IN THE SUPREME COURT OF FLORIDA

ROBERT ALTON BECKER,

Petitioner,

v. CASE NO. 79,392

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

NADA M. CAREY
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR NO. 0648825

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

CONSTITUTIONS

IN THE SUPREME COURT OF FLORIDA

ROBERT ALTON BECKER,

Petitioner,

v. CASE NO. 79,392

STATE OF FLORIDA,

Respondent.

_____:

INITIAL BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

This case is before the Court on discretionary review *of* two questions certified by the First District Court of Appeal as questions of great public importance. ROBERT ALTON BECKER was the defendant/appellant below and will be referred to as "petitioner." The State of Florida, plaintiff/appellee below, will be referred to as "the state." The record will be referred to as "R" and the three-volume transcript as "T."

STATEMENT OF THE CASE AND FACTS

A jury found petitioner, Robert Alton Becker, guilty of burglary (R 22, T 139). Following conviction, the state sought to have petitioner sentenced as a habitual violent felony offender. In support, it offered evidence of a 1988 conviction for armed burglary (R 28-31, T 156-57). Based solely on this single prior offense, the court found petitioner to be a habitual violent offender (T 160), and sentenced him to 30 years in prison with a 10-year minimum mandatory (R 46-49, T 163). On appeal, the First District Court of Appeal rejected petitioner's argument that an enhanced sentence may not be imposed for a nonviolent offense and that his sentence violated constitutional due process, equal protection, double jeopardy and ex post facto guarantees but certified two questions addressing those issues. Becker v. State, 17 FLW D D425 (Fla. 1st DCA Feb. 7, 1992).[1] This Court postponed its decision on jurisdiction and ordered briefs on the merits.

---

[1] The First District previously certified the same questions in Reeves v. State, 17 FLW D281 (Fla. 1st DCA Jan. 17, 1992), review pending. The statutory and constitutional issues also are before this Court in Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), review pending, no. 78,715, and Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), review pending, no. 78,613. The due process issue is pending in Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991), review pending, no. 78,179.

CERTIFIED QUESTIONS

I. DOES SECTION 775,084, FLORIDA STATUTES (1989), AUTHORIZE HABITUAL FELON SENTENCING FOR A CRIMINAL DEFENDANT WHO HAS PREVIOUSLY BEEN CONVICTED OF A VIOLENT OFFENSE ENUMERATED IN THE STATUTE, BUT WHO IS CURRENTLY BEING SENTENCED FOR A NON-VIOLENT OFFENSE?

11. IF SECTION 775.084, FLORIDA STATUTES (1989), AUTHORIZES HABITUAL FELON SENTENCING FOR A CRIMINAL DEFENDANT WHO IS CURRENTLY BEING SENTENCED FOR A NON-VIOLENT OFFENSE, DOES THE STATUTE VIOLATE THE CONSTITUTIONAL PRINCIPLES OF EQUAL PROTECTION, DUE PROCESS, DOUBLE JEOPARDY, OR EX POST FACTO?

SUMMARY OF ARGUMENT

I. Principles of statutory construction require that an offense for which the state seeks an enhanced punishment as a habitual violent felony offender be an enumerated, violent felony. The title evinces a legislative intent to require that the instant felony be a violent crime, so that the punishment comports with the term "habitual violent felony offender." The phrase, "The felony for which the defendant is to be sentenced" should be construed together with the act's title to read "The [violent enumerated] felony. . . ." This construction is consistent with the plain meaning of the word habitual and achieves the evident legislative intent to punish habitual violent crime more severely. Additionally, this reading of the statute is required to avoid the constitutional defects explored below.

11. If the Court rejects this interpretation, the statute suffers several fatal constitutional defects. Thus interpreted, the statute bears no substantial and reasonable relationship to its objective of punishing repetition of violent crime because it permits imposition of an enhanced sentence as a habitual violent felon upon one who has committed a single violent felony. The statute violates the equal protection clauses found in our federal and state constitutions because there is no rational basis for punishing persons convicted of committing a violent crime and then a nonviolent crime more severely than persons convicted of committing a

nonviolent crime and then a violent crime. The statute's fixation on the prior offense, for which an offender has already been punished, also renders the enhanced sentence a violation of constitutional prohibitions against double jeopardy. When the prior offense predates the amendment creating habitual violent offender sentencing, the statute also violates constitutional protections against *ex* post facto laws.

