OA 4-7-92 0x7

FILED
SID J. WHITE
JAN 15 1992
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

BOBBY ROSS,

Petitioner,

vs.

Case No. 78,179

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The First District routinely allows constitutionality of a sentencing statute to be raised for the first time on appeal. Ford v. State, 575 So.2d 1335 (Fla. 1st DCA 1991) *rev. denied*, 581 So.2d 1310 (1991). The State did not raise the preservation issue before that court. Here, the State is raising preservation not only in its argument against subject matter jurisdiction, but to suggest that review of this issue on the merits would be improvident.

Three of four issues raised by Petitioner are far outside the grounds upon which jurisdiction was accepted by this Court. Jurisdiction was accepted on the basis that the First District directly construed, and found valid, §775.084, Florida Statutes. Petitioner concedes this. The State will begin its response to each by noting why review of the ancillary issues on the merits would be improvident.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement, except to add:

1. At sentencing, the trial court recounted Petitioner's criminal record from his PSI report. In addition to the eleven convictions from Duval County (T 147, 149; R 99-140), there were felony convictions from Tennessee and Georgia. (T 149-50). The court said:

> I've examined the defendant's criminal record as set forth in the PSI, and heard those matters submitted by the State, the arguments of counsel. I find from the PSI that this 44 year old defendant has been arrested at least 68 times, has been charged with at least 91 separate crimes, has been convicted of at least 21 misdemeanors, and at least 18 felonies. Cannot be determined from his rap sheet if an additional five convictions are felonies or misdemeanors.
>
> In addition to that, this defendant during his lengthy criminal career has been arrested and charged with crimes in nine different states, Arkansas, California, Florida, Georgia, Illinois, Ohio, Tennessee and Virginia.
>
> I've said it before but certainly applies here that the statutory definition of an habitual criminal points to this defendant with precision of a laser beam.
>
> Over the last 27 years his criminal activities have been a constant threat and expense to society, he is deserving and long over due for the maximum prison sentence.
>
> (T 153-4).

2. Petitioner's prior violent felony conviction was for two counts of aggravated assault in October 1988. (T 140, 149). He also pled to an aggravated assault in July or August 1987. (R 234-8). His current felony was committed in August, 1989. (R 7).

3. The constitutionality of the habitual violent felony offender statute was never raised before the trial court.

SUMMARY OF THE ARGUMENT

ISSUE I: Preservation of the "Jurisdictional" Issue

Petitioner did not attack the constitutionality of the habitual violent felon statute -- facially or as applied -- before the trial court. Instead, he raised it for the first time before the First District. Controlling case law holds that the constitutionality of statutes, as here, does not rise to fundamental error. Therefore, Appellant waived this issue.

The State did not raise the preservation issue in the First District. However, the Petitioner's failure to preserve the issue at trial has jurisdictional aspects. Jurisdiction cannot be conferred by waiver. At the least, Petitioner's waiver before the trial court strongly weighs against review on the merits.

ISSUE II: Constitutionality of the Habitual Felon Statute

Petitioner, who was sentenced as an habitual violent felon, does not have standing to attack the constitutionality of the entire statute. The lower court's "validation" of the entire statute is *dicta* as to the statute's treatment of felons who are habitual, but not violent.

The classification or definition of an habitual violent felon, and the enhanced sentences for such felons, are reasonably related to the unassailable goal of better protecting society from recidivists who commit felonies, including violent felonies. All felons found to be habitual and violent are treated alike. All provisions of the statute applicable to Petitioner are clear and capable of being understood by persons of reasonable intelligence.

Petitioner's last point expresses no more than his personal disagreement with the statutory definition of an habitual, violent felony offender. To claim an enhanced sentence is unreasonable for a defendant such as Petitioner -- who has committed violent felonies in the past and defied incarceration by his present offense of escape -- is misguided at best. Such claim does not rise to constitutional significance.

ISSUE III: Use of Petitioner's Rap Sheet

Review of this issue on the merits would be improvident, as it is completely unrelated to the ground upon which jurisdiction was accepted. More important, the First District summarily rejected Petitioner's argument as without merit. In essence, this Court would be reviewing a PCA decision on this issue.

The trial court could not abuse its discretion by allowing the prosecution to refresh Petitioner's memory with his rap sheet. Any document may be used to refresh a witness' recollection. Any error was harmless, as Petitioner's credibility had already been severely damaged by the jury's knowledge of his status as an incarcerated convict and his admitted lie to police about his identity.

ISSUE IV: Richardson Hearing Denial

For the reasons stated in Issue III, the Court should decline review of this issue on the merits. Nevertheless, the trial court did not err by denying a Richardson hearing in response to the State's failure to provide defense counsel with Petitioner's rap sheet. This information was equally available to Petitioner at all times. Further, the prosecutor offered to review the information with the defense once it became clear Petitioner would testify.

ISSUE V: Propriety of Career Criminal Division

Review of this issue on the merits should be declined for the reasons stated in Issue III. Petitioner does not have standing to challenge the administrative structure of the trial court. If he has standing, Petitioner cannot show prejudice. Since no harm resulted from any error, the outcome of this issue

will have no effect on this case after disposition of the jurisdictional issue.

The career criminal division was established pursuant to general law, as provided in the state constitution. It did not alter or diminish the jurisdiction or authority of any circuit judge. Petitioner's argument is totally without merit.

ARGUMENT

ISSUE I

WHETHER CONSTITUTIONALITY OF A SENTENCING STATUTE MAY BE RAISED FOR THE FIRST TIME ON APPEAL

Petitioner has characterized his attack upon the habitual violent felon statute as facial. (initial brief, p. 20) In so doing, he tacitly admits the obvious: trial counsel[1] did not challenge the constitutionality of the statute.

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1 The trial court noted Petitioner's prior record, which includes at least 18 felonies in nine states; and at least 21 misdemeanors. (T 153-4). Three of the past felonies were for aggravated assaults committed in Florida. (R 7, 134-8; T 140, 149). No reasonable trial counsel, as a matter of strategy, would risk credibility by challenging the statute under these facts. This possibility is re-enforced by defense counsel's express lack of objection to the PSI report in substance. (T 140-2). Ironically, this entire appeal could be grounded on no more than a deliberate tactical decision by Petitioner's trial counsel.

