O/A 4-7-92

IN THE SUPREME COURT OF FLORIDA

BOBBY ROSS,

Petitioner,

v. CASE NO. 78,179

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii,iii, iv
I. PRELIMINARY STATEMENT	1
II. STATEMENT OF THE CASE AND FACTS	2
III. SUMMARY OF ARGUMENT	16
IV. ARGUMENT	18
ISSUE I	
SECTION 775.084, FLORIDA STATUTES (1988), IS IMPERMISSIBLY INEQUITABLE, IRRATIONAL, AND VAGUE, IN VIOLATION OF ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.	18
ISSUE II	
THE TRIAL JUDGE IMPROPERLY OVERRULED PETITIONER'S OBJECTION TO THE MANNER IN WHICH THE PROSECUTOR IMPEACHED PETITIONER WITH HIS PRIOR CRIMINAL RECORD AND FURTHER ERRED IN ALLOWING THE PROSECUTOR TO QUESTION PETITIONER ABOUT HIS RECORD BASED ON A "RAP" SHEET.	29
ISSUE III	
THE TRIAL COURT ERRED IN REFUSING TO CONDUCT A RICHARDSON INQUIRY AFTER THE PROSECUTOR COMMITTED A DISCOVERY VIOLATION.	42
ISSUE IV	
THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO TRANSFER HIS CASE FROM THE CAREER CRIMINAL DIVISION PURSUANT TO ARTICLE V, SECTIONS 7 AND 20 OF THE FLORIDA CONSTITUTION.	44
CONCLUSION	47
CERTIFICATE OF SERVICE	47

TABLE OF CITATIONS

CASE	PAGE(S)
Ciccarelli v. State, 531 So.2d 129 (Fla. 1988)	41
City of Coral Gables v. Blount, 131 Fla. 36, 178 So. 554 (1938)	17,45,46
Clark v. Jeter, 486 U.S. 456 (1988)	21
Copeland v. State, 566 So.2d 856 (Fla. 1st DCA 1990)	42
Cross v. State, 96 Fla. 768, 119 So. 380 (1928)	20,21,25
Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982)	30
Dukes v. State, 356 So.2d 873 (Fla. 4th DCA 1978)	30,39
Eutsey v. State, 383 So.2d 219 (Fla. 1980)	25
Fulton v. State, 335 So.2d 280 (Fla. 1976)	29,39
Haber v. State, 396 So.2d 707 (Fla. 1981)	22
In Re: Certification of Judicial Manpower, 521 So.2d 1161 (Fla. 1988)	45
Irvin v. State, 324 So.2d 684 (Fla. 4th DCA) cert. denied 334 So.2d 608 (Fla. 1976)	29,30,39
Jackson v. State, 498 So.2d 906 (Fla. 1986)	29
Logan v. Zimmerman, 455 U.S. 422 (1982)	22
McArthur v. Cook, 99 So.2d 565 (Fla. 1957)	29
McCoy v. Court of Appeals, 486 U.S. 429 (1988)	21
Peek v. State, 488 So.2d 52 (Fla. 1986)	40
Powell v. State, 508 So.2d 1307 (Fla. 1st DCA) rev. denied, 518 So.2d 1277 (1987)	27
Quiles v. State, 523 So.2d 1261 (Fla. 2d DCA 1988)	29

TABLE OF CITATIONS (cont'd)

CASE	PAGE(S)
Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962)	21,25
Richardson v. State, 246 So.2d 771 (Fla. 1971)	17,42,43
Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991)	1
Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942)	23
Smith v. State, 500 So.2d 125 (Fla. 1986)	42
Sneed v. State, 397 So.2d 931 (Fla. 5th DCA 1981)	29
State v. Bussey, 463 So.2d 1141 (Fla. 1985)	26
State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)	40,41
State v. Leicht, 402 So.2d 1153 (Fla. 1981)	22
State v. Saiez, 489 So.2d 1125 (Fla. 1986)	24
State v. Walker, 444 So.2d 1137 (Fla. 2d DCA) aff'd 461 So.2d 108 (Fla. 1984)	25

CONSTITUTIONS

Amendment V, United States Constitution	28
Amendment XIV, United States Constitution	21,28,31
Article I, Section 2, Florida Constitution	28
Article I, Section 9, Florida Constitution	28,31
Article V, Section 7, Florida Constitution	44,45,46
Article V, Section 20(c)(1), Florida Constitution	44,45
Article V, Section 20(c)(10), Florida Constitution	46

TABLE OF CITATIONS (cont'd)

STATUTES	PAGE(S)
Section 26.037, Florida Statutes	45
Section 775.084, Florida Statutes (1988)	14,16,18, 27,28
Section 775.084(1)(b), Florida Statutes (1988)	2
Section 775.084(3), Florida Statutes (1987)	27
Section 775.084(3), Florida Statutes (1988)	27
Section 775.084(4)(b), Florida Statutes (1988)	22
Section 775.084(4)(c), Florida Statutes (1988)	27,28
Section 90.610, Florida Statutes (1989)	29

OTHER AUTHORITIES

Chapter 88-167, Law of Florida	45
Chapter 12022, Acts of 1927	20

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STATE OF FLORIDA,	:	
Respondent.	:	
_____/	:	

PETITIONER'S INITIAL BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal in Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991).

Petitioner was the appellant in the district court and the defendant in the Circuit Court, and will be referred to in this brief as petitioner or by name. Respondent was the appellee in the district court and the prosecutor in the circuit court, and will be referred to as respondent or as the state.

Petitioner will designate references to the record and the transcript by "R" and "T" respectively, followed by the appropriate page number in parentheses.

II. STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with escape (R 7).

Petitioner filed a Motion to Transfer Case from Career Criminal Division. The trial judge agreed to incorporate into the record and accept as argument in petitioner's case the argument made on identical motions in other cases referred to as the "ROC motions". This argument was made a part of the record in petitioner's case (R 19-45). The motion was denied (T 7; R 55).

Appellant filed a Motion to Preclude Classification as Habitual Violent Felony Offender Pursuant to Section 775.084(1)(b), Fla. Stats., (1988) (R 47-52; R 56). This motion was denied (R 56).

The case proceeded to trial on December 14, 1989.

On August 17, 1989 petitioner was a prisoner on work release at Dinsmore Community Correctional Center in Duval County. In the morning, petitioner went uneventfully to his employment at Western Sizzlin in Jacksonville. He was taken to work by an inmate driver. Having inmates drive other inmates to and from work was a standard operating procedure in the work release program at the Community Correctional Center (T 31-35).

Officer James Ray of the correctional center checked petitioner out of the center on August 17. Ray reported back to work on August 18, 1989 at midnight (T 31). At that point, petitioner had not returned to the center and was listed as escaped (T 37).

Ray agreed that petitioner had actually been put on escape status at 10:19 p.m. Ray further stated that once the phone call is made to the Jacksonville Sheriff's Office, "the wheels of progress have started." If Ross had returned to the center the next day, he would have been removed from the correctional center and taken to the Duval County Jail (T 38).

