IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

Supreme Court Case No.: SC04-174
DCA Case No.: 4D02-4985

vs.

ERICK RICHARDSON,

Respondent.
_____/

Answer Brief of Respondent Erick Richardson

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PRELIMINARY STATEMENT

In this Answer Brief, references to Erick Richardson are designated “Mr. Richardson,” and references to the State of Florida are designated “the State.”

Pursuant to Order of this Court dated September 13, 2004, the Fourth District Court of Appeal has forwarded a one-volume record on appeal to the undersigned counsel and to this Court. This record-on-appeal is not sequentially numbered or indexed, so it will be referenced by document title or description.

All emphasis in quoted material is supplied unless otherwise stated.

INTRODUCTION

This is a review of the Fourth District's unanimous panel decision in Erick Richardson v. State of Florida, 28 Fla. L. Weekly D1716 (Fla. 4th DCA Jul. 23, 2003), as supplemented on rehearing, 29 Fla. L. Weekly D215 (Fla. 4th DCA Jan. 14, 2004). In its opinion, the Fourth District reversed the trial court's summary denial of post-conviction relief and, in doing so, found merit in Mr. Richardson's claim that the sentencings for the predicate convictions used to declare him a habitual felony offender were not proved by the State to be sequential.

In its motion for rehearing, the State argued that the panel overlooked a dispositive point of law because the placing of a defendant on probation constitutes a "prior conviction" under the habitual offender statute. If the date Mr. Richardson was placed on probation for his conviction for possessing cocaine is the relevant date of inquiry under the habitual offender statute, rather than the date he was sentenced for violating that probation, the State argued that Mr. Richardson's convictions and sentences were in fact sequential. The panel granted rehearing in order to address this argument, but rejected the State's position. The Fourth District did certify conflict with McCall v. State, 862 So. 2d 807 (Fla. 2d DCA 2003). That certified conflict is the basis of this Court's jurisdiction. See Art. V, § 3(b)(4), Fla. Const.

STATEMENT OF THE CASE AND FACTS

1. Statement Of The Case.

Erick Richardson moved for post-conviction relief on March 17, 2002. That motion raised the following three claims:

> ISSUE ONE
>
> THIS DEFENDANT WAS DENIED DUE PROCESS OF LAW ALONG WITH HIS 6TH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING SENTENCING PROCEEDINGS IN VIOLATION OF U.S.C.A. 5TH 6TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION FOR FAILING TO OBJECT TO THE SENTENCE ENHANCEMENT AS A HABITUAL OFFENDER BECAUSE HIS PRESENT OFFENSE HAD NOT BEEN COMMITTED WITHIN FIVE (5) YEARS OF HIS RELEASE FROM PRISON.
>
> ISSUE TWO
>
> THIS DEFENDANT WAS DENIED DUE PROCESS OF LAW ALONG WITH HIS 6TH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING SENTENCING PROCEEDING IS IN VIOLATION OF U.S.C.A. 5TH, 6TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE HIS ATTORNEY FAILED TO PROPERLY INVESTIGATE AND THEN OBJECT TO THE SENTENCE ENHANCEMENT CLASSIFYING HER CLIENT AS A HABITUAL OFFENDER BASED ON TWO PRIOR CONVICTIONS THAT WERE ENTERED ON THE SAME DAY, AT THE SAME TIME, AND ISSUED BY THE SAME HONORABLE CIRCUIT COURT JUDGE.
>
> ISSUE THREE
>
> THIS DEFENDANT WAS DENIED DUE PROCESS OF LAW ALONG WITH HIS 6TH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING TRIAL IN VIOLATION OF U.S.C.A. 5TH, 6TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION, IN FAILING TO PROVIDE AN ADEQUATE LINE OF DEFENSE BY UNJUSTIFIABLY IGNORING EXCULPATORY EVIDENCE. IN LIGHT OF OTHER UNTRUTHS, WOULD HAVE STRONGLY SUPPORTED THE IMPEACHMENT OF THE "ALLEGED" VICTIM, BY ESTABLISHING THE "ALLEGED" VICTIM WAS GUILTY OF PERJURY.