The State acknowledges that it did not raise the preservation issue in the First District. *See* State v. Wells, 539 So.2d 464, 468 n. 4 (Fla. 1989)(state waived issue of defendant's standing to assert privacy interest in luggage found in car trunk and later searched, when defendant's standing was not raised at trial or on appeal), *affirmed*, 109 L.Ed.2d 1 (1990).

However, Petitioner's waiver through lack of preservation at trial has jurisdictional implications. In Davis v. State, 383 So.2d 620, 622 (Fla. 1980), this Court held that a defendant who pled nolo without reservation of the constitutionality of a controlling statute was "clearly wrong in his effort to activate the [court's] jurisdiction." [e.s.] Therefore, the Petitioner here is equally wrong in activating this Court's jurisdiction through an issue not raised before the trial court. Any waiver by the State is immaterial, as subject matter jurisdiction cannot be conferred on the court by waiver or the parties' failure to object. Florida Nat'l Bank of Jacksonville v. Kassewitz, 25 So.2d 271 (Fla. 1946)(jurisdiction cannot be infused in the court through error or inadvertence by the parties). *See* Thomas v. State, 16 F.L.W. D2320, 2324 (Fla. 1st DCA Aug. 30, 1991)(Miner, J., dissenting)("Since the absence of a contemporaneous objection renders the appellate court unable to address the alleged error, I believe it totally irrelevant whether or not the state raises the absence of a defense objection below in its answer brief.").

It is a settled rule of appellate review that "[e]xcept in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. [cites omitted]." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

The meaning of "fundamental error" has been frequently addressed by this Court and the district courts. In Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970), the district court held that a challenge to the constitutionality of a statute was cognizable on appeal as fundamental error even though the constitutionality of the statute had not been raised and preserved in the trial court. This Court rejected the proposition that constitutionality of the statute was fundamental and could be raised for the first time on appeal. The Court made two general points which deserve attention. First, "'[f]undamental error,' which can be considered on appeal without objection in the lower court is error which goes to the foundation of the case or goes to the merits of the cause of action." *Id.* Second, an "Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly." *Id.*

Sanford was a civil case. The same doctrine is applied to criminal cases. In Castor v. State, 365 So.2d 701, 704 (Fla.

1978), in the context of jury reinstruction, the Court reaffirmed the rule that contemporaneous objections were required and rejected the argument that the error was fundamental, reiterating that the doctrine of fundamental error must remain a "limited exception." *Id.* The Court also reaffirmed that the error must be so fundamental as to "amount to a denial of due process. State v. Smith, 240 So.2d 807 (Fla. 1970)." *Id.*, fn. 7.

This Court has consistently limited the scope of fundamental error. *See* Clark v. State, 363 So.2d 331, 333 (Fla. 1978)("we have consistently held that even constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court. Sanford.").

This Court was even more emphatic in Ray v. State, 403 So.2d 956, 960 (Fla. 1981):

> [F]or error to be so fundamental that it may be urged on appeal, though not properly raised below, the error must amount to a denial of due process. *Castor*.
>
> * * * *
>
> We agree with Judge Hubbart's observation that the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. *Porter v. State*, 356 So.2d 1268 (Fla. 3d DCA)(Hubbart, J., dissenting),

remanded, 364 So.2d 892 (Fla. 1978), *rev'd on remand*, 376 So.2d 705 (Fla. 3d DCA 1979). *Id.*[2]

The cases holding and applying the above principles are legion. Representative cases include: Ellis v. State, 74 Fla. 215, 76 So. 698 (1917)("[I]t is suggested that the statute is unconstitutional. This question was not raised in the trial court, and, as the statute is not patently in conflict with organic law" will not be considered here); Silver v. State, 188 So.2d 300, 301 (Fla. 1966)(court strongly criticizes and refuses to condone decision of district court to indulgently address constitutionality of statute where constitutionality not raised in trial court); Whitted v. State, 362 So.2d 668, 672 (Fla. 1978)(failure of defendant to raise constitutionality of statutory provision under which convicted precludes appellate review); and Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984)(issue of constitutionality of statutory authority to override jury

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[2] In Porter, the issue was whether an unobjected to comment on a defendant's exercise of his right to silence was fundamental error. The district court, J. Hubbart dissenting, originally held that it was but reversed itself after remand for reconsideration in light of Clark. The point for this Court to recognize is that the right to silence is unquestionably a fundamental constitutional right in the English language sense of "fundamental," but, in the context of an unobjected to error, "fundamental error" is a legal term-of-art of exceptionally narrow scope. *See* cases above and below. This Court should reject the ubiquitous tendency of contemporary defense lawyers to debase the legal, and English, language by seeing "fundamental error" everywhere.

recommendation in death penalty case not cognizable for first time on appeal).

Davis v. State, 383 So.2d 620, 622 (Fla. 1980), is particularly instructive. It involved a nolo plea which purported to reserve the right to appeal the denial of motions to dismiss. On appeal, Davis challenged the constitutionality of the statute under which he was convicted. This Court, relying on Silver, held there was no jurisdiction to consider the challenge:

> In the case *sub judice* the defendant entered a plea of *nolo contendere* and did not reserve the right to raise the constitutional question on appeal. The statute was not attacked at the trial level. Defendant has exercised his right to one appeal. If he had desired to appeal to this Court, he only had to raise a constitutional question before the trial court and, in event of an unfavorable ruling, could have appealed directly to this Court. Not having followed this course, he is clearly wrong in his effort to activate the jurisdiction of this Court.
>
> For the reason stated, jurisdiction is declined and the judgement of the circuit court is not disturbed.