David Schwab, a patrolman with the Jacksonville Sheriff's Office, arrested petitioner on August 30, 1989 for escape from the correctional center. Schwab was directed by the dispatcher to proceed to a specific corner where the suspect would be located, wearing brown pants and a white T-shirt. Petitioner gave the officer the name of Willie Hill. Schwab patted down petitioner, and located a visitation log for Bobby Ross at Dinsmore Correctional Center. After obtaining a photograph of Bobby Ross and comparing it to petitioner, petitioner stated to Schwab that petitioner's real name was Bobby Ross (T 39-48).

The state rested its case-in-chief (T 50).

Petitioner moved for a directed judgment of acquittal which motion was denied (T 50).

Officer Paula Monroe was called as a defense witness. She received a call from petitioner on August 17, 1989 at approximately 6:38 in the evening. (64) Her business log reflected that the inmate van sent to pick up petitioner arrived at Western Sizzlin at 9:15 in the evening (T 64-65).

Petitioner testified that on August 17, 1989 he worked at Western Sizzlin. At six-thirty in the evening he called the Center for a van to pick him up. Normally, the van would

arrive at seven in the evening. After an hour, when the van did not arrive, petitioner called back to the center and asked again for a van to pick him up. The correctional officer told him to stand by. Petitioner tried again at nine in the evening to call the center, but the line was busy. He decided to find another way back. Petitioner took a bus to his home and tried to get his brother-in-law to give petitioner a ride to the center. However, after checking at his mother-in-law's home, he was unable to locate his brother-in-law. At that point, he was concerned because he had to return to the center by midnight. Petitioner then called his employer. His employer promised to give petitioner a ride back to the center, but never showed up.

Petitioner did not call the center the next day because he was scared.

He and his wife talked, and decided they could not live like this. He asked his wife to call the police and give them a clothing description and that he was going down Davis Street. Petitioner did this because he did not want the police around the house where his children were.

Petitioner was stopped by the police on Davis Street. He did give a false name at first because he was scared (T 70-75).

After the state rested and prior to the petitioner taking the stand, there was the following colloquy between the attorneys and the trial judge, outside the presence of the jury, concerning appellant's criminal record:

Mr. Radloff: Essentially, Judge, I have asked Mrs. Peek for copies of judgment and sentences with regards to how many convictions my client has had. She has indicated 20. And she has been telling us that she's been getting this information off the arrest and booking report. Through my experience, Your Honor, as an attorney the arrest and booking reports don't always match up with the judgment and sentences, sometimes there is an extra conviction on the arrest and booking report which doesn't show up on the judgment and sentence, and they're just not one hundred percent accurate. As I indicated in opening statement, Mr. Ross was going to take the stand. At this point, we have no idea how many convictions he has for sure, Your Honor. And all I ask of Mrs. Peek during this recess was to please provide me with any judgment and sentences that she has so I can show them to my client prior to him taking the stand. And I think I'm entitled to that, Your Honor.

The Court: And what was her response?

Mr. Radloff: She told me she was going to refresh his recollection off the arrest and booking report, Judge.

The Court: Don't you have the arrest and booking reports available?

Mr. Radloff: Yes, Judge, but as I told you those are not one hundred percent accurate. My client cannot give an accurate answer on the stand. I cannot fully prepare him for that question because Mrs. Peek either doesn't have them or may have them now but just is not going to provide them to me.

The Court: Well, of course the best -- I suppose that may be one way of finding out how many convictions he has. He is probably in the best position to know how many convictions he has, perhaps he's had so many that he's forgotten.

Mr. Radloff: Well, that's probably the case here, Judge.

The Court: Yes, Mrs. Peek, can you state how many to the defense how many convictions you think you have evidence of?

Mrs. Peek: Well, Judge, I think I've got 11 or 12 here, I need a moment to count them but as I explained to Mr. Radloff it's two different issues. Him refreshing his client's memory from his six out of state convictions is one issue and what I can prove up is another issue. And I thought I said, sir, take what I've got, try to refresh your client's memory before I do it. He's got from Chicago, Tennessee, Atlanta, and California.

Now, him telling his client to say 12 is not responsive to the question and that's perjury. And I told him I was concerned about that. I have -- I need to count them either 11 or 12 right here, plus I have the F.B.I. rap sheet that his client needs to refresh his memory from if he is having some trouble remembering all those encounters in these other jurisdictions, whether or not I will be able to prove it up is one thing but suborning perjury is another.

Mr. Radloff: That's absolutely ridiculous. First of all, I know this issue is going to come up so I think we maybe need to address it at this point since we are running into a problem with this. Mrs. Peek attempts to quote, unquote, refresh my client's recollection as to prior out of state convictions. Judge, she cannot do it from some F.B.I. rap sheet because my client has no knowledge whether or not those are actually adjudications of guilt or not. If there is a judgment and sentence, fine, yes, then we can say for sure, up to this point --

The Court: She just said she doesn't have those from other places, she said she can only prove up to 12, I think, here in the State of Florida. That's what she just said.

Mr. Radloff: Right, but I'm going to strenuously object to her trying to refresh my client's recollection as to other convictions when she has no proper evidence

> of those whether or not they are actually convictions and for what offenses.
>
> The Court: She has a right to test his credibility insofar as she can ask the question were you in Los Angeles, California on November the 6th, 1983. In an effort to refresh his memory of that if that sparks some memory in him, then, fine, but without anything further, she can go into Philadelphia or any other place, such and such a date.
>
> Mr. Radloff: Well, if she also intends to bring up the nature of the crime itself --
>
> The Court: I don't know what she intends to do but she can't really do that because she has no evidence other than the booking report. I don't know what other evidence she has. She can certainly ask the question whether he was in those places on such and such a date. Whether or not that gives rise to perjury charge later on I don't know. I don't know what he is going to say and I don't know what evidence is going to come out. But he can say, yes, I was there. I was not there on that date. I don't know what's going to happen since I don't know what the State has other than what she just said (T 56-60).

Just prior to the trial beginning, the prosecutor represented to the Court during a plea offer from petitioner that petitioner had "twenty prior felony convictions, five are out of state" (T 11).

On cross-examination of petitioner, the prosecutor impeached petitioner's credibility utilizing petitioner's prior "record". Petitioner objected to the manner in which the prosecutor was impeaching petitioner including that the prosecutor did not have in her possession copies of judgment and sentences in the cases she was impeaching petitioner with and her mention of specific crimes in her cross-examination. His

objection was overruled and his motion for mistrial denied (T 75-78).