On June 21, 2002, the trial court issued an Order requiring the State to respond to the motion.[1] The State responded on October 2, 2002. The trial court summarily denied Mr. Richardson's motion on October 9, 2002. An appeal to the Fourth District Court of Appeal ensued.

On January 22, 2003, the Fourth District issued a Show Cause Order requiring the parties to, *inter alia*, address Mr. Richardson's second and third issues in his motion. The State filed its Response on April 8, 2003.

On July 23, 2003, the Fourth District issued its opinion reversing the summary denial of relief, based on Mr. Richardson's second issue in his motion. The case was remanded for further proceedings.[2] The State moved for rehearing. On January 14, 2004, the Fourth District supplemented its earlier

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[1] On July 21, 2002, Mr. Richardson signed an amended motion for post-conviction relief, which made amendments to issue three. The new issue three was entitled:

> AMENDED ISSUE THREE
> DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16(a) OF THE FLORIDA CONSTITUTION BY COUNSEL'S FAILURE TO PROPERLY INVESTIGATE AND PRESENT FAVORABLE EVIDENCE TO THE JURY.

It does not appear that a hearing on the motion for leave to file the amended motion was ever held.

[2] The Fourth District did not address Mr. Richardson's first or third issues.

opinion, but did not change its conclusion. The Fourth District did certify conflict with McCall v. State, 862 So. 2d 807 (Fla. 2d DCA 2003).[3] On February 4, 2004, the State filed its Notice To Invoke Discretionary Jurisdiction of this Court.

2. Statement Of The Facts.

Mr. Richardson was convicted of robbery and sentenced as a habitual felony offender to twenty years in prison. To establish Mr. Richardson as a habitual felony offender, the State relied on prior convictions in case number 93-4322, for possession of cocaine, and 93-15462, for grand theft. The record shows that, although a conviction in the possession case was entered on April 14, 1993, sentencing was stayed and withheld. Instead, Mr. Richardson was placed on probation.

Mr. Richardson was convicted on the grand theft charge on September 23, 1993. On that same day, the court found Mr. Richardson in violation of probation on the possession case and sentences were entered on both charges.

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[3] On November 5, 2004, the Fifth District issued its opinion in Love v. State, 2004 WL 2482591 (Fla. 5th DCA Nov. 5, 2004), which aligned the Fifth District with the Second District on the issue in this review proceeding and certified conflict with this case. See also Perry v. State, 29 Fla. L. Weekly D2624a (Fla. 5th DCA Nov. 19, 2004)(same conclusion, but with the express disclaimer that "we point out that this case is distinguishable on its facts from Richardson. It involves a habitual violent felony offender sentence, not a habitual felony offender sentence, ... [I]n this case, Perry actually was 'sentenced' after his first violation of community control, although he was placed back on community control.").

SUMMARY OF THE ARGUMENT

Mr. Richardson was improperly sentenced as a habitual offender after he was convicted for the crime of robbery. The State argues that, because the robbery was his third felony conviction, the habitualization was proper. The State ignores that Mr. Richardson was sentenced for his possession of cocaine offense and his grand theft offense (the two predicates for his habitualization) on the same day. The State does not contend that those two predicate sentences were imposed at separate proceedings on that day. Therefore, Mr. Richardson in actuality does not qualify for habitualization under the law.

Specifically, subsection 775.084(5) reads as follows:

> In order to be counted as a prior felony for purposes of sentencing under this section, the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony.

To avoid the plain meaning of this rule, the State argued below that Mr. Richardson was actually sentenced for his possession of cocaine conviction when he was placed on probation, and then re-sentenced when he was sentenced for violating probation on the same day that he was sentenced for his grand theft conviction. That argument of course ignores the plethora of precedent that the imposition of probation is not an imposition of a sentence and the fact that, if the imposition of

probation were the imposition of a sentence, the so-called re-sentencing could violate double jeopardy principles.

In all events, the re-sentencing would become the operative sentence upon being pronounced and, therefore, the so-called re-sentencing for possession of cocaine would still have occurred on the same day as the sentencing for grand theft, and accordingly would still implicate subsection five.