Id. See the rule of Brown v. State, 376 So.2d 382, 385 (Fla. 1979), that the reserved issue must be totally dispositive and that the constitutionality of a controlling statute is an appropriate issue for reservation; that is, must be reserved. *See also* State v. McInnes, 133 So.2d 581, 583 (Fla. 1st DCA 1961)("It is fundamental that the constitutionality of a statute

may not generally be considered on appeal unless the issue was raised and directly passed upon by the trial court."); Randi v. State, 182 So.2d 632 (Fla. 1st DCA 1966)(constitutionality of statute may not be raised for the first time on appeal).

It might be suggested that the above holdings apply only to the constitutionality of statutes under which convicted and not to statutes under which sentenced. Such suggestion would be completely illogical because it could not show how all sentencing issues are fundamental while guilt issues are not. In any event, the same rule is applicable to sentencing statutes. *See* Gillman v. State, 346 So.2d 586, 587 (Fla. 1st DCA 1977)(constitutionality of sentencing statute not cognizable when raised for first time on appeal). *See also* Knight v. State, 501 So.2d 150 (Fla. 1st DCA 1987)(*ex post facto* and equal protection challenges to sentencing statutes not cognizable when raised for first time on appeal).

Applying the above law to the case at hand, it is uncontroverted that Petitioner did not raise, or otherwise preserve, the issue of whether the habitual, violent felon statute is constitutional. Pursuant to the case law above, the issue is whether the definition of "habitual violent felony offender" is fundamental, as to violate due process and to justify consideration of the issue although not raised below.

Given the great latitude and deference accorded the Legislature in defining statutory terms, the answer leaps out at the reader. That answer is "NO."

By failing to raise the jurisdictional issue before the trial court, Petitioner waived it. The State's failure to argue preservation before the First District, although embarrassing in hindsight, does not vitiate Petitioner's initial failure. Moreover, jurisdiction cannot be established through waiver. Since this Court accepted jurisdiction based on a non-preserved issue, this appeal must be dismissed outright.

If not dismissed, this Court should decline consideration on the merits. The State requests such; and strongly urges this Court to issue an opinion declaring that non-preserved, non-fundamental errors can not be the basis for appellate review.

ISSUE II

WHETHER IT IS REASONABLE TO PUNISH A REPEAT FELON, WHOSE CRIMINAL RECORD INCLUDES A VIOLENT OFFENSE, MORE HARSHLY THAN A NONVIOLENT REPEAT FELON

A. Introduction

Although the issue was not preserved at trial, and the case should be dismissed for lack of jurisdiction, the state will nevertheless address Petitioner's argument on the merits.

Petitioner's criminal record includes at least four violent felonies: three instances of aggravated assault (R 93, 134), and unarmed robbery as a plea to a lesser included offense. (R 106). Based on his PSI report, the trial court noted "at least 18 felonies." (T 153). Defying incarceration, he escaped while on work release and was apprehended about thirteen days later. (T 30-1, 40-2). Incredibly, he now claims unconstitutionality of a statute that is operating quite reasonably against a proven recidivist.

Petitioner's claim rings hollow. Having demonstrated his strong propensity to commit both violent and nonviolent felonies, and having refused to abide by the strictures of work release; Petitioner cannot complain simply because he received commensurate imprisonment.[3] However, the statute is absolutely constitutional, on its face, even if Petitioner had only the minimum required convictions.

Three attacks are lodged against the habitual violent felony offender statute:[4] (1) that equal protection is not

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[3] As pronounced, Petitioner was sentenced to 30 years with a ten year minimum. (T 155). His sentence form shows the 30-year maximum, but not the 10-year minimum. (R 147-8). If Petitioner's sentence is upheld, the State requests remand for this purpose.

[4] Once (initial brief, p. 22), Petitioner alludes to the entire "habitual offender statute." The State will limit its response to specific attacks upon the violent habitual felon provisions;

afforded by the classification of a defendant as an habitual violent felon; (2) denial of due process by not requiring a felon's current offense to be violent in order to be so classified; and (3) vagueness, through alleged imprecision in the statute as to who initiates the process, etc. (*See* Petitioner's initial brief, p. 20). For clarity, the State will answer each claim separately.

B. Equal Protection/Substantive Due Process

> This Court has long held . . . that where a sentence is one that has been established by the legislature and is not on its face cruel and unusual, it will be sustained when attacked on grounds of due process, equal protection, or separation of power theories.

Sowell v. State, 342 So.2d 969 (Fla. 1977)(upholding mandatory three-year sentence for use of shotgun to commit aggravated assault). Petitioner's sentence is statutorily authorized. He does not even allege it is facially cruel or unusual. *See* Rebon v. State, 203 So.2d 202 (Fla. 2d DCA 1967)(rejecting equal

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as Petitioner is not affected by other parts of the statute, and does not challenge the procedural requirements that apply to all habitual felons. *See* Greenway v. State, 413 So.2d 23 (Fla. 1982) (defendant may challenge only that portion of prison contraband statute affecting him); State v. Olson, 568 So.2d 1239, 1242 (Fla. 1st DCA 1991)(same). *See also* Wilson v. State, 16 F.L.W. D2924 (Fla. 1st DCA Nov. 20, 1991)(declining to address one-subject challenge to 1989 amendments to habitual felon statute, when appellant not affected by those changes).

protection attack upon statute imposing harsher penalty for escaped felon than for escaped misdemeanant).

Recidivist statutes have long been part of the criminal law in Florida. They enjoy comparably long acceptance on constitutional grounds. As early as 1928, this Court upheld a recidivist statute against equal protection and due process attacks. *See* Cross v. State, 96 Fla. 768, 119 So. 380 (1928); Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962). *See also* Oyler v. Boles, 368 U.S. 448, 451, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962)("[T]he constitutionality of the practice of inflicting severer penalties upon habitual offenders is no longer open to serious challenge.").