Petitioner also objected on the basis that the documents being used to "refresh petitioner's memory" had not been provided to the petitioner. During cross-examination there was the following colloquy between the trial judge and counsel:

> Mr. Radloff: Judge, I would further object to Mrs. Peek's failure to provide me with the judgement and sentences prior to my client taking the stand. I would argue to the Court that it's a discovery violation. That we should be entitled to go over these things with my client prior to him taking the stand. Mrs. Peek refused to do that.
>
> I would ask that you conduct a Richardson hearing with regards to that matter.
>
> Mrs. Peek: Can I respond to that? I got that information out of the rap sheet that's been in this courtroom since the man got arraigned. And I'm not going to do this guy's job for him. I simply walked down to the clerk's office and said could i have these to look at. I don't know why Mr. Radloff couldn't do that.
>
> The Court: That's where they came from?
>
> Mrs. Peek: Yes sir, right downstairs one floor below us.
>
> Mr. Radloff: They were never listed on discovery.
>
> Mrs. Peek: They don't have to be.
>
> Mr. Radloff: Never listed on discovery and she has used them here in Court, I have never been put on notice. In fact, I asked her, Judge, during the recess to provide me with copies and she absolutely refused to do that.
>
> Mrs. Peek: I'm not about---

> The Court: You say that you got these copies from the clerk's office downstairs, copy of judgement and sentence here in Duval County.
>
> Mrs. Peek: Yes, sir, I got them from looking at the rap sheet that's been in this court every since this man appeared. It wasn't some big hidden mystery.
>
> Mr. Radloff: It's the state's obligation to list on discovery all evidence that they intend to use during the course of the trial. Not only was this not listed but once I found out I immediately asked to have copies made and she refused to do that and I ask the Court conduct a Richardson Hearing.
>
> The Court: I'll take your motion under advisement. Let's move along (T 83-84).

After the defense had rested, further proceedings were had on petitioner's Richardson objection. Petitioner also moved for a mistrial based on the prosecutor's impeachment of petitioner. The court considered the matters together as follows:

> Mr. Radloff: Judge, just that by the failure of the state to even have--even let me look at these judgement and sentences, we were lead to a situation where my client took the stand, as I already told the jury he would in opening statement, and also lead to the introduction of some of his--what some of his prior convictions were for, Judge, which is what I was trying to avoid in the first place.
>
> The items were never listed on discovery, never. When I asked Mrs. Peek to just show me copies she said no, I am not going to do that, I am not required to do that and I am not going to do that.
>
> And then prejudice, Judge, is that my client took the stand, I didn't have an opportunity to go over with him the judgement and sentences what are the only proper evidence of a conviction, Judge. As you well know, arrest and booking records are sometimes filled out wrong and they don't have the--either the exact crime for which

he's been convicted, perhaps it may have been lesser, may have been a misdemeanor, perhaps wasn't the exact amount of counts on the report or on FBI rap sheet.

And this lead to a situation now where the jury not only knows that my client has felony convictions, which obviously they are entitled to and which Mrs. Peek is entitled to bring up during cross examination, but now they know some of the the-- what some of the convictions were for, Judge.

And this all could have been avoided if Mrs. Peek would have properly disclosed these items to me but they were not.

Mrs. Peek: Judge, if I may briefly respond.

Mr. Radloff: And your honor, I would move for mistrial due to the nature of procedure in which Mrs. Peek tried to refresh my client's recollection which lead to the disclosure to the jury of the nature of crimes for which he was convicted, move for mistrial.

The Court: I instructed the jury on that one.

Mrs. Peek: If I may briefly respond. A witness' memory may be refreshed in any manner, shape, or form. I think that's pretty basic evidence out of law school but I guess the compelling question is why Mr. Radloff didn't do what I did and simply walk from about four steps from which he is sitting and look at the man's rap sheet which I advised him to do before his client took the stand. I told him I would be happy to go over the rap sheet with him and count out his 20 prior felony convictions, I never expected a defendant to take the stand and lie. That certainly wasn't planned by me that I am going to have to put in all these judgement and sentences, but like I said,the compelling question is why the defense attorney, I see two sitting there, one of them couldn't do what I did, look at the rap sheet, consult with their defendant and go down to the clerk's office if they thought there was any error in the rap sheet.

> The Court: All right. I deny the motion for mistrial, I deny the motion for Richardson hearing.
>
> What I have is that I don't know in this case if State could have anticipated the defendant, one, was going to take the stand, and two, whether he was going to say he didn't know how many times he had been convicted and would not make an estimate of the number of times that he had been convicted of felonies.
>
> She went to the clerk's office, she got certified copies of judgement and sentences which could have been done by defense counsel should there be any question knowing you were going to put him on the stand.
>
> She read the rap sheet from which is here in Court available to both State and defense, certainly just as available to one as to the other.
>
> I don't feel as though she's violated the discovery rules and I don't think Richardson hearing is necessary. And I--that's it. For those reasons I deny the motion for mistrial. Deny the motion for Richardson hearing (T 91-95).

Petitioner's renewed motion for judgment of acquittal, brought after the defense rested, was denied (T 91).

The prosecutor then announced her intention to introduce as rebuttal evidence "all his prior judgment and sentences that he can't remember" (T 102).

Petitioner then renewed his discovery violation objection based on the prosecutor's announced intent to introduce into evidence judgment and sentences which had not been disclosed to the defense. Petitioner further pointed out that as the prosecutor had not had the documents she put in front of petitioner on the stand marked for identification, there was no way to tell which ones he had acknowledged and which ones he had not.

When asked by the trial judge, "Mrs. Peek, can you tell him which ones? I don't recall which ones were verified that he admitted he had convictions of?", the prosecutor replied, "Judge, I don't think he really recalled very many of them, no, I don't know. I've got 11 to put in. That's the point, he's got 11 on convictions and not the seven or eight that he grudgingly sort of admitted" (T 103).

Petitioner moved for mistrial noting that the prosecutor should only be able to introduce into evidence those documents which represented convictions that petitioner said he did not remember and that letting in all the convictions would impermissible identify all the crimes. The court noted that at least one part of that argument was correct (T 104).

The prosecutor then proposed not having the actual judgment and sentences introduced into evidence but having the fingerprint expert testify that petitioner's prints matched those on 11 prior felony convictions. The defense stated, "that's fine" (T 105).

Susan Bowles testified as a state rebuttal witness. Bowles testified that she had compared petitioner's prints with eleven felony judgment and sentences and verified that the judgment and sentences were petitioner's (T 106-107).

From the prosecutor's previous statements it is apparent that the eleven certified copies of convictions that Bowles testified to were all from Duval County, Florida (T 83-84).

The state rested (T 107).

Petitioner renewed all previous motions for judgment of acquittal and for mistrial. The renewed motions were denied (T 108).

The case was submitted to the jury who returned a verdict of guilty as charged (R 62).

Petitioner moved for a new trial (R 63-64). In addition to the written grounds, petitioner orally amended the motion to add as a ground that the trial court erred in failing to exclude evidence of prior convictions and further in not granting a mistrial after the reference to prior convictions (T 137-139).

During argument, the prosecutor stated:

> Judge, we clearly -- I tried to help Mr. Valladeres as much as I possibly could by giving him the rap sheet and I even circled the number -- the defendant's number of prior felony convictions. I don't know what more I could have done to help him and his defendant refresh the defendant's memory about his number of prior felony convictions (T 139).

The trial court denied the motion for new trial (T 139-140; R 65).

At sentencing, the state introduced into evidence a prior conviction of petitioner for two counts of aggravated assault (T 147; R 93-99). The state further asked the court to take judicial notice of eight other Duval County cases containing nine felony convictions (T 149; R 99-140). This totalled eleven certified copies of convictions, all from Duval County, Florida.

The state further presented to the court out of state self-authenticated conviction documents from Tennessee and Atlanta, Georgia (T 149-150).

Petitioner notes that the authenticated documents reflect the following: In Tennessee, petitioner was previously convicted of Attempt to Commit a Felony and Grand Larceny (R 67-74). In Georgia, petitioner was convicted of driving while license suspended, driving under the influence, robbery, and twice of "theft by taking" (R 79-92).