The opinion of the Fourth District is true to the actual language of the statute at issue, is not inconsistent with subsection two of the same statute (as the State argues), and in fact is the mandated result under the statutory rule of lenity. The Fourth District's opinion should be approved and the contrary opinions of the Second District and the Fifth District should be disapproved.

Moreover, Mr. Richardson has other valid legal issues related to his conviction and sentencing that should be addressed by a court.

ARGUMENT

I. THE FOURTH DISTRICT CORRECTLY INTERPRETED SUBSECTIONS 775.084(2) AND 775.084(5) OF THE HABITUAL OFFENDER STATUTE.

A. Standard of Review.

Mr. Richardson agrees with the State that this issue should be reviewed *de novo* by this Court. B.Y. v. Department of Children & Families, 2004 WL 2534335 (Fla. Nov 10, 2004)("The standard of appellate review on issues involving the interpretation of statutes is *de novo*."); State v. Burris, 875 So. 2d 408, 410 (Fla. 2004)("This question of statutory interpretation is subject to *de novo* review."); Bellsouth Telecommunications, Inc. v. Meeks, 863 So. 2d 287, 289 (Fla. 2003)("Statutory interpretation is a question of law subject to *de novo* review.").

B. The Fourth District Correctly Interpreted Subsection 775.084(5) Of The Habitual Offender Statute.

The statute at issue in this case, section 775.084, Florida Statutes (2004), is entitled: "Violent career offenders; habitual felony offenders and habitual violent felony offenders; three-time violent felony offenders; definitions; procedure; enhanced penalties or mandatory minimum prison terms." The State claims that Mr. Richardson is a habitual felony offender.

The statute defines "habitual felony offender" as follows:

> (a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in

paragraph (4)(a), if it finds that:

1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses.

2. The felony for which the defendant is to be sentenced was committed:

a. While the defendant was serving a prison sentence or other sentence, or court-ordered or lawfully imposed supervision that is imposed as a result of a prior conviction for a felony or other qualified offense; or

b. Within 5 years of the date of the conviction of the defendant's last prior felony or other qualified offense, or within 5 years of the defendant's release from a prison sentence, probation, community control, control release, conditional release, parole or court-ordered or lawfully imposed supervision or other sentence that is imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later.

3. The felony for which the defendant is to be sentenced, and one of the two prior felony convictions, is not a violation of § 893.13 relating to the purchase or the possession of a controlled substance.

4. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this paragraph.

5. A conviction of a felony or other qualified offense necessary to the operation of this paragraph has not been set aside in any post-conviction proceeding.

§ 775.084(1), Fla. Stat. (2004).

This definition is further refined by subsection five of the statute, which subsection is at the root of this case.

Subsection five reads:

> (5) In order to be counted as a prior felony for purposes of sentencing under this section, the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony.

This Court, in Bover v. State, 797 So. 2d 1246, 1250 (Fla. 2001), reviewed this subsection and held that:

> The habitual offender statute, section 775.084(5), specifically provides that the court must have imposed sentences for the two prior convictions separately from each other. Thus, although the sentencing for separate convictions arising out of unrelated crimes can take place on the same day, the sentences cannot be part of the same sentencing proceeding.

Indeed, as the Fourth District recognized, the more accurate term for the requirement set forth by subsection five would be the sequential sentencing proceeding requirement, rather than the sequential conviction requirement, as some have labeled it.

In this case Mr. Richardson was sentenced on both of his predicate felonies on the same day: September 23, 1993.[4] Specifically, Mr. Richardson was convicted on the possession charge on April 14, 2003, but sentencing was stayed and

[4] Although the record is not clear that the sentences were imposed in the same proceeding, the State has not contended otherwise. This issue surely can be verified on the remand ordered by the district court.

withheld, and Mr. Richardson was instead placed on probation. On the grand theft charge, Mr. Richardson was convicted and sentenced on September 23, 1993, the same day that he was sentenced on the possession charge after he violated his probation.

