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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,100

STATE OF FLORIDA

Petitioner.

vs.

TIMOTHY JAMES ROSS,

Respondent.

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PETITIONERS' BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS.....	ii
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE AND FACTS.....	2
SUMMARY OF THE ARGUMENT.....	3
ARGUMENT.....	4

ISSUE

WHETHER SECTION 775.084(1)(a)1, FLORIDA  
STATUTES (SUPP. 1988) WHICH DEFINES  
HABITUAL FELONY OFFENDERS AS THOSE WHO  
HAVE "PREVIOUSLY BEEN CONVICTED OF ANY  
COMBINATION OF TWO OR MORE FELONIES IN  
THIS STATE OR OTHER QUALIFIED OFFENSES,"  
REQUIRES THAT A SECOND FELONY BE  
COMMITTED AFTER CONVICTION FOR THE FIRST  
OFFENSE

CONCLUSION.....	20
CERTIFICATE OF SERVICE.....	20

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGES</u>
<u>Barnes v. State</u> , 576 So.2d 758 (Fla. 1st DCA 1991), review pending, case no. 77,751 (Fla.).....	2, 4
<u>Carson v. Miller</u> , 370 So.2d 10 (Fla. 1979).....	7
<u>Citizens of the State of Florida v. Public Service Commission</u> , 435 So.2d 784 (Fla. 1983).....	8
<u>DeBose v. State</u> , 580 So.2d 638 (Fla. 5th DCA 1991).....	16
<u>Dees v. State</u> , 19 So.2d 705 (Fla. 1944).....	8
<u>Ervin v. Peninsular Tel. Co.</u> , 53 So.2d 647 (Fla. 1951).....	7
<u>Graham v. State</u> , 472 So.2d 464 (Fla. 1985).....	7
<u>In re Investigation of Circuit Judge of Eleventh Judicial Circuit of Fla.</u> , 93 So.2d 601 (Fla. 1957).....	13
<u>Jenny v. State</u> , 447 So.2d 1351 (Fla. 1984).....	7
<u>Joyner v. State</u> , 30 So.2d 304 (Fla. 1947).....	9
<u>Leigh v. State ex rel. Kirkpatrick</u> , 298 So.2d 215 (Fla. 1974).....	7
<u>Shed v. State</u> , 367 So.2d 264 (Fla. 3rd DCA 1979).....	15
<u>Snowden v. State</u> , 449 So.2d 332 ..... (Fla. 5th DCA 1984), quashed on other grounds, 476 So.2d 191 (Fla. 1985).....	15
<u>State v. Egan</u> , 287 So.2d 1 (Fla. 1973).....	7
<u>State v. Hamilton</u> , 388 So.2d 561 Fla. 1980).....	18

<u>Taylor v. State</u> , 558 So.2d 1092 (Fla. 5th DCA 1990).....	15
<u>Thayer v. State</u> , 335 So.2d 815 (Fla. 1976).....	9
<u>Valentine v. State</u> , 577 So.2d 714 (Fla. 5th DCA 1991).....	16
<u>White v. Pepsico, Inc.</u> , 568 So.2d 886 (Fla. 1990).....	8
<u>Wilken v. State</u> , 531 So.2d 1011 (Fla. 4th DCA 1988).....	15

**FLORIDA STATUTES:**

§§775.09 and 775.10, Florida Statutes (1941).....	9
§775.021(4)(a), Florida Statute (1988).....	17
§775.084, Florida Statutes (1975).....	15
§775.084(1)(a)1, Florida Statutes (1988).....	3
§921.001(4)(c)(2), Florida Statutes (1989).....	17

**OTHER AUTHORITY:**

Chapter 88-131, Laws of Florida.....	8
--------------------------------------	---

**FLORIDA RULES:**

Rule 3.800 Fla.R.Crim.P.....	2
Rule 3.701(d)(1), Fla.R.Crim.P.....	16

PRELIMINARY STATEMENT

Petitioner,/appellee below, will be referred to herein as either "the State" or "Petitioner". Respondent, Timothy James Ross, defendant/appellant below, will be referred to herein as "Respondent". A copy of the opinion of the case on review is attached hereto as Exhibit "A".