ARGUMENT

ISSUE 1

TO AVOID INTERNAL CONFLICT AND CONSTITUTIONAL DEFECTS, THE HABITUAL VIOLENT FELONY PROVISIONS OF SECTION 775.084, FLORIDA STATUTES, MUST BE CONSTRUED *TO* REQUIRE THAT THE OFFENSE FOR WHICH A SENTENCE UNDER THOSE PROVISIONS IS IMPOSED BE A VIOLENT, ENUMERATED FELONY.

In 1988, the legislature amended section 775.084, Florida Statutes, creating among other changes a new classification, habitual violent felony offender. Ch. 88-131, s. 6, Laws of Fla. Section 775.084(1)(b), Florida Statutes (1989), now defines a habitual violent felony offender as one who has committed one of 11 violent felonies within the past five years, or been released from a prison sentence for one of these crimes within the past five years, and then commits a new felony. Section 775.084(4)(b) provides enhanced penalties for those who qualify, including mandatory minimum terms.

The habitual violent felony provisions suffer internal conflict. The statute's title invokes the term "habitual violent felony offenders." The term is repeated in section 775.084(1)(b). The word habitual denotes an act of custom or habit, something that is constantly repeated or continued. Oxford American Dictionary (1980 ed,). However, section 775.084(4)(b) defines a habitual violent felony offender as one who commits a felony within five years of a prior, enumerated violent felony. The statute may thus be construed as permitting habitual violent felony enhancement for an

unenumerated, nonviolent instant offense, as it was here. That construction permits a habitual violent felony offender sentence for a single, prior crime of violence.

Courts have a duty to reconcile conflicts within a statute. In re Nat'l Auto Underwriters Ass'n, 184 So.2d 901 (Fla. 1st DCA 1966); Vocelle v. Knight Bros. Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960). A court may resolve the conflict by considering the title of the act and legislative intent underlying it, and by reading different sections of the law in pari materia. See Parker v. State, 406 So.2d 1089 (Fla. 1981)(legislative intent); State v. Webb, 398 So.2d 820 (Fla. 1981)(title of the act): Speights v. State, 414 So.2d 574 (Fla. 1st DCA 1982)(in pari materia). If doubt over the meaning of the law remains, the court must apply a strict scrutiny standard and resolve the ambiguity in favor of the defendant. State v. Wershow, 343 So.2d 605 (Fla. 1977). This result is consistent with the rule of lenity, a creature of statute in Florida. S. 775.021(1), Fla. Stat. (1989). The rule of lenity, which requires the construction most favorable to the accused when different constructions are plausible, covers the entire criminal code, sentencing provisions included. Cf. Bifulco v. State, 447 U.S. 381, 387 (1980)(federal rule of lenity applies to interpretation of penalties imposed by criminal prohibitions).

Applying these principles, this Court should find that the instant offense must be a violent felony, as enumerated in

section 775.084(4)(b)(1), to subject the offender to habitual violent felony sentence enhancement. The statute is certainly susceptible of different constructions on this point. See Canales v. State, 571 So.2d 87, 89 (Fla. 5th DCA 1990)(in dicta, court states that when requirement of prior violent felony is met, legislature intended offender be eligible for enhanced penalty "for a subsequent Florida violent felony"). The title evinces a legislative intent to require that the instant felony be a violent crime, so that it comports with the term ''habitual violent felony offender." The phrase, "The felony for which the defendant is to be sentenced" in section 775.084(1)(b)(2), should be construed together with the act's title to read "The [violent enumerated] felony. . . ." This construction is consistent with the plain meaning of the word habitual, achieves the evident legislative intent to punish habitual violent crime more severely, and comports with the rule of lenity. Additionally, this reading of the statute is required to avoid the constitutional defects explored below. See Schultz v. State, 361 So.2d 416, 418 (Fla. 1978)(when reasonably possible, a statute should be construed so as to avoid conflict with the Constitution).