Nevertheless, the State argues that Mr. Richardson was originally sentenced ("for purposes of the habitual offender statute," In. Br. at 2) on the possession offense when he was placed on probation and then sentenced again when he violated probation. The Fourth District properly rejected this argument. It wrote:

> A sentence and probation are distinct concepts. When a defendant is placed on probation, the court must stay and withhold the imposition of sentence regardless of whether adjudication of guilt is withheld. [Mr.] Richardson was sentenced on the possession charge for the first time after the finding of a violation of probation. Thus, the sentences for the predicate convictions used to classify [Mr.] Richardson as a habitual felony offender were entered on the same day.

(emphasis in original; citations omitted).

In its Initial Brief, the State does not dispute that a sentence and probation are distinct concepts. Specifically, the State admits that "probation and the 'imposition of a sentence' are indeed treated as distinct concepts in subsection 948.01(2), Florida Statutes . . . ." In. Br. at 15. As the Fourth District noted in its opinion, there is a multitude of case law

that supports the fact that imposition of probation and imposition of a sentence are distinct concepts. See Mack v. State, 823 So. 2d 746 (Fla. 2002); State v. Summers, 642 So. 2d 742, 744 (Fla. 1994); Villery v. Fla. Parole & Prob. Comm'n, 396 So. 2d 1107 (Fla. 1980).

Moreover, subsection 948.01(2), Florida Statutes (2004), specifically supports the Fourth District's conclusion. In relevant part, that subsection reads as follows:

> If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt; and, in either case, it shall stay and withhold the imposition of sentence upon such defendant and shall place the defendant upon probation.

In sum, the statute specifically directs that a sentence shall not be imposed if a defendant is placed on probation. Therefore, it would be directly contrary to the probation statute to conclude that probation is a sentence for the purposes of the habitual offender statute.[5]

[5] Of course, as the Fourth District noted, a determination that probation is a sentence for the purposes of the habitual offender statute would also appear to be at odds with Ford v. State, 814 So. 2d 1121 (Fla. 4th DCA 2002), and Edison v. State, 848 So. 2d 498 (Fla. 2d DCA 2003). The Fourth District also acknowledged that Render v. State, 742 So. 2d 503 (Fla. 3d DCA 1999) would indicate the opposite. And, the State points out in

Of course, the Florida Legislature did not have to enact subsection five to require sequential sentencing proceedings. The Legislature could have chosen to require simply that the predicate convictions (rather than sentences) take place at separate proceedings; it did not do so. Or it could have omitted the requirement of separateness (of either convictions or sentences) altogether. See State v. Barnes, 595 So. 2d 22, 24 (Fla. 1992)("While we agree that the underlying philosophy of a habitual offender statute may be better served by a sequential conviction requirement, we agree with the district court that the current statute is clear and unambiguous and contains no sequential conviction requirement."). It did not do so.

Instead, in 1993, the Legislature specifically required that "the court must have imposed sentence for the two prior convictions separately from each other." See Ch. 93-406, § 2, Laws of Fla. At that time, the law in Florida was clear that the imposition of probation is not a sentence. See Villery, 396 So. 2d at 1110 ("A sentence and probation are discrete concepts which serve wholly different functions."); Addison v. State, 452 So. 2d 955, 956 (Fla. 2d DCA 1984)("Probation does not

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its Initial Brief that Odom v. State, 859 So. 2d 569 (Fla. 5th DCA 2003) indicates the opposite, as well. None of these cases analyzed the interaction between subsection two and subsection five, and the two cases favorable to the State's argument do not even mention subsection five, essentially writing it out of the statute.

constitute a sentence.").

The Legislature is presumed to know the law that the imposition of a sentence and the imposition of probation are distinct concepts. See Holmes County Sch. Bd. v. Duffell, 651 So. 2d 1176 (Fla. 1995)(the Legislature is presumed to know existing law when it enacts a statute); Professional Consulting Services, Inc. v. Hartford Life And Accident Ins. Co., 849 So. 2d 446, 447 (Fla. 2d DCA 2003)(same). Thus, it is plain that there must be sequential sentencing proceedings.

