IN THE SUPREME COURT OF FLORIDA

Case No. SC00-724

DOUGLAS ISOM,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF

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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."

CERTIFICATE OF TYPE SIZE AND STYLE

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

ARGUMENT ONE

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

The State argues that the law of the case doctrine precludes consideration of Isom's arguments that habitual offender status and escalating pattern of criminal activity are impermissible criteria to support a departure sentence. This argument ignores, however, the well-established doctrine that reconsideration of the law of the case may be warranted in exceptional circumstances where reliance on the previous decision would result in manifest injustice. *Wilson v. State*, 752 So.2d 1227 (Fla. 5th DCA 2000) (defendant's habitual felony offender sentence for ineligible offense vacated even though issue had been previously reviewed on merits and rejected twice); *Butler v. State*, 593 So.2d 569 (Fla. 3d DCA 1992) (defendant's departure sentence based on temporal proximity reversed even though it was law of that case because intervening *Smith v. State*, 579 So.2d 75 (Fla. 1991) decision was contrary). In addition, this honorable Court stands in a position to review from above the validity of district court opinions, superseding any law of the case arguments. *See Zolache v. State*, 687 So.2d 298 (Fla. 4th DCA 1997) (appellate court may correct rulings which have become law of the case where it

would be fundamentally unfair to require defendant to serve a sentence in excess of what is legally authorized).

The State, after dismissing Isom's habitual offender and escalating pattern of activity arguments based on its law of the case theory, claims that Isom's sentence "need not" be reversed due to scoresheet errors. The state conveniently overlooks the fact that the scoresheet error acknowledged by the Third District--counting one offense too many--affected not only the number of offenses counted, but also the determination that there was temporal proximity of offenses, a criterion the State then used to impose a departure sentence. The scoresheet error, then, is not harmless but is an integral part of the trio of invalid grounds for imposing a departure sentence. To allow a departure sentence to stand when no ground for it exists and when a guidelines scoresheet error correctible under Rule 3.800 has caused the illegal sentence is manifestly unjust and fundamentally unfair.

Finally, the State parrots *Davis v. State*, 661 So.2d 1193 (Fla. 1994) to imply that a sentence can only be illegal when it exceeds the statutory maximum, but fails to modify that statement when it cites *State v. Mancino*, 714 So.2d 429 (Fla. 1998), in which this honorable Court states, "[W]e have rejected the contention that our holding in *Davis* mandates that *only* those sentences that facially exceed the statutory maximums may be challenged under rule 3.800(a) as illegal...A sentence

that patently fails to comport with statutory or constitutional limitations is by definition 'illegal'." *State v. Mancino*, 714 So.2d 429, 433. This Court has, in fact, revisited its own decisions when finding that correcting an illegal sentence requires it. In *Bedford v. State*, 633 So.2d 13 (Fla. 1994), this Court had, in considering and deciding issues on appeal, previously affirmed a kidnapping sentence. When the kidnapping sentence came before it on post-conviction relief, this Court stated that its attention had not been directed to the correctness of the kidnapping sentence, but stated: "An illegal sentence may be corrected even after it has been erroneously affirmed." *Bedford v. State*, 633 So.2d 13, 14. Isom's sentence, for all the reasons set forth above and in the Petitioner's Initial Brief on the Merits, patently fails to comport with either statutory or constitutional requirements and must be corrected.

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.

The State argues that the statement by the trial court that Isom was found to be a habitual felony offender "within the statutory criteria" should satisfy the very specific requirements of *Florida Statute section* 775.084 (1987) requiring a trial court to make specific findings when sentencing a defendant to an extended term as an habitual offender. Such a general reference cannot meet the statutory requirements. Those requirements are discussed in detail in Petitioner's Initial Brief on the Merits and will not be repeated here except to reiterate that the language is mandatory. A blanket referral to "the statutory criteria" does not state in a defendant's record the reasons for finding him a habitual offender. Principles of justice and due process, codified by the 1987 statute governing Isom's offense, demand that defendants be afforded specific findings supporting habitualization by the governmental official imposing it. *Williams v. State*, 562 So.2d 446 (Fla. 2nd DCA 1990) (court must make specific findings that an extended sentence is

necessary to protect the public from defendant; a mere conclusory statement given by the trial court is not sufficient); *West v. State*, 571 So.2d 89 (Fla. 2nd DCA 1990) (even saying habitual offender sentence is necessary for protection of public is not enough; court must make specific findings of fact establishing sentence is necessary).

The State's position that the requirement of the "protection of the public" finding is barred procedurally or foreclosed by law of the case doctrine is superseded by the fact that failure to make the requisite findings for habitual felony offender is fundamental error, resulting in an illegal sentence, which may be corrected at any time. *Daniels v. State*, 593 So.2d 312 (Fla. 1st DCA 1992); *see Donaldson v. State*, 519 So.2d 737 (Fla. 3rd DCA 1988) (sentence vacated because trial court failed to issue findings that habitual offender sentence was necessary for protection of the public).

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 Law of the case doctrine should be reconsidered in this matter, again because to require Isom to serve a sentence based upon criteria which did not yet exist at the time of Isom's offense violates the *Ex Post Facto* Clause and violates fundamental principles of fairness and represents manifest injustice.

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. 6th Street, 10th Floor, Fort Lauderdale, FL 33301, by U. S. Mail this 8th day of January, 2001.

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Mary E. Adkins