Adoption by the Court of this interpretation does not require reconsideration of the statute as a whole, or review of sentences imposed under the nonviolent provisions. Presumably, only a small portion of sentences imposed under the habitual violent felony offender provisions are for commission of

nonviolent instant offenses. These provisions would remain fully viable, although available in more limited circumstances.

ISSUE II

IF SECTION 775.084, FLORIDA STATUTES (1989), IS CONSTRUED TO AUTHORIZE HABITUAL FELON SENTENCING FOR A CRIMINAL DEFENDANT WHO IS CURRENTLY BEING SENTENCED FOR A NON-VIOLENT OFFENSE, THE STATUTE VIOLATES THE CONSTITUTIONAL PRINCIPLES OF DUE PROCESS, EQUAL PROTECTION, DOUBLE JEOPARDY, AND EX POST FACTO.

A. Due Process and Euual Protection

If a construction of the statute that does not require the instant offense to be an enumerated violent felony is approved, the habitual violent felony provisions fail the due process test of "a reasonable and substantial relationship to the objects sought to be obtained." See State v. Saiez, 489 So.2d 1125 (Fla, 1986); State v. Barquet, 262 So.2d 431 (Fla. 1972); **U.S. Const., amend. V;** art. I, s. 9, Fla. Const. As noted above, the label "habitual violent felony offender" purports to enhance the punishment of those who habitually commit violent felonies. S. 775.084(1)(b), Fla. Stat. This is the object the statute seeks to attain. However, as applied by the trial court, the statute does not require the current offense to be an enumerated violent felony. Here, the state established only one prior violent felony, armed burglary, plus the instant, nonviolent offense of burglary. On this record, there is no evidence of a habit of violent crime.

The First District's rationale in upholding the statute is both circular and off the mark. In Perkins, the First District reasoned that the statute serves a "general objective of

providing additional protection to the public from certain repetitive felony offenders," and that enhancing the sentence of one who has previously committed a violent offense serves that objective. 583 So.2d at 1104. This nebulous view of the statute's objective led the court into circular reasoning, that is: the legislature's actions define its purpose, and therefore the actions comport with that purpose.

The same court took a slightly different tack in rejecting a similar due process argument in Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991), review pending, No. 78,179. In Ross, the court stated, "[i]n our view, just as the state is justified in punishing a recidivist more severely than it punishes a first offender, its even more severe treatment of a recidivist who has exhibited a propensity toward violence is also reasonable.'' Id. at 878. Petitioner has no quarrel with this proposition, except that the court's use of the word "propensity" does not reflect the showing required for habitual violent felon enhancement. Propensity connotes tendency or inclination. If the habitual violent provisions required that the state establish commission of two prior violent felonies, a propensity would be shown. However, a single, perhaps random act of violence does not fit within the common understanding of the word. In a guideline departure case, Judge Cowart of the Fifth District Court of Appeal has noted:

> If the term "pattern" is not carefully defined by reference to objective criteria, looking for a "pattern" in a defendant's criminal record is like looking for a pattern

> or figure in the moon, or in the clouds or in the Rorschach test or in tea leaves or in sheep entrails--the process is highly subjective and the result is in the eye of the beholder. One ***sees*** largely what one wants to see. Those who do not like guideline sentencing can always say, "I spy a pattern and two offenses show continuous and persistent conduct!"

Lipscomb v. State, 573 So.2d 429, 436 (Fla. 5th DCA), review dismissed, 581 So.2d 1309 (1991)(Cowart, J., dissenting), The manner in which the Ross court employed the word "propensity" sparks the same concern. By any objective measure, one violent offense does not establish a propensity. Moreover, as noted above, the expressed legislative intent is to punish habitual violent conduct, not merely a loosely defined propensity.