A proceeding that simply imposes probation is not a sentencing proceeding, and cannot satisfy the requirements of subsection five. The Second District Court of Appeal, in McCall, ruled that an actual sentencing is not really necessary and, instead, just a sanctioning proceeding is required: "When it enacted the habitual felony offender statute, the legislature intended that once a defendant had twice been convicted with sanctions the third conviction would be enhanced. We find that a sentence, as referred to in section 775.084, includes the sanction of probation." Id. at 807; see also Teal v. State, 862 So. 2d 871 (Fla. 2d DCA 2003). That simply re-writes the statute; subsection five requires sequential sentencing proceedings, not sequential sanctioning proceedings. See Barnes, 595 So. 2d at 24 ("Under these circumstances, this Court has no authority to change the plain meaning of a statute where the

legislature has unambiguously expressed its intent.").

Moreover, it is important to note that one of the reasons that the case law emphasizing the distinction between the imposition of probation and the imposition of a sentence developed is because of double jeopardy concerns. If imposition of probation is the same as imposition of a sentence, then a re-sentencing on a violation of probation could violate the double jeopardy protections of both the United States Constitution and the Florida Constitution. As explained in Brown v. State, 463 So. 2d 1230, 1232 (Fla. 1st DCA 1985), "[t]he general rule regarding the right against double jeopardy is that once a defendant has begun serving a sentence, double jeopardy protections attach and the sentence cannot thereafter be increased." The court concluded that, "Appellant's argument that the probation order constituted a sentence is incorrect. In placing a defendant on probation, Florida's courts must 'withhold the imposition of sentence.'" Id. (citations omitted). Moreover, in Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002), this Court held that the scope of the double jeopardy clause is the same in both the federal and Florida constitutions.

Consequently, if the State is correct that Mr. Richardson was actually sentenced when he was placed on probation and then re-sentenced when he was sentenced after violating his probation, the new sentence would run afoul of the double

jeopardy protections of the United States Constitution and the Florida Constitution. The State cannot have it both ways.[6]

Even if we assume that Mr. Richardson was originally sentenced and then later re-sentenced on the possession of cocaine offense, the re-sentencing would then become the operative sentence. The prior sentence would cease to exist. And, because the re-sentencing on the possession offense and the sentencing on the grand theft offense took place on the same day, the procedure still fails to satisfy requirements of subsection five (again assuming the record on remand will prove that the sentences were imposed in the same proceeding).

C. The Fourth District's Interpretation Of Subsection 775.084(5) Does Not Deprive Subsection 775.084(2) Of All Effect.

The State argues that the Fourth District's reading of subsection five deprives subsection 775.084(2) of all effect. In. Br. at 13. The State is wrong. But, as an initial matter, it must be noted that the plain language of subsection two does

[6] The State seemingly recognizes this tension in its Initial Brief in this Court, as it has dropped the usage of the idea of re-sentencing in this briefing. Instead, it carefully explains that the imposition of probation was a sentence simply "for purposes of the habitual offender statute." In. Br. at 2. The State was not so careful in its Response filed in the Fourth District, wherein it argued: "the Appellant's sentence of 15 months in case # 93-4233 [the possession of cocaine case] was actually a re-sentencing since he originally received a sentence of two years [sic] probation." State's Fourth District Response at 2-3. The State's semantics aside, the double-jeopardy problem remains.

not even apply to the facts of this case. Subsection two provides:

> For the purposes of this section, the placing of a person on probation or community control without an adjudication of guilt shall be treated as a prior conviction.

In this case, Mr. Richardson was adjudicated guilty of possession of cocaine in 1993 and placed on probation. Thus, subsection two, which addresses situations wherein a person is placed on probation without an adjudication of guilt, is inapposite to Mr. Richardson's case. This observation underscores the different requirements imposed by subsections two and five. There is no need to apply subsection two to Mr. Richardson, because it is clear that his conviction for possession of cocaine was prior to his conviction for grand theft, both of which were prior to his conviction for robbery. But, subsection five is not concerned with the separateness of Mr. Richardson's convictions. It requires something more. It requires that the sentencing proceedings also be separate and sequential.