Notably, the copies of the Georgia records are accompanied by a letter from the Georgia Department of Corrections indicating that the documents were mailed to the prosecutor on January 5, 1990 (R 79). The Tennessee documents were apparently mailed to the prosecutor on December 22, 1989 (R 67). The trial in petitioner's case was held on December 14, 1989.

Thus, the eleven certified convictions that were testified to during the trial were the eleven Duval County convictions. The only record of out-of-state convictions that the prosecutor had, other than her reference to the "rap sheet", were obtained after the trial.

Petitioner was found to be a violent habitual felony offender and sentenced to thirty years (R 145-148).

This First District Court of Appeal affirmed petitioner's conviction and sentencing. In doing so, the District Court of Appeal directly construed the constitutionality of Section 775.084, Florida Statutes (Supp. 1988), finding the statute constitutional.

Petitioner filed a notice to invoke discretionary jurisdiction.

This Court accepted jurisdiction by order dated November 19, 1991.

III. SUMMARY OF ARGUMENT

In Issue I, petitioner submits that the habitual violent felony offender statute, Section 775.084, Florida Statutes (1988), is unconstitutional in that it violates the equal protection clause of the federal constitution and the due process clauses of the state and federal constitutions. The statute creates classifications which are clearly inequitable. Although the habitual offender statute has a reasonable purpose, its terms do not address that purpose in a reasonable or rational manner. One obvious defect of the statute is that it does not require the felony before the court for sentencing to be a violent felony.

Further, portions of the statute are so vague that it is impossible to tell what is required. The habitual felony offender statute should thus be held unconstitutional. Petitioner's sentence should be reversed and remanded for a guideline sentence.

In Issue II petitioner submits the prosecutor improperly impeached petitioner by reference to petitioner's prior record. The prosecutor refused to disclose to petitioner before he testified his number of prior convictions. She cross-examined petitioner as to the nature of the crimes. She further had no good faith for asking many of the questions, relying on an incomplete rap sheet which did not in many cases even reflect whether petitioner was convicted of the crime. The improper impeachment further became a feature of the trial. Under the foregoing circumstances, the state cannot meet its burden of

proving beyond a reasonable doubt that the error in overruling petitioner's objections and motions for mistrial to the aforementioned impeachment did not contribute to the verdict. Reversal and remand for a new trial is required.

In Issue III petitioner argues that the trial judge erroneously ruled that a Richardson hearing was not required when the prosecutor failed to disclose to the defense certified copies of convictions which were in the prosecutor's possession. The failure to conduct a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971) constitutes reversible error per se and requires reversal of petitioner's conviction.

In Issue IV petitioner contends the trial court erred in denying petitioner's motion to transfer his case from the career criminal division. Because the Career Criminal Division, in which petitioner's case was tried, was established by Administrative Order, and not by general law or local rule approved by the Florida Supreme Court, the proceedings in this case are void. See City of Coral Gables v. Blount, 131 Fla. 36, 178 So. 554 (1938). Petitioner's case should be reversed and remanded for a new trial.

ARGUMENT

ISSUE I

SECTION 775.084, FLORIDA STATUTES (1988), IS IMPERMISSIBLY INEQUITABLE, IRRATIONAL, AND VAGUE, IN VIOLATION OF ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Section 775.084, Florida Statutes (1988), creates two classes of defendants, habitual felony offenders and habitual violent felony offenders, and allows for substantial increases in penalties for those who qualify as members of the classes. The statute provides in pertinent part:

> (1)(b) "Habitual violent felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if its finds that:
>
> 1. The defendant has previously been convicted of a felony or an attempt or conspiracy to commit a felony and one or more of such convictions was for:
> a. Arson,
> b. Sexual Battery,
> c. Robbery,
> d. Kidnapping,
> e. Aggravated child abuse
> f. Aggravated Assault
> g. Murder
> h. Manslaughter
> i. Unlawful throwing, placing, or discharging of a destructive device or bomb, or
> j. Armed burglary;
>
> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior enumerated felony or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for an enumerated felony, whichever is later;

3. The defendant has not received a pardon on the ground of innocence for any crime that is necessary for the operation of this section; and

4. A conviction of a crime necessary to the operation of this section has not been set aside in any post-conviction proceeding.

(4)(b) The court, in conformity with the procedure established in subsection (3), may sentence the habitual violent felony offender as follows:

1. In the case of a felony of the first degree, for life.

2. In the case of a felony of the second degree, for a term of years not exceeding 30, and such offender shall not be eligible for release for 10 years.

3. In the case of a felony of the third degree, for a term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.

(c) 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 a ... habitual violent felony offender, the court shall make that determination as provided in subsection (3).

The court below applied this statute in sentencing petitioner to an extended term of 30 years in prison. The enumerated felony which was used to enhance petitioner's sentence was a previous conviction for aggravated assault. If this had been a previous conviction for aggravated battery, appellant would

not have qualified for sentencing as a habitual violent felony offender.[1]

Petitioner contends that the habitual violent offender statute is facially invalid in several respects: the statute violates the equal protection clause because it creates classifications which are unreasonable and irrational; it violates the constitutional guarantees of due process because, although it has a legitimate purpose, the means selected to achieve this purpose are unreasonable, arbitrary and capricious, allowing such classification where the offense before the court is not even a violent felony; and it is void for vagueness because, by its terms, it is impossible to tell who initiates the process for enhanced sentencing, to whom the statute should be applied, and whether its provisions are mandatory.

Recidivist statutes are not new in Florida jurisprudence. In fact, enhanced penalty provisions have been implemented and sanctioned for over sixty years. See Chapter 12022, Acts of 1927, and Cross v. State, 96 Fla. 768, 119 So. 380 (1928). In Cross, the Supreme Court upheld the enhanced penalty provisions for habitual offenders in Chapter 12022 against attacks, inter alia, that the law constituted cruel and unusual punishment and violated both equal protection and due process. The need to

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[1]The statute was amended, effective October 1, 1989, to include aggravated battery as a predicate violent felony. Appellant's offense occurred prior to the effective date of the amendment.

protect society was the primary consideration of habitual offender sentencing. Accord, Reynolds v. Cochran, 138 So.2d 500, 502 (Fla. 1962)(recidivist statutes are designed to protect society from the continuing activities of habitual offenders).

In finding that Cross was not denied equal protection, the Cross Court ruled that the equal protection clause under the Fourteenth Amendment:

> requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses ... . And the State may undoubtedly provide that persons who have been convicted of crime may suffer severer punishment for subsequent offenses than for a first offense against the law, and that a different punishment for the same offense may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated.

119 So. at 387. The problem with the statute at issue here is that all who are similarly situated to petitioner are not being subjected to the enhanced penalty provisions.

A state's enforcement of its criminal laws must comply with the principles of substantial equality and fair procedure that are embodied in the Fourteenth Amendment to the United States Constitution. McCoy v. Court of Appeals, 486 U.S. 429 (1988). The equal protection clause of the Fourteenth Amendment requires, at a minimum, that a statutory classification be rationally related to a legitimate governmental purpose. Clark v. Jeter, 486 U.S. 456 (1988). "To be constitutionally permissible, a classification must apply equally and uniformly to all

persons within the class and bear a reasonable and just relationship to a legitimate state objective." State v. Leicht, 402 So.2d 1153, 1155 (Fla. 1981); Haber v. State, 396 So.2d 707 (Fla. 1981).