References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On April 27, 1988, Appellant entered a nolo contendere plea to two felony drug offenses (R 25-26). The trial judge accepted the plea on May 2, 1988 (R 26). After being released on probation, Appellant was arrested for and pled guilty to the charge of sale of cocaine (R 69-70). The guilty plea was accepted by the trial court on June 27, 1989 (R 70). The State filed a notice of intent to seek enhanced penalties on July 18, 1989 (R 76). Appellant was sentenced as a habitual offender on August 3, 1989 (R 91-92). The predicate felonies used to habitualize were sale of cocaine in case number 88-154, and possession of cocaine in case number 88-04 (R 26). Judgment in each case was entered on June 1, 1988 (R 29-30, 39-40).

On appeal from a denial of a motion filed pursuant to Rule 3.800 of the Florida Rules of Criminal Procedure, the Fourth District Court of Appeal reversed Respondent's habitual offender sentence on the authority of Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991), review pending, case no. 77,751 (Fla.). The Fourth District certified a question similar to the question previously certified by the First District in Barnes. Notice to invoke this Court's discretionary jurisdiction was timely filed on December 12, 1991.

### SUMMARY OF THE ARGUMENT

The State requests that this Honorable Court answer the certified question in the negative, and hold that the plain language of §775.084(1)(a)1, Florida Statutes (Supp. 1988) which requires that a defendant must have "...previously been convicted of any combination of two or more felonies..." to be sentenced as a habitual felony offender in no way requires that a second felony be committed after conviction for the first offense.

This result is correct because the plain language of the provision reflects the legislative intent to habitualize a defendant convicted of two or more felonies, regardless of the order of conviction. The line of cases which state that there must be an interim between convictions were based on a 1947 Florida Supreme Court case in which this Court reached this result by construing the then-existing recidivist statutory scheme which is materially different from the 1988 habitual offender statute. The 1988 statute on its face mandates the result arrived at by the trial judge in this case.

ARGUMENT

ISSUE

WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (SUPP. 1988) WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF ANY COMBINATION OF TWO OR MORE FELONIES IN THIS STATE OR OTHER QUALIFIED OFFENSES," REQUIRES THAT A SECOND FELONY BE COMMITTED AFTER CONVICTION FOR THE FIRST OFFENSE

The State respectfully requests that this Court answer the certified question in the negative.

In the opinion below, the appellate court reversed Respondent's habitual felony offender sentence presumably because the two predicate previous convictions were entered on the same date. The court relied on the recent en banc opinion in Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991), review pending, case no. 77,751 (Fla.).<sup>1</sup> Other decisions were also cited. However, Petitioner believes the resolution of this issue in Barnes will be dispositive in the present case.

In Barnes, five dissenting judges of the court agreed that the plain meaning of §775.084(1)(a)1, Florida Statutes (Supp. 1988), does not require, in order for a defendant to be sentenced as a habitual felony offender, that the underlying felony convictions must be separated in time or that the convictions be obtained in separate proceedings. The five dissenting judges recognized that since the statute is neither ambiguous nor unclear, and since no other obvious legislative policy was

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<sup>1</sup> Oral argument in Barnes is set for March 3, 1992.



expressed which conflicts with the statute's literal interpretation, that the plain meaning necessarily controls its construction. The dissenting judges would end the inquiry there and follow the unambiguous language of the statute.

Five of the six judges comprising the majority agreed that the plain language did not require that habitualization must be supported by sequential convictions, stating that "...we are aware that our holding interprets the statute in a manner that goes beyond the plain language of the provision." 576 So.2d at 762. These five judges reasoned, however, that

There is no indication that in amending section 775.084 the legislature sought to alter the purpose behind the habitual offender provision or to exercise the sequential conviction requirement that had long been a part of the law. Had the legislature intended to overturn long-standing precedent and the construction that the courts had placed on the statute, then it was obliged to use unmistakable language to achieve its objective.

576 So.2d at 761.

The majority and the dissent, however, concurred in certifying the following question as one of great public importance:

Whether section 775.084(1)(a)1, Florida Statutes (Supp. 1988), which defines habitual felony offenders as those who have "previously been convicted of two or more felonies," requires that each of the felonies be committed after conviction for the immediately previous offense?

Section 775.084, Florida Statutes (Supp. 1988), the statute under which Barnes and Respondent was sentenced, states in pertinent part:

(1) As used in this act:

(a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if it finds that:

1. The defendant has previously been convicted of two or more felonies in this state;

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 felony or other qualified offense of which he was convicted, 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 a felony or other qualified offense, whichever is later;

3. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this section; and

4. A conviction of a felony or other qualified offense necessary to the operation of this section has not been set aside in any postconviction proceeding.