Petitioner alleges (initial brief, p. 21) -- without any facts in support -- that all defendants similarly situated to him are not being subjected to the enhanced penalty for habitual, violent felons. He, of course, offers no statistics as to other Florida defendants with several past violent felonies, and many other felonies, who defy incarceration by escaping. Assuming his equal protection attack contemplates a defendant with only one prior violent felony conviction, and a current conviction for a nonviolent felony; Petitioner does not have standing. His prior record is far worse.[5] He cannot attack the statute on the

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[5] Again , the State notes Petitioner's criminal past includes at

grounds it may be applied unconstitutionally to others. State v. Burch, 545 So.2d 279, 283 (Fla. 1st DCA 1989)("A person to whom a statute may constitutionally be applied may not challenge that statute on the grounds that it may conceivably be applied unconstitutionally to others in situations not before it.")(citation omitted), *aff'd with opinion*, 558 So.2d 1 (Fla. 1990).

Later, Petitioner will make much of the fact that his current offense (escape) was not violent. The State agrees that escape is not specified as a violent offense by §775.084(1)(b)1, Florida Statutes. Escape, however, is a troublesome nonviolent offense. It shows defiance of authority even while incarcerated, and gives rise to the reasonable belief that past violent crimes could be repeated in the future. Again, however, the State emphasizes that the statute is constitutional, even as to a defendant with only one prior violent felony and a nonviolent present felony.

In reality, Petitioner's first point is nothing but his personal objection to the prosecutor's discretion in seeking an enhanced penalty when a defendant so qualifies. Such discretion does not violate any constitutional rights. United States v. Batchelder, 442 U.S. 114, 125, 99 S.Ct. 2198, 60 L.Ed.2d 755

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least three violent felonies; and at least 15 other felonies committed in eight other states. His felonies are exceeded by his misdemeanors.

(1979)("Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced."). *See* State v. Bloom, 497 So.2d 2,3 (Fla. 1980)("Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute."). Bloom's separation of powers implication is obvious, as it expressly relies on Art. II, §3 of the constitution. *Id.* *See also* Vickery v. State, 539 So.2d 499 (Fla. 1st DCA 1989), *rev. denied, sub. nom.* Nunnari v. State, 549 So.2d 1014 (Fla. 1989)(RICO statute not violative of equal protection simply by delegating to prosecutor the choice to pursue misdemeanor offenses for each gambling incident or to pursue felony conviction under RICO statute for entire gambling episode).

Petitioner next alleges that the definition of "habitual violent felony offender" violates equal protection by creating a classification that is neither equitable or rational. In this regard, he notes that the "statute allows anyone [e.s.] with one prior violent felony . . . to be classified." (initial brief, p. 22). There are two flaws to Petitioner's approach. First, the statute mandates that all defendants fitting the appropriate definition be classified as habitual. Absent case-specific

factual findings that society does not need the protection provided by an enhanced sentence, classification of a qualifying felon is mandatory. The statute does not merely "allow"; it requires. *See* §775.084(4)(c), Florida Statutes (absent findings to contrary, the court "shall make that determination" that a felon is habitual, nonviolent or violent). The statute should not be read to leave more discretion in the trial court than it actually does.

Second, Petitioner alleges the statute is not equitable or rational because it requires only one prior "violent" felony conviction within the last five years. He simply disagrees with the Legislature's policy decision to treat felons who have committed at least one violent offense more harshly than those whose past offenses are nonviolent. The definition of "habitual, violent felony offender" requires at least two convictions -- for at least one past violent felony, and the present felony. In effect, the Legislature has decided that two felony convictions are sufficient to classify a defendant as "habitual" when the first felony is violent. Having committed a violent felony in the recent past, and a nonviolent felony in the present; a defendant cannot complain simply because the Legislature has chosen not to wait for a third felony to impose a lengthier sentence with a minimum mandatory term. In reasonable contrast, the Legislature requires two prior felony convictions, if not

violent crimes, before requiring that a defendant be classified as merely habitual.

In his next point, Petitioner moves from an argument that is weak to an argument that is both weak and misleading. He claims the definition of an habitual, violent felon is unconstitutional because it includes aggravated assault as a qualifying offense, but not aggravated battery.[6]

The Legislature is not required to address every conceivable aspect of a problem. In its plenary discretion, it may choose to do less. *See* State v. Leicht, 402 So.2d 1153, 1154 (Fla. 1981)(drug trafficking statute not violative of equal protection because minimum mandatory sentences imposed for

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[6] As amended through 1988, the definition did not include the latter. *See* §6, ch. 88-131, Laws of Florida. Since his offenses were committed in August, 1989 (R 7), Petitioner falls under the 1988 version.

However, the failure to include aggravated battery had already been corrected by the 1989 Legislature. *See* §1, ch. 89-280, Laws of Florida (effective Oct. 1, 1989). Since ch. 89-280 became law on July 5, 1989, only the delayed effective date, often specified for criminal statutes, prevented the change from applying when Petitioner escaped.

The 1989 Legislature corrected an obvious oversight. Arguably, the change in ch. 89-280 was curative and retroactive. Regardless, the legislature was not constitutionally required to delay the effective date of changes in ch. 89-280. The fact that it did so does not entitle Petitioner to relief. *See* Smith v. State, 567 So.2d 55 (Fla. 2d DCA 1990), *rev. denied*, 576 So.2d 291 (Fla. 1991)(use of 1988 version of habitual felon statute to enhance sentence for aggravated assault did not violate equal protection or due process).

trafficking in cocaine, cannabis, morphine and opium, and not for other drugs; as "the legislature may select one phase of one field and apply a remedy there, neglecting the others"), *quoting*, Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). *See also* City of New Orleans v. Dukes, 427 U.S. 297, 303, 97 S.Ct. 2513, 49 L.Ed.2d 511 (1976)(city ordinance that banned most street vendors did not violate equal protection, as legislature may implement programs of economic regulation "step by step").