The habitual offender statute violates the constitutional provisions cited above in that the classifications it creates are neither equitable nor rational. The statute allows anyone with one prior violent felony conviction in the State of Florida, committed within the last five years, to be classified a "habitual violent felony offender". Aggravated assault is included as a predicate for habitual violent felony offender treatment, aggravated battery is not. While the statute may appear to be aimed at the most dangerous criminals, by its very terms it excludes the most serious crimes, i.e., a first degree felony punishable by life, a life felony, or a capital offense. Section 775.084(4)(b), Florida Statutes (1988).

The equal protection and due process clauses prohibit arbitrary classifications in legislation.

In Logan v. Zimmerman, 455 U.S. 422 (1982) the United States Supreme Court considered the constitutionality of a statute dealing with discrimination laws which granted hearings to some and denied hearings to others. The Court held the statute violated due process. In a concurring opinion, four justices discussed the equal protection problems with the law, stating:

> For over a century, the Court has engaged in a continuing and occasionally almost metaphysical effort to identify the precise

> nature of the equal protection clause guarantees. As the minimum level, however, the Court "consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." Schweider v. Wilson, 450 U.S. 1074 (1981). This is not a difficult standard for the State to meet, when it is attempting to act sensibly and in good faith. But the "rational basis standard is 'not a toothless one,'" (citations omitted); the classificatory scheme must "rationally advance a reasonable and identifiable governmental objective."
>
> . . .
>
> This Court still has an obligation to view the classificatory system, in an effort to determine whether the disparate treatment accorded the affected classes is arbitrary. Rinaldi v. Yeager, 384 U.S. 308, 16 L.Ed2d 577, 86 S.Ct. 1497 ("The Equal Protection Clause requires more of a state law than non-discriminatory application within the class it establishes"). Cf. U.S. Railroad Retirement Bd. v. Fritz, 449 US, at 178, 66 L.Ed.2d 368, 101 S.Ct. 453.

Id. at 439; 441.

In Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) disparate treatment of similarly situated groups was found to violate equal protection. In Skinner, a law which provided for sterilization of those convicted of three felonious larcenies but did not provide for sterilization of those convicted of three felonious embezzlements, was found to violate the equal protection clause because felonious embezzlement was arbitrarily excluded from the category of those subject to sterilization.

Similarly, in the case at bar, disparate treatment of those with a prior conviction for aggravated assault as opposed

to those with a prior conviction for aggravated battery violates equal protection. There is no rational basis to support the position that a battery is less of an intrusion into a victim's personal rights than an assault against the victim's person. But the habitual violent felony offender sentencing scheme provides for habitualization for someone with a prior aggravated assault but not a prior aggravated battery.

Because the classification is arbitrary and without rational basis, petitioner's sentence violates the constitutional guarantees of equal protection and due process of law.

The due process clauses of the state and federal constitutions require substantive due process, i.e. that a statute's general purpose be for the general welfare and also:

> that the means selected shall have a reasonable and substantial relation to the object sought to be attained and shall not be unreasonable, arbitrary, or capricious. See Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934); Lasky v. State Farm Insurance Co., 296 So.2d 9, 15 (Fla. 1974); L. Maxcy, Inc. v. Mayo, 103 Fla. 552, 139 So. 121, 129 (1931).

State v. Saiez, 489 So.2d 1125, 1128 (Fla. 1986).

While the state's right to exercise its police power is accorded great respect by the courts, the rights of citizens under the due process clause not to be deprived of life, liberty, or property without due process of law provides parameters to that police power.

As stated in Saiez,

> Nevertheless, despite a state's wide discretion, and the cautious restraint of the courts, there remain basic restrictions

> and limits on the state's legislative power to intrude upon individual rights, liberties, and conduct. To exceed those bounds without rational justification is to collide with the Due Process Clause.

Id. at 1129 ((quoting from State v. Walker, 444 So.2d 1137 at 1138-39 (Fla. 2d DCA), affirmed and lower court opinion adopted, 461 So.2d 108 (Fla. 1984))

Without question, the statute at issue effects a citizens liberty in its provision for harsher sentences including minimum mandatory terms.

In analyzing a statute under substantive due process grounds, the first step is determining what the legislative objective of the statute. See State v. Walker, 444 So.2d 1137 (Fla. 2d DCA) aff'd 461 So.2d 108 (Fla. 1984).

Petitioner submits the legislative objective of the statute at bar is added protection to society from habitually violent offenders by the use of enhanced penalties. See Eutsey v. State, 383 So.2d 219, 223 (Fla. 1980) (previous 1977 habitual felony offender law has as purpose "to allow enhanced penalties for those defendants who meet objective guidelines indicating recidivism"); Cross v. State, supra; Reynolds v. Cochran, supra.

The question for this Court becomes whether or not augmenting an individual's sentence for a non-violent felony, such as the escape committed here which was completely devoid of any violent aspects, is a reasonable means which bears a substantial relation to the legitimate goal of giving society added

protection from violent individuals. Petitioner submits the question answers itself.

First, under the sentencing scheme the individual being sentenced has already been sentenced for the predicate violent felony. Thus, the individual has already been sentenced for the violent offense in a manner which one must presume was commensurate with the offense and designed to protect society.

Secondly, when the offender appears before the court for sentencing on a subsequent non-violent offense, the commission of the non-violent felony adds no relevant criteria for determining the offenders likelihood to engage in the commission of violence nor does it otherwise elucidate his past violent behavior. Thus there is no reasonable basis for concluding that the offender engages in a pattern of violent behavior. Therefore the statutory means of identifying offenders prone to repeat violent behavior, a past violent offense, is not reasonable and bears no substantial relation to giving society added protection from habitual violent offenders.

Due process also requires that a criminal statute not be overly vague.

> The question presented by a vagueness challenge, . . ., is whether the language of the statute is sufficiently clear to provide a definite warning of what conduct will be deemed a violation; that is, whether ordinary people will understand what the statute requires or forbids, measured by common understanding and practice.

State v. Bussey, 463 So.2d 1141, 1144 (Fla. 1985). A separate function of the void for vagueness doctrine is "to curb the

discretion afforded to law enforcement officers and administrative officials in initiating criminal prosecutions." Powell v. State, 508 So.2d 1307, 1309 (Fla. 1st DCA), rev. denied, 518 So.2d 1277 (1987).

The habitual offender statute sets up no objective factors or method to determine who should be "habitualized" and who should be sentenced pursuant to the guidelines. Nor does the statute explain who decides whether an individual should come under its classification -- the prosecutor or the court. It is not inconceivable that two defendant with identical or similar criminal records will be treated totally differently -- one as a habitual violent offender with an extended term of imprisonment, a mandatory minimum, and loss of gain time, the other under the usual guidelines sentencing within the recommended range and with full gain-time eligibility.