Nevertheless, the Fourth District did reconcile the two subsections in order to properly state the rule of law for cases wherein a defendant is placed on probation for one of the alleged predicate felonies without an adjudication of guilt and later sentenced (after a violation of probation) on that

predicate felony on the same day as the sentencing for another predicate felony. The Fourth District got it right.

Subsection five imposes a distinct requirement from subsection two. As stated above, subsection five requires that "the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony." There is no doubt that the placing of a person on community control or probation shall be counted as a prior conviction whether or not adjudication is initially withheld. But still, such a prior conviction must also comply with the sequential sentencing proceeding requirement of subsection five. The requirement of subsection five does not deprive subsection two of all meaning. The Fourth District gave the following good example to show why that is true:

> If, for example, a person is adjudicated guilty upon revocation of probation and simultaneously adjudicated guilty of a new offense, the VOP conviction shall be treated as a "prior" conviction for habitualization on the new offense as long as sentencing for the VOP occurs in a separate proceeding before sentencing for the new offense. This gives meaning to both subsections. Based on subsection two, the VOP conviction shall be treated as a "prior" offense even though both adjudications occurred at the same time.

Ignoring this reality, the State invites this Court to disregard the plain language of subsection five in cases where

the defendant was placed on probation in one proceeding, and not sentenced until after a violation of probation (and then at the same time of another predicate sentencing). In doing so, the State argues that the Fourth District's conclusion is clearly erroneous because it creates a requirement of a violation of probation (VOP). See In. Br. at 14 (the Fourth District's example above "is unconvincing since it presupposes—indeed, **requires**—a violation of probation in order to give effect to" subsection two (emphasis in original)).

With all due respect, that does not make the Fourth District's conclusion clearly erroneous. Instead, the Fourth District maintained the meaning of subsection two, while also remaining faithful to the literal requirements of subsection five. The Legislature is presumed to know that the imposition probation is an option a trial court has at its disposal. The Legislature is also presumed to know what the legal effect of the imposition of probation will be. See supra, at 13, 14. Yet, the Legislature still chose to require sequential sentencing proceedings.

There is nothing irrational about that choice, and there is certainly nothing irrational or clearly erroneous about the courts respecting and enforcing that legislative choice. Indeed, as the legislative history below demonstrates, one of the reasons subsection five was enacted in the first place was

to reverse the effect of the State v. Barnes decision, see supra, at 13, 14, and to focus on targeting only the most serious habitual offenders. It is perfectly logical to think that the Legislature intended the actual effect of subsection five to be as the Richardson court ruled it should be, and that the Legislature was not just drafting statutory language, as plain as its requirements are, that it did not intend, as the State would suggest.

D. In All Events, The Rule Of Lenity Requires The Result Reached By The Fourth District.

As explained above, the result dictated by subsection five could not be plainer. Nevertheless, if there is an ambiguity in the interplay between subsections two and five, the statutory rule of lenity should apply to require the statute to be construed in the manner most favorable to Mr. Richardson. Specifically, section 775.021, Florida Statutes, reads in relevant part as follows:

> **775.021 Rules of construction.**--
>
> (1) The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

As this Court explained in State v. Huggins, 802 So. 2d 276, 279 (Fla. 2001), a criminal defendant is not held to the burden of showing the State's construction of a statute is

unreasonable; rather, if there are two reasonable constructions of a statute, the courts are required to opt for the one that is most favorable to the accused: "Neither the State's nor the defendant's interpretation of the language 'occupied structure or dwelling' can be said to be unreasonable. Because we hold that the phrase 'occupied structure or dwelling' as used in section 775.082(8)(1)(q) is susceptible to differing constructions, we are bound to construe the language most favorably to the defendant."

In sum, although the State repeatedly argues that the legislative intent in this case is clear, it has cited no legislative history for subsection five. The very language of the subsection speaks for itself; it requires sequential sentencing proceedings. But, to the extent that legislative history exists, it supports Mr. Richardson's construction of the statute.