Petitioner maintains that the statute clearly provides for the sentencing of a defendant as a habitual felony offender if two or more felony convictions have been entered within five years of the instant conviction, regardless of whether the prior convictions were entered the same day.

Initially, §775.084, Florida Statutes (Supp. 1988) on its face clearly does not require that one previous conviction must precede another previous conviction for a defendant to qualify for habitual offender status. To require that there must be an interim between the two or more convictions ignores the plain

meaning of the statute and leads to an absurd result, especially where a defendant habitually engages in felonious behavior of an ongoing nature but, for one reason or another, is convicted and sentenced on one day for multiple separate offenses.

This Court has repeatedly held that unambiguous statutory language must be accorded its plain meaning. Carson v. Miller, 370 So.2d 10 (Fla. 1979). See also Graham v. State, 472 So.2d 464 (Fla. 1985) (when the language of a penal statute is clear, plain, and without ambiguity, effect must be given to it accordingly. Where the language of a statute has a definite and precise meaning, courts are without power to restrict or extend that meaning); Jenny v. State, 447 So.2d 1351 (Fla. 1984) (where a statute is unambiguous and clear upon its face, courts must accord the statute its plain meaning and are not free to construe it otherwise); State v. Egan, 287 So.2d 1 (Fla. 1973) (where legislative intent as evidenced by statute is plain and unambiguous, then there is no necessity for any construction or interpretation of the statute and effect need only be given to the plain meaning of its terms. Rules of statutory construction are useful only in the case of doubt and should never be used to create doubt, but only to remove it); Leigh v. State ex rel. Kirkpatrick, 298 So.2d 215 (Fla. 1974) (when the terms and provisions of a statute are plain, there is no room for judicial or administrative interpretation, and the Legislature is presumed to have meant what it said); Ervin v. Peninsular Tel. Co., 53 So.2d 647 (Fla. 1951) (where the intent of a statute is clear on its face and when it is susceptible of but one construction, that

construction must be given); Citizens of the State of Florida v. Public Service Commission, 435 So.2d 784 (Fla. 1983) (where the words of a statute are clear and unambiguous, judicial interpretation is not appropriate to displace the expressed intent); White v. Pepsico, Inc., 568 So.2d 886 (Fla. 1990) (statutes are construed to effectuate the intent of the Legislature in light of public policy. First, the court must look to the plain and ordinary meaning of the language in the section at issue).

Before the 1988 amendment to §775.084, Florida Statutes, in order to be sentenced as a habitual felony offender, a defendant need only have been previously convicted of one felony prior to the instant conviction. See §775.084(1)(a)(1)(a), Florida Statutes (1987). The provision was amended in 1988 to provide that a habitual felony offender must previously have been convicted of two felonies prior to the instant conviction. See Chapter 88-131, Laws of Florida.

The clear intent of the Legislature in amending the statute was to merely require two predicate felonies instead of one. To read into the new statutory language a requirement that did not exist in the 1987 statute and which was not even hinted at by the Legislature is patently absurd and completely rejects the plain legislative expression. This Court has held that the result of a legislative modification of a statute changes the law of Florida so that the Court's previous decisions in that regard are no longer controlling. Dees v. State, 19 So.2d 705 (Fla. 1944).

In §775.084, Florida Statutes (Supp. 1988), the Legislature specifically listed four predicate conditions for sentencing a defendant as a habitual felony offender. See §775.084(1)(a)1-4. The decision in Barnes effectively adds a fifth condition in direct contravention of the well-settled rule that the express mention of one thing implies exclusion of another (*expressio unius est exclusio alterius*). See e.g. Thayer v. State, 335 So.2d 815 (Fla. 1976).

