 1987). Therefore, this honorable Court must remand for resentencing within the guidelines.

## ARGUMENT TWO

THE APPELLATE COURT IMPERMISSIBLY APPLIED LAW OF THE CASE DOCTRINE TO PRECLUDE PETITIONER FROM RAISING THE TRIAL COURT'S FUNDAMENTAL ERROR OF FAILING TO MAKE A SPECIFIC FINDING THAT HABITUAL OFFENDER SENTENCING IS NECESSARY FOR PROTECTION OF THE PUBLIC AS REQUIRED BY THE HABITUAL OFFENDER STATUTE.

In its February 2, 2000 opinion, the Third District Court of Appeal acknowledged that the trial court failed to make a “finding in so many words” that sentencing Petitioner to an extended term as an habitual offender was necessary for the protection of the public, as the habitual offender statute in effect at the time of Petitioner’s offense required. *Isom v. State*, 750 So.2d 734, 736 (Fla. 3<sup>rd</sup> DCA 2000) [A-3<sup>rd</sup> DCA 2/2/00, p. 6]; *Fla. Stat. sec. 775.084(3), (4)(a),(c)* (1987). Because “no one raised the question of including a specific finding that imposition of such a sentence was necessary for the protection of the public” and “no complaint about the absence of this finding was made in [petitioner’s] appeal,” the Third District stated, “We think that this claim is barred by the law of the case doctrine.” 750 So.2d 734 at 736 [A-3<sup>rd</sup> DCA 2/2/00, pp.5-6].

The language in Section 775.084 (1987) is mandatory. In subsection (3) the

court “shall determine if it is necessary for the protection of the public to sentence the defendant to an extended term as provided in subsection (4) and if the defendant is an habitual felony offender....” Subparagraph (4)(a) states, “The court, in conformity with the procedure established in subsection (3) and upon a finding that the imposition of sentence under this section is necessary for the protection of the public from further criminal activity by the defendant, shall sentence the habitual felony offender as follows:....” Subparagraph (4)(c) states:

If the court decides that imposition of sentence under this section is not necessary for the protection of the public, sentence shall be imposed without regard to this section. At any time when it appears to the court that the defendant is an habitual felony offender or an habitual misdemeanor, the court shall make that determination as provided in subsection (3).

*Fla. Stat. sec. 775.084(4)(c)*. There can be no mistake that the legislature’s intention is for the trial court to make a specific finding that giving a particular defendant a habitual offender sentence is necessary for the protection of the public. The Third District Court is not free to ignore the trial court’s failure to make a “finding in so many words.”

Failure to make the specific findings required by law to support a habitual offender sentence results in an illegal sentence, *Daniels v. State*, 593 So.2d 312 (Fla. 1<sup>st</sup> DCA 1992); *Donaldson v. State*, 519 So.2d 737 (Fla. 3d DCA 1988). An

illegal sentence is a fundamental error that can be raised at any time. *Daniels v. State, supra*; *Gonzalez v. State*, 392 So.2d 334 (Fla. 3<sup>rd</sup> DCA 1981). The law of the case doctrine does not attach to an illegal sentence. *Price v. State*, 692 So.2d 971 (Fla. 2<sup>nd</sup> DCA 1997). Reconsideration of the law of the case may be warranted in exceptional circumstances where reliance on a previous decision would result in manifest injustice. *Tippins v. State*, 25 *Fla. L. Weekly* D2391 (Fla. 5<sup>th</sup> DCA Oct. 6, 2000); *Zolache v. State*, 687 So.2d 298 (Fla. 4<sup>th</sup> DCA 1997). Furthermore, a sentencing error which causes an individual to be restrained for a time longer than that allowed by law may be heard in any and every manner possible. *Rodgers v. State*, 645 So.2d 20 (Fla. 1<sup>st</sup> DCA 1994).

Because application of the law of the case doctrine results in an illegal sentence for Petitioner, reconsideration of it is warranted here. Manifest injustice, in addition to denial of Petitioner's due process rights granted in the Fifth and Fourteenth Amendments to the United States Constitution, would result from this honorable Court's blind reliance upon prior affirmances of the petitioner's sentence where the reasons given for departure sentencing and habitual offender sentencing are invalid. Petitioner respectfully requests that this Court remand with

instructions to the trial court to hold a new resentencing hearing which does not find Petitioner to be an habitual offender.

### ARGUMENT THREE

THE TRIAL COURT VIOLATED PETITIONER'S  
CONSTITUTIONAL DUE PROCESS RIGHTS WHEN  
THE TRIAL COURT VIOLATED THE *EX POST*  
*FACTO* CLAUSE IN SENTENCING THE  
PETITIONER.

The petitioner contends that the trial court committed fundamental error in violating the *ex post facto* clause in Article I, Sections 9 and 10 of the United States Constitution when it applied the criteria of “increasingly serious criminal activity” to Isom’s record to depart from the sentencing guidelines in the resentencing order. Petitioner contends that the “increasingly serious criminal activity” criteria was not codified in Florida Statutes section 921.001(8) at the time Petitioner’s offense was committed. Undersigned counsel hereby adopts Argument Three of the Petitioner’s Meritorious Brief submitted *pro se* by the petitioner on September 6, 2000, and incorporates it as though it were contained in this brief.



## CONCLUSION

The trial court imposed an illegal sentence of life imprisonment. The reasons cited by the trial court for departure all were invalid, and the trial court may not now resentence outside the presumptive guidelines. The trial court failed to make a finding that sentencing Isom to an extended term as an habitual offender is necessary for the protection of the public, a fundamentally unfair error resulting in manifest injustice and overriding any law of the case argument. The scoresheet errors and invalid reasons resulting in the illegal sentence have deprived Isom of his due process rights and violated the *ex post facto* clause of the United States Constitution. For all these reasons, the case should be remanded to the trial court and petitioner Douglas Isom be resented to the guidelines sentence of twelve (12) to seventeen (17) years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to DOUGLAS GLAID, Assistant Attorney General, at 110 S. E. 6<sup>th</sup> Street, 10<sup>th</sup> Floor, Fort Lauderdale, FL 33301, by U. S. Mail this \_\_\_\_ day of November, 2000.

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Mary E. Adkins