A review of the House of Representatives Committee On Criminal Justice Final Bill Analysis & Economic Impact Statement for Senate Bill 26-B (chapter 93-406, Laws of Florida, as passed) reveals that the statute was amended to reverse the effect of the previously-mentioned State v. Barnes opinion, in the accused's favor. For instance, on page 6 of the Report describing the present situation in 1993, the Report states:

> In February 1992, the Florida Supreme Court ruled in State v. Barnes, 595 So. 2d 22 (Fla. 1992), that in order to qualify as a habitual felony offender, the statutory requirement of two prior felony convictions may arise from a single prior sentencing event. For example, an offender who was previously convicted of two counts of purchasing cocaine at a single sentencing event would now be eligible for sentencing as a habitual offender. Prior to the Barnes decision, the habitual offender statute had been interpreted to require sequentially separate convictions, at separate sentencing events. In Barnes, the court noted that:
>
> > ..(t)his construction of the statute, in accordance with its plain meaning, may cause many more defendants to be sentenced as habitual offenders, resulting in longer prison terms, and thus may have a substantial effect on the prison population. The sequential conviction requirement provides a basic, underlying reasonable justification for the imposition of the habitual sentence, and we suggest that the legislature reexamine this area of the law to assure that the present statute carries out its intent and purpose. Id. at 24.

In another section of the Report entitled "Current Status of Florida's Prison Capacity," see page 11 of the Report, it is reported that "[t]he Department indicates that if the current situation continues, the entire prison population will be comprised of inmates who are statutorily ineligible for release by spring of 1996, a condition known as 'gridlock.'"

Finally, on page 16 the Report describes the changes to section 775.084 made by the legislation:

> This bill amends s. 775.084, Fla. Stat. to revise the criteria for sentencing habitual felony offenders. Specifically, an offender may be designated as a "habitual felony offender" only if the felony for which the is to be sentenced and one of the last two felony convictions, is not a violation of s. 893.13, Fla. Stat., relating to the purchase or the possession of a controlled substance.
>
> Additionally, in response to the Florida Supreme Court's decision in the Barnes case, the following language is added to the habitual offender statute: "in order to be counted as a qualifying prior felony, the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony."

(Emphasis in original.). The legislative intent in amending section 775.084 in 1993 was two-fold: First, the Legislature intended to require at least one of the prior felony convictions to be something other than a possession conviction under section 893.13, in an effort to reduce the number of habitual offenders with only possession felony convictions. Second, the Legislature intended to reverse the Barnes decision, to the accused's favor. With these two facts being the case, it is difficult to imagine how the State says that the clear intent of the Legislature is frustrated by the Fourth District's conclusion.

In fact, a prior and similar version of subsection two was on the books when the Legislature enacted subsection five in 1993 and, under the facts of Mr. Richardson's case, both

versions of subsection two would apply alike. Subsection two previously read as follows:

> (2) For the purposes of this section, the placing of a person on probation without an adjudication of guilt shall be treated as a prior conviction if the subsequent offense for which the person is to be sentenced was committed during such probationary period.

§ 775.084(2), Fla. Stat. (1993).

In all events, it cannot be said that the legislative intent in amending section 775.084 in 1993 was to act to the accused's disfavor. Instead, it is clear that the amendment was to reduce prison overcrowding and to reverse the Barnes ruling, to the accused's favor. As a similar version of subsection two was on the books at that time, the best the State can do is show that reading subsections two and five together may be ambiguous, but the State does not have the better of the legislative intent argument. Neither can the Fourth District's interpretation be said to be unreasonable. That being the case, the statutory rule of lenity is implicated, and the Fourth District's construction of the statute must control.

II. OTHER ISSUES REGARDING MR. RICHARDSON'S CONVICTION AND SENTENCE SHOULD BE ADDRESSED BY A COURT.

A. Standard of Review.

Mr. Richardson raised an ineffective assistance of counsel claim as his third issue in his motion for post-conviction relief. The standard of review for ineffective assistance of

counsel claims under Strickland v. Washington, 466 U.S. 668 (1984) is two-pronged: this Court defers to the trial court's factual findings, but this Court's ultimate conclusions as to defectiveness and prejudice are reviewed *de novo*. Bruno v. State, 807 So. 2d 55 (Fla. 2001).