The district court of appeal cases which have determined that prior convictions entered the same day do not qualify as the "two or more felonies" required by the 1988 version of the habitual offender statute have relied on this Court's opinion in Joyner v. State, 30 So.2d 304 (Fla. 1947), and the line of cases which follow Joyner. The rationale exposed in Joyner, however, no longer applies to the 1988 habitual offender statute. This Court's decision in Joyner was predicated on the particular configuration of the then-existing habitual offender statutory scheme found in §§775.09 and 775.10, Florida Statutes (1941), which were as follows:

775.09 Punishment for second conviction of felony. - A person who, after having been convicted within this state of a felony or an attempt to commit a felony, or under the laws of any other state, government or country, of a crime which, if committed within this state would be a felony, commits any felony within this state is punishable upon conviction of such second offense as follows: If the subsequent felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then such person must be sentenced to imprisonment for a term no less than the longest term

nor more than twice the longest term prescribed upon a first conviction.

775.10 Punishment for fourth conviction of felony. - A person who, after having been three times convicted within this state of felonies or attempts to commit felonies or under the law of any other state, government or country of crimes which, if committed within this state, would be felonious, commits a felony within this state shall be sentenced upon conviction of such fourth or subsequent offense to imprisonment in the state prison for the term of his natural life. A person to be punishable under this and the preceding section need not have been indicted and convicted as a previous offender in order to receive the increased punishment therein provided, but may be proceeded against as provided in the following section.

In explaining this two-tiered system, the court stated:

To constitute a second or a fourth conviction within the purview of Sec. 775.09 or Sec. 775.10, supra, the information or indictment must allege and the evidence must show how that the offense charged in each information subsequent to the first was committed and the conviction therefor was had after the date of the then last preceding conviction. In other words, the second conviction must be alleged and proved to have been for a crime committed after the first conviction. The third conviction must be alleged and proved to have been for a crime committed after both the first and second convictions, and the fourth conviction must be alleged and proved to have been for a crime committed after each of the preceding three convictions...

If there was no second offense chargeable as contemplated by the statute certainly such second conviction could not be used as a basis for charging the offense contemplated by Sec. 775.10, supra.

Sec. 1 of the 1927 Act, now Sec. 775.09, fixed the standard for the determination of the question as to whether or not one could be prosecuted as a second or subsequent offender and, as hereinbefore, said, without it being required that the second offense should have been committed after the first conviction and that the third offense should have been committed after the second conviction, and so on. Under the standard so fixed, the requirement is clearly apparent...

Joyner, supra at 306.

The two-tiered system of habitualization for felony offenses has not existed since 1971, when the Legislature enacted Section 775.084, Fla. Stat. (1971), which stated in pertinent part that in order to be habitualized, it must be demonstrated that

(c) The defendant has previously committed a felony in this state or another qualified offense which was committed after the defendant's seventeenth birthday. For the purpose of this subsection, the term "qualified offense" includes any crime in violation of a law of another state or of the United States that was punishable under the laws of such state or the United States at the time of its commission by the defendant by death or imprisonment exceeding one year.

(d) The felony for which the defendant is to be sentenced was committed within five years of the date of the commission of the last prior felony or other qualified offense of which he was convicted, or within five 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 a felony or other qualified offense, whichever is later.

The 1971 change from the tiered system signaled an end to the sequential conviction requirement construed in Joyner. The

Joyner court's rationale for requiring sequential convictions was twofold. The first reason was based on the configuration of the statutes:

This construction is implicit in the statutes. The statute was originally chapter 12022, Acts of 1927. The present Sections (775.09, 775.10 and 775.11, supra, were respectively sections 1, 2 and 3 of that Act, Sec. 775.09, supra) provide in terms that the second offense must have been committed subsequent to the first conviction.

Joyner, supra at 306.

The second reason was:

because the purpose of the statute is to protect society from habitual criminals who persist in the commission of crime after having been theretofore convicted and punished for crimes previously committed. It is contemplated that an opportunity for reformation is to be given after each conviction.

Joyner, supra at 306.

Petitioner submits that there is no indication whatsoever that the "opportunity for reformation" policy of the halcyon days of the 1940s continues to apply to the crime-ridden 1990s. The majority opinion in Barnes finds that there has been no change in this policy, stating:

Having examined the staff analyses for the Senate and House Committee on Criminal Justice, we find no indication of a shift in legislative intent, nor is there a suggestion that the change in language was directed at the sequential conviction requirement. See Senate Staff Analysis, S. Bill 307, June 1, 1988, p.2; House of Representatives Committee on Criminal Justice, Staff Analysis, H. Bill 1710, May 20, 1988, pp.1-2.