The 1988 amendment to Section 775.084 also apparently eliminated the requirement that the court find enhanced sentencing necessary for the protection of the public. Compare Section 775.084(3), Florida Statutes (1988), with Section 775.084(3), Florida Statutes (1987). However, the statute still provides that if the court decides sentencing under the statute is not necessary for the protection of the public, then a sentence shall be imposed without regard to the statute. Section 775.084(4)(c), Florida Statutes (1988). Further adding to the confusion, in the same paragraph that appears to make application of habitual offender sentencing optional, other language in the subsection suggests that habitual offender

sentencing is mandatory. The second sentence of Section 775.084(4)(c) reads:

> At any time when it appears to the court that the defendant is a habitual felony offender or a habitual violent felony offender, the court shall make that determination as provided in subsection (3).

In other words, it is not clear whether the trial court must impose a sentence under the statute if the defendant has one prior violent felony conviction in the state, for which he has not been pardoned, and the offense charged was committed within five years of the last conviction or the defendant's release from prison or other commitment; or whether the trial court may impose an enhanced sentence if the court finds it is necessary for the protection of the public, and the defendant otherwise qualifies for habitual felony offender classification. In this regard, the statute is unconstitutionally vague as "persons of common intelligence must necessarily guess at its meaning and differ as to its application." Powell v. State, supra, at 1309-1310; Marrs v. State, 413 So.2d 774, 775 (Fla. 1st DCA 1982).

For the foregoing reasons, petitioner contends that the amended habitual felony offender statute, Section 775.084, Florida Statutes (1988), violates Article I, Sections 2 and 9 of the Florida Constitution and Amendments V and XIV of the United States Constitution and should be declared unconstitutional. Petitioner asks this Court to reverse petitioner's sentence.

ISSUE II

THE TRIAL JUDGE IMPROPERLY OVERRULED PETITIONER'S OBJECTION TO THE MANNER IN WHICH THE PROSECUTOR IMPEACHED PETITIONER WITH HIS PRIOR CRIMINAL RECORD AND FURTHER ERRED IN ALLOWING THE PROSECUTOR TO QUESTION PETITIONER ABOUT HIS RECORD BASED ON A "RAP" SHEET.

A witness in a criminal trial may be impeached by evidence that the witness has previously been convicted of a felony or certain misdemeanors. Section 90.610, Florida Statutes (1989). Both case law and the specific language of the evidence code mandate that only prior convictions can be used for impeachment. Fulton v. State, 335 So.2d 280 (Fla. 1976); McArthur v. Cook, 99 So.2d 565 (Fla. 1957); Quiles v. State, 523 So.2d 1261 (Fla. 2d DCA 1988); Sneed v. State, 397 So.2d 931 (Fla. 5th DCA 1981).

Only the fact of conviction, and not information surrounding the underlying crime, is admissible. Jackson v. State, 498 So.2d 906 (Fla. 1986); Fulton v. State, supra; McArthur v. State, supra; Irvin v. State, 324 So.2d 684 (Fla. 4th DCA) cert. denied 334 So.2d 608 (Fla. 1976). As stated by this Court in Fulton:

> When there has been a prior conviction, only the fact of the conviction can be brought out, unless the witness denies the conviction. See McArthur v. State, 99 So.2d 565 (Fla. 1957); Mead v. State, 86 So.2d 773 (Fla. 1956). If the witness denies ever having been convicted, or misstates the number of previous convictions, counsel may impeach the witness by producing a record of past convictions. Even if a witness denies a prior conviction, the specific offense is identified only incidentally when the record of

> convictions is entered into evidence. Irvin v. State, 324 So.2d 684, 686 n.1 (Fla. App. 4th 1976); Lockwood v. State, 107 So.2d 770, 773 (Fla. App. 2nd 1958) ("The proof of a prior conviction under Section 90.08, supra, is limited to the record of such conviction. Any description of the crime involved, not shown in the record, is improper.") See also Mead v. State, 86 So.2d 773, 774 (Fla. 1956). If the witness admits the conviction, "the inquiry by his adversary may not be pursued to the point of naming the crime for which he was convicted." McArthur v. Cook, 99 So.2d at 567. (Emphasis supplied).

Before cross-examining a defendant concerning his prior conviction record, a prosecutor should have a good faith basis for the examination. Dukes v. State, 356 So.2d 873 (Fla. 4th DCA 1978); Cummings v. State, 412 So.2d 436, 439 (Fla. 4th DCA 1982) ("Questions regarding past convictions should not be asked unless the prosecutor has knowledge that the witness has been convicted of a crime and has the evidence necessary for impeachment if the witness fails to admit the number of convictions of such crimes"); See Irvin v. State, supra.

Rap sheets are not considered reliable documents either to substantiate the conviction or for use as a basis for impeachment. Irvin v. State, supra, 324 So.2d at 686 f.2.

Notwithstanding this well-settled procedure, the prosecutor did the following:

1) refused to allow petitioner to see any certified copies of convictions she had in her possession prior to petitioner taking the witness stand (T 56-59; T 83-84);

2) in effect, threatened to prosecute the petitioner for perjury if he answered incorrectly as to the number of prior convictions (R 58);

3) "refreshed" petitioner's recollection by referring to some document, perhaps a "rap sheet", and either mentioning the crime or several different cities implying petitioner was convicted in those different cities (T 57-58; T 75-80);

4) implied petitioner was being untruthful or evasive about his number of prior convictions (T 75-82);

5) did not have a good faith basis for her questions as she had in her possession at the time of trial only certified copies of convictions from Duval County although her questioning of petitioner covered "convictions" from several other jurisdictions (T 57-58; T 103);

6) even at sentencing was able to produce, in addition to the Duval County convictions, only certified copies of documents from Tennessee and Georgia encompassing three felonies and two misdemeanors which qualified for impeachment (T 149-150; R 67-92).

The result of the foregoing was to deprive petitioner of due process of law and a fair trial in contravention of Article I, Section 9 of the Florida Constitution and Amendment XIV of the United States Constitution.

Petitioner's counsel attempted several times to have the prosecutor advise petitioner as to his number of actual convictions. The prosecutor's response was that petitioner had twenty prior convictions. She maintained this even though she

had in her possession only eleven certified copies of convictions (which she refused to show to petitioner's counsel). The remaining convictions she apparently surmised from the "rap sheet". This surmisal is made all the more offensive in that apparently even the "rap sheet" was not clear as to what were convictions and in what situations adjudication may have been withheld. Despite this, the prosecutor not only insisted that petitioner answer that he had twenty prior convictions, but she further threatened a perjury prosecution if petitioner answered otherwise.

This left petitioner in the untenable position of either accepting, without knowing if it were true, the prosecutor's assertion that he had twenty prior convictions, or stating the number he was aware of, and risking a perjury prosecution. Thus, based on an unsubstantiated rap sheet which did not adequately disclose whether petitioner had been adjudicated guilty, the prosecutor strong armed petitioner into stating on the stand he did not know his number of prior convictions. Not satisfied with this, the prosecutor then extensively cross-examined him in such a manner as to imply numerous out of state felony convictions, relying on this same "rap" sheet.

The foregoing is well-illustrated by the following excerpts from the prosecutor's cross-examination of petitioner:

> Q. How many felony convictions do you have, sir?
>
> A. I don't know, ma'am.
>
> Q. I'm sorry?