In this case, the trial judge summarily denied Mr. Richardson's claim for the reasons stated in the State's response to the motion, which response the trial court attached. Accordingly, the trial judge made none of his own findings of fact, but simply adopted by reference those arguments made by the State. The trial court apparently never ruled on this issue as refined in Mr. Richardson's amended motion, nor on the motion for leave to file that amended motion.

As to Mr. Richardson's following effort to raise an issue related to Blakely v. Washington, 124 S. Ct. 2531, 2536 (2004), it is a pure issue of law that he is raising, and pure issues of law are reviewed de novo by this Court. See Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000)("[T]he standard of review for a pure issue of law is de novo.").

B. A Court Should Address Other Issues Regarding Mr. Richardson's Conviction And Sentence.

If this Court exercises its discretion to resolve the certified conflict, it then has jurisdiction to review the entire record in this case. See Ocean Trail Unit Owners Ass'n

v. Mead, 650 So. 2d 4, 6 (Fla. 1995)("Having accepted jurisdiction to answer the certified question, we may review the entire record for error."); Lawrence v. Florida E. Coast Ry., 346 So. 2d 1012 (Fla. 1977)(same). That being the case, Mr. Richardson asks this Court to review the record for error in two further respects.

First, Mr. Richardson raised an ineffective assistance of counsel claim as his third issue in his motion for post-conviction relief. The basis of the claim was that his trial counsel was ineffective for failing to investigate potentially exculpatory taxi cab logs maintained by his alleged robbery victim. Mr. Richardson believes that those logs would demonstrate that the victim of his alleged robbery had a prior relationship with him, as he repeatedly had gone to Mr. Richardson's apartment to buy drugs.

The trial court summarily denied this claim, and simply adopted by reference those arguments made by the State. On appeal, the Fourth District initially demonstrated a level of interest in this claim by ordering the State to respond to it: "ORDERED that the parties shall address Appellant's Third Claim that counsel was ineffective in failing to investigate potentially exculpatory evidence." Fourth District Show Cause Order dated January 22, 2003.

Despite demonstrating an initial interest in this issue, however, the Fourth District did not address the point at all, one way or the other, in its decision. This Court should review the record and either grant the relief sought or, at a minimum, order an evidentiary hearing on the issue upon remand.

Second, since briefing was completed in the Fourth District, the United States Supreme Court issued its opinion in Blakely v. Washington, 124 S. Ct. 2531, 2536 (2004), holding that factors which enhance a defendant's sentence from the presumptive sentencing guidelines must be decided by a jury. Thus, Mr. Richardson should be entitled to a retroactive application of Blakely requiring a jury to find whether "it is not necessary for the protection of the public to sentence the offender as a habitual felony offender." See § 775.084(3)(a)6., Fla. Stat. (2004).

Although not raised below, Mr. Richardson did not have the benefit of the Blakely decision at the time he filed his pro se motion or filed his pro se Fourth District briefs. For that reason, he should be allowed to raise the issue now. Moreover, we invite the Court to address this issue in this case, as it is an issue of statewide importance and is brewing in the district courts. See Frumenti v State, 2004 WL 2254703 (Fla. 5th DCA Oct. 8, 2004); McBride v. State, 29 Fla. L. Weekly D2235, D2236 (Fla. 4th DCA Oct. 6, 2004). If the Court is inclined to

address the Blakely/retroactivity issue in this case, the undersigned counsel would be happy to offer supplemental briefing to assist the Court.

CONCLUSION

For the reasons stated above, the Fourth District's opinion should be approved and the contrary opinions of the Second District and the Fifth District should be disapproved.

Moreover, Mr. Richardson has other valid legal issues related to his conviction and sentencing that should be addressed by a court.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Respondent Erick Richardson and the Appendix To Answer Brief of Respondent Erick Richardson, have been furnished by Federal Express, to

Daniel P. Hyndman
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West Palm Beach, FL 33401

this 2nd day of December, 2004.

by: _____
Joseph H. Lang, Jr.

CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

I HEREBY FURTHER CERTIFY, this 2nd day of December, 2004, that the type size and style used throughout Respondent's Answer Brief is Courier New 12-Point Font.

by: _____
Joseph H. Lang, Jr.