576 So.2d at 762.

This reasoning is astonishing in that it elevates the role of the legislative staff above that of the Legislature itself. The Legislature has taken the ground out from under the Joyner sequential conviction rationale by deleting the language and the tiered system on which it rested. The court below implicitly holds that enactment of the amended statute is not enough, that it must be accompanied by a staff report stating that deletion of the language overrules judicial decisions based on the deleted language. There is no rule of statutory interpretation requiring that unambiguous language be "explained" by a staff report or other language within a newly enacted statute.

The United States Supreme court has held that courts should be faithful to the meaning of a statute, and, if legislative policy is couched in vague language, a court should not stifle a policy by a pedantic process of construction, but the court cannot draw on some unexpressed spirit outside of the normal meaning of the words.

This Court has held that it has a duty to interpret the law as given to it by the people in the constitution or by the Legislature, and is not permitted to substitute judicial cerebration for the law or command the enforcement of that which the Supreme Court might think the law should be. In re Investigation of Circuit Judge of Eleventh Judicial Circuit of Fla., 93 So.2d 601 (Fla. 1957).

The district courts of appeal which have addressed the issue at bar before Barnes have considered themselves bound by the

rationale espoused in Joyner in 1947, even though the statutory scheme on which Joyner was based has changed in a material way. Section 775.084, Florida Statutes (Supp. 1974) stated, in pertinent part:

775.084 Subsequent felony offenders;  
extended terms. -

(1) Unless otherwise specifically provided by statute, the court, after reasonable notice to the parties and opportunity to be heard, may sentence a person who has been convicted of a felony within this state to the punishments provided in this section if it finds all the following:

(a) The imposition of sentence under this section is necessary for the protection of the public from further criminal activity by the defendant;

(b) The defendant has previously committed a felony or has twice previously been convicted of a misdemeanor of the first degree in this state or another qualified offense which was committed after the defendant's 18th birthday. For the purpose of this subsection, the term "qualified offense" includes any offense in violation of a law of another state or of the United States that was punishable under the laws of such state or the United States at the time of its commission by the defendant by death or imprisonment exceeding 1 year or that was equivalent in penalty to a misdemeanor of the first degree;

The death of the two-tiered statutory scheme should have alerted the district courts to the death of the Joyner rationale that an interim period between convictions was required for habitual offender sentencing; but the Third District relied on Joyner when it ruled that simultaneous convictions of two misdemeanors committed on the same day did not meet the statutory

requirement of "twice previously been convicted of a misdemeanor", based on §775.084, Florida Statutes (1975). Shead v. State, 367 So.2d 264 (Fla. 3rd DCA 1979).

The same flawed rationale was relied on in Snowden v. State, 449 So.2d 332 (Fla. 5th DCA 1984), quashed on other grounds, 476 So.2d 191 (Fla. 1985). In Wilken v. State, 531 So.2d 1011 (Fla. 4th DCA 1988), the court felt that it was bound by Joyner, but expressed some hesitation, stating:

Even though the above principle was said to be implicit in the statutes, Joyner mentions that the habitual offender statutes in effect in 1947 made explicit reference to the requirement that the second offense have been committed after conviction for the first. Inspection indicates this was found in then section 775.09, but not the two succeeding sections which also were habitual offender statutes. We find no such language in the present statute, which appears to be something more than a mere rewrite of previous law.

Wilken, 531 So.2d at 1011, 1012.

In Taylor v. State, 558 So.2d 1092 (Fla. 5th DCA 1990), the Fifth District considered an enhanced sentence pursuant to §775.084, Florida Statutes (Supp. 1988), and reversed that sentence, relying on Joyner and the subsequent cases discussed above. The court stated:

In the case *sub judice*, although the State did prove that Taylor had been previously convicted of 12 felonies, each felony was contained in the same judgment of conviction. Thus, none of the felonies could have been committed after conviction of an initial felony and the court erred in enhancing Taylor's sentence.

Taylor, supra at 1093. <sup>2</sup>

Petitioner submits that the clear legislative mandate to give enhanced sentences to felons who have the predicate two felony convictions is thwarted by continued reliance on Joyner. This is particularly evident considering a further change in Florida law regarding sentencing which supports the State's position. Rule 3.701(d)(1), Fla.R.Crim.P. requires in pertinent part that "(o)ne guidelines scoresheet shall be utilized for each defendant covering all offenses pending before the court for sentencing." This Court recently expanded this rule, holding that:

Defendants should be allowed to move a trial court to delay sentencing so that a single scoresheet can be used in two or more cases pending against the same defendant in the same court at the same time, regardless of whether a plea of guilty or nolo contendere or a conviction has been obtained. The trial court must grant the motion, we believe, when the defendant can show that the use of a single scoresheet would not result in an unreasonable delay in sentencing. For each sentence that would not be unreasonably delayed, the trial court must order simultaneous sentencing.