Petitioner's next claim of an arbitrary classification is based on the fact that the punishments specified for habitual violent felons expressly address only first, second, and third degree felonies. *See* §775.084(4)(b)(Supp. 1988). From this, he concludes that the definition arbitrarily excludes felons committing the "most serious crimes" (initial brief, p. 22); that is, capital offenses, life felonies, and first degree felonies punishable by life. This exact argument has been categorically rejected. Barber v. State, 564 So.2d 1169, 1173 (Fla. 1st DCA 1990), *rev. denied*, 576 So.2d 284 (Fla. 1990)(addressing 1987 statute as to habitual, nonviolent felons). All district courts of appeal have concluded that the statute includes first-degree felonies punishable by life. Burdick v. State, 584 So.2d 1035 (Fla. 1st DCA 1991)(*en banc*), *appeal pending* case no. 78,466 (oral argument held December 6, 1991); Lock v. State, 582 So.2d 819

(Fla. 2d DCA 1991), *appeal pending* case no. 78,472; Newton v. State, 581 So.2d 212 (Fla. 4th DCA 1991); Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990).

First-time felons convicted of capital offenses must receive a sentence of death or life imprisonment with a 25-year minimum. Since the penalty for a first-time capital felon is more severe than the penalty for a first-degree habitual, violent felon (life with 15-year minimum), the Legislature reasonably found no need to further enhance the sentence for a repeat felon whose present offense is capital.

Only the sentencing portion of the statute does not expressly include life felonies. Again, the Legislature may address as much of a problem as it wishes. Leicht, Dukes; *supra*. The issue of the statute's applicability to life felonies is not present here. Moreover, the State maintains that the statute applies to life felonies.

Another flaw in Petitioner's point is that he fails to distinguish between classification of a qualifying repeat felon as habitual and violent, and the sentencing of such felon. Classification is mandatory, pursuant to §775.084(4)(c), absent

sufficient factual findings to the contrary. Life felons are not excluded.[7]

Not until late in his argument does Petitioner broach the standard for review. For equal protection purposes, classification or definition of criminal punishments must rest on some difference bearing a reasonable relationship to the object of the classification. Soverino v. State, 356 So.2d 269, 271 (Fla. 1978)(upholding statute reclassifying battery of a police officer from a misdemeanor to a felony), *citing*, McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964)(other citations omitted). A statutory classification must bear a reasonable relationship to the purpose sought. State v. Saiez, 489 So.2d 1125 (Fla. 1986). For substantive due process purposes:

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7 Petitioner fails to note any life felony that does not, by cross-reference, authorize punishment subject to §775.084. He also ignores the obvious absurdity of punishing habitual felons whose present offense is a life felony less severely than habitual felons whose present offense is merely a first-degree felony. However, the State declines to argue that issue further.

The real point is that the Legislature, recognizing that a first-time defendant convicted of a life felony could be subject to a life sentence, may simply chose not to enhance punishment further. Moreover, the applicability of the statute to life felons does not affect Petitioner, who was sentenced for the second degree felony of escape. Also, the alleged omission of life felons does not affect the reasonableness of enhancing the penalties for all other non-capital felons who are both habitual and violent.

> It need only be shown that the challenged legislative activity is not arbitrary or unreasonable. . . . Courts will not be concerned with whether the particular legislation in question is the most prudent choice. . . . [I]f the legislation is a reasonably means to achieve the intended end, it will be upheld.

Id. at 1129 (Barkett, J.) *quoting with approval*, State v. Walker, 444 So.2d 1137 (Fla. 2d DCA 1984)(Grimes, J.), *affirmed and lower court opinion adopted*, 461 So.2d 108 (Fla. 1984).

The two tests merge. The obvious intent and purpose of the habitual felon statute is to punish recidivists more harshly than first-time felons; and to punish violent felons more harshly still. *See* Eutsey v. State, 380 So.2d 219, 223 (Fla. 1980)(noting purpose of earlier version of habitual offender statute). The entire statute does just that.

It takes only one prior felony conviction -- if "violent" -- to qualify as a violent repeat felon; as opposed to two prior convictions for nonviolent habitual felons. The current offense need not be violent. Minimum mandatory sentences are imposed, whereas there are no minimum sentences for nonviolent habitual felons.[8]

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[8] Perhaps as a balancing factor, classification as a violent habitual felon must be based on Florida convictions; since the definition of habitual, violent felony offender does not include the phrase "qualified offense."

A person whose criminal conduct includes past commission of a violent felony plus another felony in the present is subject to a lengthier sentence with a mandatory minimum. The question becomes whether such a sentence is a reasonable means to protect society. The question answers itself. A repeat felon strongly intimates lack of rehabilitation, and presents a continuing threat to the public. Violent past crimes raise the possibility of violent future crimes. Simply because the present crime need not be violent does not render the statute unconstitutional.

Petitioner's argument stumbles badly in light of his numerous past felonies. (T 153-4). It stumbles again in light of the fact that he was convicted for two counts of aggravated assault (R 93) in December 1988 in case no. 88-3856. (T 140). He received consecutive sentences of five and two years. (R 95-6). Petitioner was serving these sentences when he escaped.

Moreover, Petitioner has yet another past violent felony, the aggravated assault to which he pled guilty in July or August 1987 (R 134-8); and for which he received a sentence of 18 months. (R 137). Therefore, Petitioner has <u>three</u> prior violent felony convictions. His objection to the statutory definition of habitual violent felony offender -- on the grounds only one prior violent felony is required -- challenges that definition on the grounds it might be applied unconstitutionally to others. He cannot do this. <u>Burch</u>, *supra*.

Petitioner simply voices his personal disagreement with the Legislature's policy decision to treat repeat felons more harshly when their first offense is one of ten (through 1988) crimes deemed to be violent. His argument (initial brief, p. 26) to the contrary is a continuation of his personal disagreement. His own criminal history, briefly discussed above, proves the wisdom and reasonableness of the statute. Having committed aggravated assault twice in 1988 and once in 1987, Petitioner defied incarceration by escaping from work release. Although he was apprehended on August 30 (T 40-2), or about thirteen days later, there is no reason to believe Petitioner would not have committed a violent crime again. Society, through its elected legislators, does not have to wait for him to shoot a convenience store clerk before deciding that lengthier imprisonment (with a minimum mandatory term) is the appropriate penalty. The means chosen by the statute reasonably achieve that purpose. *See* Barfield v. State, case no. 76,524 (Fla. Jan. 9, 1992), slip op. at p. 3 ("Moreover, Florida's habitual offender statute provides a statutory means of dealing with persistent criminal conduct.").