A. I'm not sure.

Q. Can you guess?

A. I don't know.

Q. Well, let's spend a little time and see if we can figure it out. Were you in Atlanta, Georgia in 1963?

A. Yeah, I was.

Q. You have felony conviction for interstate transportation of stolen motor vehicle? (T 75).

Ruling on the defense attorney's objection to the foregoing line of questioning, the trial judge acknowledged that the prosecutor improperly mentioned the charge and instructed the jury to disregard the charge. However, the trial judge sanctioned the prosecutor's procedure of "refreshing" petitioner's memory from a rap sheet stating, "You may refresh his memory if you wish to do so" (T 78). The trial judge further denied petitioner's motion for a mistrial.

Thus encouraged, the prosecutor continued her cross-examination of petitioner:

Q. Mr. Ross, let's take a little time and try to refresh your memory. I'd ask you to look at that line there, does that refresh your recollection?

A. City does---

Q. Does that refresh your recollections?

A. No, ma'am.

Q. I ask you to look at that line that's been highlighted for you?

A. Yes, ma'am.

Q. Have you been in Chattanooga, Tennessee?

A. Yes.

Q. Does that refresh your recollection?

A. No ma'am, I'm trying to tell you I don't know how many times I've been arrested.

Q. We're going to refresh your recollection, sir, that's why we are spending some time together. I'd ask you to look at this, Chicago, Illinois, have you been there, sir?

A. Yes, ma'am.

Q. I'd ask you to look at this line and that line?

A. No, ma'am.

Q. That does not refresh your recollection?

A. No, ma'am.

Q. You you've been in Nashville, Tennessee, again?

A. Yes sir--yes ma'am.

Q. Ask you to look at this, does that refresh your recollection?

A. No, ma'am, I don't know how many times I've been--I believe I've been locked up but I can't remember the years and the times I've been locked up.

Q. You been to Atlanta, Georgia?

A. Yes, ma'am.

Q. Ask you to look at this line, sir, that charge?

A. Yes, ma'am, I remember that charge, five years.

Q. So you remember that conviction?

A. Yes, ma'am.

Q. So we are up to one so far, is that correct?

A. Yes, ma'am (T 78-80).

As can be seen, petitioner ended up stating on the stand that he did not know his number of prior convictions. Instead of introducing rebuttal evidence of certified copies of convictions, the prosecutor then questioned petitioner about specifics of his prior record.

Amazingly, despite the foregoing questioning, the prosecutor did not have in her possession one certified copy of an out-of-state conviction.

Subsequent to the trial but before sentencing, the prosecutor did obtain certified copies of convictions from out of state. These included only certified copies of documents from Tennessee and Georgia encompassing three felonies and two misdemeanors which would have qualified for impeachment. Interestingly, there were no documents produced, even at sentencing, which would correspond to the prosecutor's questions during trial referencing a conviction for interstate transportation of a motor vehicle from Atlanta, Georgia in 1963, or any convictions from Chicago, Illinois.

Even the "rap sheet" did not support the prosecutor's questions (See pre-sentence investigation; pages 3 through 3E; also contained in sentencing order R 150-154). The "rap sheet" did not reflect an adjudication on the Atlanta, Georgia charge of interstate transportation of a motor vehicle. Nor did the

rap sheet allow for the prosecutor's inference that petitioner had been convicted of felonies in Chattanooga. There are seven entries on the "rap sheet" from Chattanooga. Three of the entries reflect failure to appear or an unknown disposition. One entry shows a 120 day sentence for "larceny by shoplifting", one entry shows adjudication withheld and one year probation for "larceny", and another reads "3 counts larceny, Guilty to Petit Larceny, 1 year in workhouse". None of the entries reflect a conviction for a felony, which was the prosecutor's first question on cross-examination and from which the above-quoted line of questioning followed.

Finally, the prosecutor finished her impeachment of petitioner by questioning him concerning certified copies of convictions from Duval County which she did possess. Again, rather than following the well-established proper procedure of introducing certified copies of the convictions in rebuttal, the prosecutor questioned petitioner concerning those convictions as follows:

> Q. Ask you to look at that judgement and sentence, do you remember that?
>
> A. Yes, ma'am.
>
> Q. That's two more convictions, isn't that correct?
>
> A. Yes, ma'am.
>
> Q. So we are up to three so far?
>
> A. That's the sentence I am doing now.
>
> Q. All right. Ask you to look at this one, do you remember that one?

A. No, ma'am.

Q. You don't remember that one?

A. No, ma'am.

Q. Ask you to take a moment and look at this one, do you recall that one?

A. For possession?

Q. Yes.

A. No.

Q. Don't remember that one either?

A. No.

Q. Do you remember these?

A. Aggravated assault?

Q. Yes, sir and that one.

Q. Yes, ma'am.

A. So you recall those two?

Q. Yes, ma'am.

A. I believe that makes it up to about five convictions, you recall that?

A. Yes, ma'am.

Q. All right. Let's take a little more time. Do you remember this one?

A. No, ma'am.

Q. Is that yes, ma'am?

A. No, ma'am.

Q. You don't recall this one?

A. No, ma'am.

Q. All right. Do you recall this one?

A. Possession again, no ma'am.

Q. You don't recall that one?

A. No, ma'am.

Q. What name appears up there?

A. Bobby Ross.

...

Q. Could you look at that one, Mr. Ross, do you remember that one?

A. I don't see the charge, what's the charge, what's the charge? Petit theft, but I don't see what year it was.

Q. That's felony, sir, is that correct?

A. Felony petit theft.

Q. So we are up to six so far that you recall?

A. Yes.

Q. Look at this one again?

A. That's the same charge.

Q. No sir, let's compare them here.

A. I believe I had two at the same time.

Q. All right. So we are up, gosh, is it seven?

A. I don't know. I'm just letting you know I remember.

Q. And here's another one, do you recall that?

A. No, ma'am.

Q. You don't recall that one?

A. Grand theft.

Q. You remember that one?

A. No, ma'am (T 80-82).

While the prosecutor did have a good-faith basis for believing petitioner had eleven prior convictions in Duval County, Florida, she improperly questioned petitioner about each of the convictions.

Irvin v. State, supra, cited with approval by this Court in Fulton, is analogous to the case at bar. The opinion contains extensive quotes of the prosecutor's impeachment of Irvin with his prior record. The method condemned by the court in Irvin, is strikingly similar to the method used by the prosecutor in the case at bar.

The court condemned the method in Irvin, stating:

> There is no approval, however, of the type of questioning pursued by the prosecutor here. The witness here answered untruthfully about the number of past convictions; this would only open the door for the production of the defendant's past record, but in this case the record was never produced and entered into evidence. This is not tolerable, all precedent indicates that for a criminal defendant to be impeached by past convictions, the record of past convictions must be made a part of the record. The reason for this is clear; it would be highly improper if a prosecutor, upon receiving a negative answer to questions about past convictions, could read from an ostensibly official paper and ask defendant if he had been convicted of various and sundry crimes (which defendant might deny), while never entering an actual certified record of the defendant's former conviction into evidence.