Clark v. State, 572 So.2d 1387, 1391.

Thus, Rule 3.701, Fla.R.Crim.P., which was enacted in 1988, effectively mandates that even though one offense and conviction may precede another, the cases must be consolidated for

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<sup>2</sup> But see: DeBose v. State, 580 So.2d 638 (Fla. 5th DCA 1991), and Valentine v. State, 577 So.2d 714 (Fla. 5th DCA 1991), which seem to suggest a different view.

sentencing, with the result that "convictions" may be entered simultaneously even though the offenses were not simultaneous.

But for Rule 3.701, Petitioner maintains that an argument based on Joyner v. State, and its progeny would not even apply to the majority of cases in which Appellants rely on Joyner. Consolidating cases for adjudication and sentencing is undeniably in the interest of judicial economy, but judicial economy does not change the fact that separate offenses are still separate, regardless of whether offenses are consolidated for purposes of entering judgment and sentence. Prohibiting habitualization in these circumstances would allow a rule of judicial convenience to take precedence over a substantive legislative pronouncement. This defeats the clear legislative intent of permitting trial courts to habitualize defendants who have "...previously been convicted of any combination of two or more felonies...", as well as the statement of legislative intent set forth in §921.001(4)(c)(2), Florida Statutes (1989), that intent being to "provide substantially enhanced terms of imprisonment for habitual felony offenders". By perpetuating the outdated policy dicta set forth in Joyner v. State in 1947, this clear intent is thwarted.

Further, the Barnes majority's construction of §775.084, F.S. (Supp. 1988) ignores the amendment to the rules of construction which was submitted in the same bill as the amendment to §775.084; Florida Statutes Section 775.021(4)(a) (Supp. 1988) requires that a defendant be sentenced separately for each criminal offense. Subsection (b) states that

The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent.

It is clear that the habitual offender statute was enacted for the benefit of the public by protecting the public from habitual criminals. Statutes enacted for the benefit of the public should be construed liberally in favor of the public even though they contain penal provisions. State v. Hamilton, 388 So.2d 561 (Fla. 1980). A proper construction of §775.084(1)(a), Florida Statutes (Supp. 1988) would thus permit habitual offender sentencing for a defendant found to have been previously convicted of two or more felonies, regardless of the timing of the convictions obtained therefrom, as the statute plainly says.


As stated in the dissenting opinion in Barnes, "[i]n a situation such as we have in the instant case, the courts should refrain from legislating and follow the legislative intent as expressed in the unambiguous language of the state itself." Barnes, supra at 766.

CONCLUSION

Based upon the foregoing argument and citation of legal authorities, Petitioner urges this Honorable Court to answer the certified question in the negative and hold that §775.084(1)(a)1, Florida Statutes (Supp. 1988) should be applied according to the plain language expressed by the Legislature therein, thus reversing the opinion below and reinstating the Respondent's habitual felony offender sentence.

Respectfully submitted,

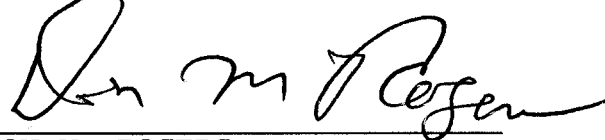
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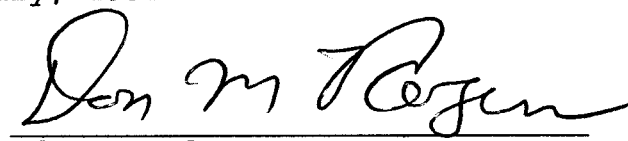
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Petitioner's Brief on the Merits" has been forwarded by United States Mail to: TIMOTHY ROSS, PRO SE, DC#111991, Marion Correctional Institution, P. O. Box 158-2102, Lowell, Florida, 32662, this 13<sup>th</sup> day of January, 1992.

  
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Of Counsel

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