Next, Petitioner attempts to revive a weary challenge based on vagueness. He claims the statute lacks standards as to which felons should be treated as habitual. This is not true, as the definitions of habitual violent and nonviolent felony offenders provide the criteria.

Bootstrapping, Petitioner claims a reasonable repeat felon must guess whether he will receive an enhanced sentence. This is not a vagueness problem, as Petitioner has no constitutional right to select his penalty. Batchelder, 442 U.S. at 125; Bloom, 497 So.2d at 3. Moreover, the statute requires habitual offender classification, and imposition of the specified sentences for violent repeat felons, absent factual findings to the contrary. The only latitude is in the range of sentences specified for second and third degree violent habitual felons. Petitioner has no constitutional right to any particular sentence within the specified range. In fact, appellate review for a sentence within the specified range is not available. *See* Banks v. State, 342 So.2d 469 (Fla. 1976)(when sentence falls within statutory range, the lengthier sentence is left to trial court's discretion and is not subject to appellate review).

Petitioner's piecemeal attacks on narrow parts of the habitual, violent felon statute fail when the whole statute is considered. A repeat felon of common intelligence can readily see that conviction for a listed, violent crime raises the possibility of an enhanced sentence upon conviction for any second felony within the next five years. The statute is not vague simply because it grants some discretion to the prosecutor in choosing when to seek habitual offender sentencing. *See* LaFave and Scott, Criminal Law §2.3(c), p. 95 (2d Ed.

1986)(vagueness does not arise simply because criminal law grants some discretion to administrators, as when jury is asked to determine whether defendant acted reasonably under some circumstances). *See also* King v. State, 557 So.2d 899 (Fla. 5th DCA 1990), *rev. denied*, 564 So.2d 1086 (Fla. 1990)(habitual felon statute bears reasonable relation to its objective, and is not vague); Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), *rev. denied*, 576 So.2d 284 (Fla. 1990)(same as to 1987 version of habitual offender statute).

Barber is particularly interesting as it found no vagueness problem in the pre-1988 version of the statute. The basis of Barber's vagueness claim was that the "same paragraph contains language that makes application of habitual felony sentencing optional [e.o.], as well as language that suggests such sentencing is mandatory." [e.o.] Reading the entire part of the statute at issue, the court concluded the language was sufficiently clear to provide a "definite warning of the prohibited conduct." *Id.*, 564 So.2d at 1172-3.

The 1988 version of the statute is equally clear. It puts all non-capital, repeat felons on notice they must be classified as habitual if the statutory definitions are met, and the trial court does not make factual findings to the contrary. Classification alone is significant, as it greatly reduces gain time.

The statute then sets forth enhanced penalties for nonviolent and violent habitual offenders. The sentences for habitual violent felons are mandatory. Alternatively, the use of "may" in §775.084(4)(b) confers limited discretion on the trial court not to impose the maximum sentences prescribed. This, of course, is no different from pre-guidelines sentencing discretion. It is no different from a trial court's present discretion to sentence anywhere within a particular guidelines range. This minimal discretion does not make §775.084(4)(b) vague.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE PROSECUTOR TO REFRESH PETITIONER'S MEMORY WITH HIS CRIMINAL RECORD

A. Propriety of Discretionary Review

The State respectfully suggests that it would be improvident for the Court to review this issue on the merits. Petitioner sought discretionary review by this Court solely because the First District expressly declared the habitual (violent) felony offender statute to be valid. Obviously, the issue of Appellant's impeachment through the use of his criminal record far exceeds the grounds upon which jurisdiction was accepted. Were the constitutionality of §775.084 before the

Court upon a certified question, discretionary review of this issue would be declined. *See* Stephens v. State, 572 So.2d 1387 (Fla. 1991)("We do not reach the other issue raised by the parties, which lies beyond the scope of the certified question.").

Even more damaging to Petitioner is the opinion below. Very early it states: "We find the points raised by Appellant to be without merit." (slip op., p. 1). While the remainder of the opinion addresses the "reasonable means" (slip op., p. 3) employed by the habitual felon statute, no further discussion of the other issues appears. In effect, the opinion below is a *per curiam* affirmance, without opinion, as to this issue (and Issues IV and V herein). Had the court below simply affirmed without discussion as to the habitual felon statute, Petitioner would have had no grounds to seek review by this Court.

Consequently, the Court should decline to review this issue on the merits. Florida's constitution contemplates that the district courts are generally the final courts of appellate jurisdiction. *See* Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982)("[W]e recognize the function of the district courts as courts of final jurisdiction and will refrain from using that authority [to review "ancillary" issues] unless those issues affect the outcome of the petition after review of the certified

case."). There is no need to repeat the First District's effort on a point so well-settled that it could be dismissed as being without merit.

Should this Court agree with the State and decline review on the merits, the State respectfully suggests that the Court say as much in any opinion. Only by doing so will the volume of ancillary issues presented to this Court ever be decreased.

B. Response on the Merits

The exchange which preceded the cross-examination Petitioner complains of here was as follows:

> Q: [by the prosecutor]: 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.
>
> (T 75).

The prosecutor proceeded to refresh Petitioner's recollection by pointing to various lines in his rap sheet. This procedure is proper. Houston v. State, 337 So.2d 852 (Fla. 1st DCA 1976). *See* Mills v. State, 395 So.2d 1145 (Fla. 1980), *cert.*

denied, 473 U.S. 911 (1985)(prosecutor entitled to cross-examine defendant about prior felony to negate "delusive" direct examination by defense counsel). Here, Petitioner's claimed inability to remember the number of his prior felony convictions -- if not delusive -- minimized his prior record. The State was entitled to an accurate answer. *See* State v. Young, 283 So.2d 58 (Fla. 1st DCA 1973), *cert. denied*, 287 So.2d 690 (Fla. 1973)(when witness testifies to only one conviction, the state can refresh the witness' memory as to other convictions). *See also* Williams v. State, 238 So.2d 137, 139 (Fla. 1st DCA 1970)("[A] party testifying . . . may be questioned about the number of his convictions of other crimes for the purpose of affecting his credibility.").