Id. at 686. In a footnote to this paragraph the court noted, "We do not believe that a 'rap sheet', as it is commonly known, would suffice. Such a document is liable to inaccuracies and is not a certified document." Id. at 686.

Similarly, in Dukes v. State, supra, the prosecutor impeached Dukes by implying to the jury that Dukes had two prior convictions. When Dukes' counsel advised the prosecutor that the correct manner of impeachment was to bring in the record, "the prosecutor made the not so veiled threat that, if petitioner persisted, he would likely be up for perjury next. Dukes' conviction was reversed for this and other errors. In reversing Dukes' conviction, the appellate court noted:

> It seems to us that before a prosecutor sets about to aggressively cross-examine a witness about his criminal record, implying as was done here, that the defendant had additional convictions, he must be prepared to produce the record to back up the implication and not leave the jury with innuendoes or worse which improperly prejudice the defendant.

Id. at 875.

The error cannot be considered harmless. The effect of the impeachment was to admit evidence of collateral crimes. Admission of improper collateral crime evidence is presumed harmful. Peek v. State, 488 So.2d 52 (Fla. 1986).

Moreover, in the case at bar petitioner submits the prosecutor's impeachment of petitioner became a feature of the trial.

Under the foregoing circumstances, petitioner suggests it is impossible to conclude that the state can meet their burden under harmless error analysis of showing beyond a reasonable doubt that the result would have been the same absent the error. Harmless error analysis is not an "overwhelming evidence of guilt" test. As stated in State v. DiGuilio, 491

So.2d 1129 (Fla. 1986) and subsequently quoted with approval in Ciccarelli v. State, 531 So.2d 129 (Fla. 1988):

> [H]armless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence. In a pertinent passage, Chief Justice Traynor points out: "Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result." Ross, 60 Cal.Rptr. at 269, 429 P.2d at 621.

DiGuilio, 491 So.2d. at 1136.

Based on the foregoing argument and citation of authority, petitioner submits his conviction should be reversed and the case remanded for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN REFUSING TO CONDUCT A RICHARDSON INQUIRY AFTER THE PROSECUTOR COMMITTED A DISCOVERY VIOLATION.

During the trial, the prosecutor had in her possession certified copies of eleven felony convictions. She refused to disclose or show them to petitioner.

Based on this, petitioner moved for a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971). The trial judge denied the motion. In so doing, the trial judge found that the prosecutor could not have known that petitioner was going to take the stand or anticipated the need for impeachment on the number of petitioner's prior convictions. He further found the petitioner's counsel could have obtained the same information from the clerk's office.

Denial of a Richardson hearing is per se reversible error. Smith v. State, 500 So.2d 125 (Fla. 1986); Copeland v. State, 566 So.2d 856 (Fla. 1st DCA 1990).

Davis v. State, 564 So.2d 606 (Fla. 3d DCA 1990) is directly on point with the case at bar. In Davis the prosecutor impeached Davis with a prior conviction record which had not been disclosed on discovery or shown to defense counsel. The trial judge did not conduct an inquiry as required by Richardson v. State, supra. The appellate court reversed, noting that while the trial judge has the discretion to determine whether prejudice has resulted to the defendant, that can be determined only after making an inquiry into all the surrounding circumstances.

Similarly, petitioner's conviction should be reversed and the case remanded for a new trial based on the trial court's failure to conduct an inquiry pursuant to Richardson.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO TRANSFER HIS CASE FROM THE CAREER CRIMINAL DIVISION PURSUANT TO ARTICLE V, SECTIONS 7 AND 20 OF THE FLORIDA CONSTITUTION.

A. The transfer of petitioner's case to the Career Criminal Division.

Before trial, petitioner filed a Motion to Transfer his case from Division, CR-F, "Career Criminal Division" (R 14-18). The trial judge agreed to incorporate by reference a previous hearing in another case held on an identical issue (R 7). The transcript of this previous hearing is included in the record (R 19-46). The argument at the hearing which was incorporated by reference was that the creation of the Career Criminal Division violated Article V, Sections 7 and 20 (c) (1) of the Florida Constitution (R 19-46). The motion alleged the following uncontroverted facts: Petitioner's case was assigned to Division CR-F pursuant to Administrative Order Number 21, per Santora, CJ, Fourth Judicial Circuit. Administrative Order 21 created Division CR-F and the "Career Criminal Project." The enabling language of the Order stated: "Whereas, the Legislature approved and funded another Circuit Judge for the Fourth Judicial Circuit, based upon the certification of the Florida Supreme Court that the need existed for such a Judge, provided that the additional Judge be targeted for the career criminal pilot project".... This Court in In Re: Certification of Judicial Manpower, 521 So.2d 1161 (Fla. 1988) certified, to the Legislature, a need for one additional judgeship for the Fourth

Judicial Circuit. The Supreme Court conditionally certified the need for such a Judge, provided the new Judge would be assigned to a career criminal pilot project. Chapter 88-167, Laws of Florida, Amended Section 26.037, Florida Statutes, to provide for one additional Circuit Judge in the Fourth Judicial Circuit (R 14-18).

B. The creation of the Career Criminal Division violated Article V, Sections 7 and 20 of the Florida Constitution.

The creation of a Career Criminal Division violated Article V, Sections 7 and 20 of the Florida Constitution. Article V, Section 7 states, in relevant part, all courts except the Supreme Court may sit in divisions as may be established by general law. The Career Criminal Division was not established by general law. Chapter 88-167 created a new circuit judgeship in the Fourth Judicial Circuit, but did not require the new judge sit in a special Career Criminal Division. The Career Criminal Division was created by Administrative Order.

This Court in City of Coral Gables v. Blount, 131 Fla. 36, 178 So. 554 (1938) disapproved of a local decision to create special divisions. In that case, the Circuit Judge for the Eleventh Judicial Circuit decided among themselves to set up divisions to handle different types of Circuit Court cases. This Court decided this was illegal because there was no organic (constitutional) or statutory provision authorizing a division of Circuit Court into divisions. As in Blount, supra,

there was no express statutory authority authority in this case to create a Career Criminal Division. The Blount court held that absent authority to create special divisions, all Circuit Judges had to exercise all the jurisdiction of a Circuit Court.

In this case there was an organic (constitutional) provision which would allow the creation of a special division. Article V, Section 20(c)(10) of the Constitution states: all courts except the Supreme Court may sit in divisions as may be established by local rule approved by the Supreme Court. Notwithstanding the requirements of Article V, Section 7, Article V, Section 20 (c) (10) permits the formation of a division if it is established by a local rule which is approved by the Supreme Court. Administrative Order 21, which created the Career Criminal Division, was not a local rule approved by the Supreme Court. Under the precedent of City of Coral Gables v. Blount, supra the Career Criminal Division was illegally formed and all proceedings within it were void. Consequently, this Court should declare the Career Criminal Division to be void and reverse Petitioner's conviction obtained in that division.

V. CONCLUSION

Petitioner's conviction should be reversed and the case remanded for a new trial. If this relief is denied, petitioner's sentence should be reversed and remanded for a guideline sentence.

Respectfully submitted,

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SECOND JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Initial Brief on the Merits has been furnished by U. S. Mail to Mr. Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, on this 18th day of December, 1991.

Lynn A. Williams
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