Any document, including a rap sheet, may be used to refresh memory. *See* Ehrhardt, Florida Evidence, §613.1 (2d Ed. 1984). To the extent the prosecutor successfully refreshed Petitioner's memory, resulting in his admission of a prior conviction, the record of the conviction was not required to be produced. Johnson v. State, 361 So.2d 767 (Fla. 3d DCA 1978), *cert. denied*, 382 So.2d 693 (Fla. 1980); Roberson v. State, 40 Fla. 509, 24 So. 474 (Fla. 1899).

Petitioner admitted to at least six prior felony convictions. The rest he neither admitted nor denied, but said

he simply could not remember. (T 82). "Only when the witness denies the conviction must the prosecutor produce the record." Johnson, *supra*, at 768.

Error, if any, was harmless. The jury knew Petitioner had been incarcerated, therefore it knew he had at least one prior conviction. He admitted to at least six others, and he admitted lying to the police. The suggestion of additional convictions[9] could not have affected the jury's verdict in view of Petitioner's already minimal credibility. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

The trial court has broad discretion in controlling the scope and extent of cross-examination.. Wong v. State, 359 So.2d 460 (Fla. 3d DCA 1973). That discretion was not abused here, and the trial court's ruling must be upheld.

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9 After the first question it was Petitioner, not the prosecutor, who announced the type of crime involved. (T 78-82). Thus, any prejudice arising from this act must be attributed to the Petitioner.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S REQUEST FOR A RICHARDSON HEARING

A. Propriety of Discretionary Review

Based on the cases and argument set forth in part A of Issue II, the State respectfully suggests that review of this issue on the merits would be improvident.

B. Response on the Merits

Because there was no discovery violation below, the trial court did not err in denying Petitioner's motion for a Richardson[10] hearing. The trial judge stated:

> 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 the certified copies of judgment 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.

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10 Richardson v. State, 246 So.2d 771 (Fla. 1971).

> 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 94).

Petitioner never requested, in discovery, his prior records. (R 10-12). There is no indication, prior to trial, the State knew Petitioner would testify. The prosecutor stated that she advised defense counsel to look over the rap sheet before Petitioner took the stand, and that she told counsel she would be happy to go over Petitioner's rap sheet and count out the 20 prior felony convictions. (T 93).

In State v. Crawford, 257 So.2d 898 (Fla. 1972), the State appealed a trial court's order, pursuant to the defendant's specific request, to produce the defendant's prior criminal record. The Court, noting the principle of fairness underlying the concept of discovery did not go so far as to require the state to prepare the defendant's case for him, stated:

> [T]he prosecuting attorney should not be required to actively assist defendant's attorney in the investigation of the case. Discovery in criminal cases has tended to be heavily weighed in favor of the defendant, and it would be contrary to the general principle of advocacy, as well as fairness itself, to require the prosecuting attorney to perform any duties on behalf of the defendant in the preparation of the case.

> If on pretrial depositions or at trial, a witness denies having been convicted of a crime and the prosecuting attorney knows this is not true, the prosecuting attorney has an obligation to provide defense counsel with information regarding the witness' prior convictions. But neither a criminal record nor an F.B.I. rap sheet is admissible evidence for that purpose. The information therefrom that would lead defense counsel to admissible evidence should be divulged, but not the actual criminal record or rap sheet with its many irrelevant notations.
>
> We therefore hold that the prosecuting attorney may be required to disclose to defense counsel any record of prior criminal convictions of defendants or of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, if such material and information is within his possession. If not in his possession, the prosecuting attorney should not be required to secure this information for defense counsel.

Id. at 900-901.

In State v. Coney, 294 So.2d 82 (Fla. 1973), the Court reemphasized that the State's disclosure obligations were directed to information which the defendant was hampered in obtaining in obtaining for his own. *See also* Yanetta v. State, 320 So.2d 23, 24 (Fla. 3d DCA 1975)("a defendant should not be permitted to so employ the pretrial discovery procedures as to require the State Attorney to disclose to him information or documents which by the exercise of due diligence, are readily available to him by subpoena or deposition."); Grays v. State, 217 So.2d 133 (Fla. 3d DCA 1969)(no error in denial of

defendant's motion to require state attorney to produce documents which were public records). In Davis v. State, 564 So.2d 606 (Fla. 3d DCA 1990), the court assumed, without discussion, that failure to provide a prior record was a discovery violation. Such an assumption is inconsistent with this Court's prior holdings as discussed above, and this Court should decline to adopt it.

In this case, the State had no prior knowledge as to whether Petitioner would deny his prior convictions. Ultimately, Petitioner did not deny them, but simply failed to remember. Nevertheless, the State went beyond the requisites of Crawford and offered to review the rap sheet with defense counsel. Having rejected this opportunity, Petitioner must not now be heard to complain. Fla.R.Crim.P. 3.220 was designed to furnish a defendant with "information which would bona fide assist him in the defense of the charge against him. It was never intended to furnish a defendant with procedural device to escape justice." Richardson, *supra* at 774. Since there was no requirement to furnish the information, any prejudice to Petitioner is irrelevant. State v. Del Gaudio, 445 So.2d 605, 509 fn. 4 (Fla. 3d DCA 1984), *pet. rev. denied*, 453 So.2d 45 (Fla. 1986). The trial court's ruling was correct and must be affirmed.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR TRANSFER

A. Propriety of Discretionary Review

Again, the State incorporates its argument and authority set forth in Issue II, and respectfully suggests review on the merits would be improvident.

B. Response on the Merits

Petitioner had so many prior felony convictions he could not remember them all (see Issue III herein), and ultimately acknowledged at least six. (T 82). Perhaps admirable for its audacity, Petitioner's argument against being tried in the Career Criminal Division must be rejected.

Petitioner has never attempted to show standing to contest the administrative structure of the local circuit court. He is certainly not akin to a juvenile improperly being treated as an adult. His argument does not even allege prejudice, but turns on the alleged absence of a general law establishing the Career Criminal Division. *See* Art. V, §7, Florida Constitution (inferior courts may sit in divisions as established by general law). Alternatively, he alleges the absence of a local rule -- approved by this Court -- establishing the Career Criminal

Division. *See* Art. V, §20, Florida Constitution (all inferior courts may sit in divisions pursuant to local rule approved by the supreme court).

Total reliance on a point of law is also fatal to Petitioner's argument. He never alleges prejudice, even if it is assumed the Career Criminal Division was technically improper. *See* Card v. State, 497 So.2d 1169, 1174 (Fla. 1986)(defendant, who was tried by judge not assigned to circuit in which trial took place after venue change, could establish no prejudice from lack of an order so assigning the trial judge).

Petitioner has overlooked §43.30, Florida Statutes, which authorizes courts to sit in divisions as established by local rules approved by this Court. Therefore, Petitioner cannot maintain there is no general law approving the establishment of the Career Criminal Division.

Technically, Petitioner would appear to be correct in noting the absence of a local rule. His mistake is to assume that a local rule is the only device by which court divisions may be established. As even Petitioner notes, Art. V, §7 authorizes court divisions "as may be established by general law." Such is the case here.

In February 1988, this Court certified the need for additional judges to the 1988 Legislature. In Re Certification of Judicial Manpower, 521 So.2d 116 (Fla. 1988). That opinion expressly requested an additional judge for the Fourth Judicial Circuit (in which Petitioner was prosecuted), if that circuit participated in the "career criminal project." *Id.* at 118. Obviously aware of this Court's certification, the Legislature did exactly that. It amended §26.031(4), Florida Statutes (1987), to add one judge to the Fourth Judicial Circuit -- presumably under the assumption that the new judge would preside in the Career Criminal Division. *See* §2, ch. 88-167, Laws of Florida.

Therefore, the Career Criminal Division has been approved by general law, meeting the requirements of Art. V, §7. The fact that §43.30 itself requires a local rule by this Court is of no benefit to Petitioner. The Legislature cannot defeat or amend constitutional language that requires approval by general law only. Moreover, §43.30 was enacted in 1972 through §25, ch. 72-404, Laws of Florida. Chapter 88-167, Laws of Florida, sixteen years more recent, must be construed as an exception to the older statute. Finally, the 1972 Legislature, by enacting ch. 72-404, could not bind future legislative sessions from directly approving court divisions by general law. To do so would defy the common law principle that one legislative session cannot bind future sessions.

Although termed a "division," in practice all that has occurred is the assignment of the career criminal cases to a particular judge or judges to facilitate the disposition of such cases. The chief judge's authority to so assign cases is well settled. *See* Gallagher v. State, 476 So.2d 754, 756 (Fla. 5th DCA 1985); Peters v. Meeks, 171 So.2d 562 (Fla. 2d DCA 1965); In Re Guardianship of Bentley, 342 So.2d 1045 (Fla. 4th DCA 1977). The issue is not one of jurisdiction, since all circuit court judges have the same jurisdictional authority. Bentley, *supra*; Grossman v. Selewacz, 417 So.2d 728, 730 (Fla. 4th DCA 1982)("[W]hile the circuit court is divided into divisions for efficiency in administration, all judges of the circuit court exercise the court's jurisdiction.").

Flexibility must be given to the trial courts to best and most effectively use their judicial manpower. Crusoe v. Rowls, 472 So.2d 1163, 1165 (Fla. 1985); Condominium Owners v. Century Village East, 428 So.2d 384, 386 (Fla. 4th DCA 1983). The Fourth [Judicial] Circuit has done precisely that.

The only case relied upon by Petitioner is City of Coral Gables v. Blount, 178 So. 554 (Fla. 1938). That case stands only for the proposition that judges of a circuit court may not divide the court into divisions in a manner that would "affect the jurisdiction conferred by law upon circuit judges." *Id.* at 555.

Petitioner's reliance upon Blount is even more troublesome because it reveals a shallow appreciation of Florida constitutional law. Blount was decided in 1938, thirty-four years before the adoption of the current Art. V, §7; and thirty-four years before enactment of §43.30. Whatever deficiency in the organic or statutory law this Court noted in 1938 was cured by Art. V, §§7 and 20(c)(10); and §43.30. To the contrary, even Blount affirmed the *de facto* transfer of a civil case between two divisions of the circuit court.

In essence, Petitioner complains about the absence of a local rule when none was necessary. He does not even allege prejudice, yet would have his conviction set aside. He has never established standing to raise a purely legal challenge to the administrative structure of the local circuit court. Petitioner's argument should be rejected, if considered on the merits at all.

CONCLUSION

This case should be dismissed for lack of jurisdiction. If the merits are reached, that portion of the habitual felon statute affecting Petitioner -- that is, those parts defining and punishing violent habitual felons -- is constitutional in every respect. Petitioner's argument on the other three issues must be rejected, if the merits are reached at all. The First District's

opinion must be affirmed, thereby upholding Petitioner's conviction and sentence.

Respectfully submitted,

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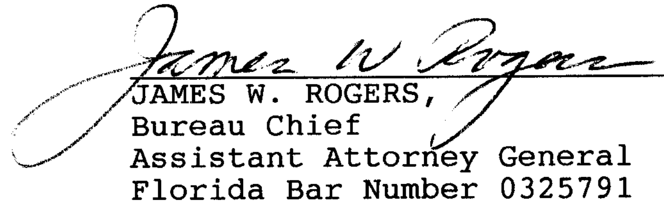

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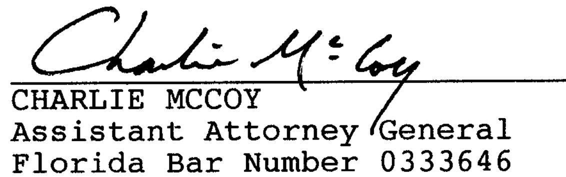

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been furnished by U.S. Mail to **MS. LYNN A. WILLIAMS**, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 15th day of January, 1992.

CHARLIE MCCOY