The statute's purpose is to punish repetition of violent crime, and the provisions at issue fail to rationally and substantially effectuate that purpose. As noted previously, in the instant case, there is no evidence of a habit of violent crime as the state established only one prior violent felony, armed burglary, plus the instant, nonviolent burglary. The statute permits an even greater absurdity: A defendant may be convicted of attempted aggravated assault -- a misdemeanor -- in 1986, then be sentenced to 30 years with a 10-year mandatory minimum term in 1991 as a habitual violent offender for dealing in stolen property. Thus, despite its objective as expressed four times in the statute's use of the term "habitual violent felony offender," the only habit this construction of the statute punishes is crime, not necessarily felonious crime and

certainly not habitual violent felonious crime. The failure of the contested provisions to reasonably and substantially relate to their purpose renders their application a violation of due process of law.

If construed so as not to require the current offense to be an enumerated violent felony, the statute also fails the equal protection test of a classification that bears some rational relationship to the statute's purpose. See U.S. Const., amend. XIV; art. I, s. 2, Fla, Const.; Vildibill v. Johnson, 492 So.2d 1047, 1050 (Fla. 1986); Rollins v. State, 354 So.2d 61, 63 (Fla. 1978); Mikell v. Henderson, 63 So.2d 508 (Fla. 1953).

On its face, the statute subjects a person convicted of a violent crime, who then commits a second nonviolent crime, to habitual violent felony sentencing but does not subject a person convicted of a nonviolent crime, who then commits a second violent crime, to such enhanced sentencing. In other words, offenders who commit a violent crime first and a nonviolent crime second may be classified as habitual violent felons; offenders who commit a nonviolent crime first and a violent crime second may not be classified as habitual violent felons.

There is no rational basis for punishing a person convicted of a nonviolent offense after a violent offense more severely than a person convicted of a violent offense after a nonviolent offense. If anything, the policy of the law is to

punish more severely persons whose crimes become more serious over time, not less serious. See Keys v. State, 500 So.2d 134 (Fla. 1986)(escalation of defendant's crimes from crimes against property to violent crimes against persons is valid reason for imposing greater sentence than authorized by guidelines). Absent a rational basis, the statute must fall. Accordingly, this Court should construe section 775.084 as allowing habitual violent felony sentencing only for enumerated violent crimes to avoid a violation of appellant's right to equal protection of the laws.

B. Double Jeopardy and Ex Post Facto

The state and federal constitutions both forbid imposition of ex post facto laws and twice placing a defendant in jeopardy for the same offense. U.S. Const,, art. I, s. 10, cl. 1; amend. V; art. I, ss. 9, 10, Fla. Const. The First District Court of Appeal has noted that the violent felony provisions of the amended habitual offender statute implicate constitutional protections. Henderson v. State, 569 So.2d 925, 927 (Fla. 1st DCA 1990). The fixation of the habitual violent felony provisions on prior offenses renders application of this statute to petitioner a violation of these protections.

To punish a defendant as a habitual violent felony offender, the state need only show that he has one prior offense within the past five years for a violent felony enumerated within the statute. The current offense need meet no criteria, other than that it be a felony committed within

five years of commission, conviction, or conclusion of punishment for the prior "violent" offense. Analysis of the construction of this statute and its potential uses leads to an inescapable conclusion: that the enhanced punishment is not for the new offense, to which the statute pays little heed, but instead for the prior, violent felony. The almost exclusive focus on this prior offense renders use of the statute a second punishment for that offense, violating state and federal double jeopardy prohibitions. When that prior offense also occurred before enactment of the amended habitual offender statute, as did petitioner's 1988 armed burglary offense,[2] the statute's use also violates prohibitions against ex post facto laws.

An *ex* post facto violation occurs when a statutory change applies to events occurring before its enactment, and disadvantages the offender affected by it. Miller v. Florida, 482 U.S. 423, 430, 107 S.Ct. 2446, 96 L.Ed.2d 351, 360 (1987). The amendment to the habitual offender statute applies in the instant case to petitioner's pre-amendment offense. He is disadvantaged by it in that he is deprived of the limitation of the statutory maximum for the current offense, deprived of eligibility for a guideline sentence, and required to serve a

---

[2]The effective date of the habitual violent felony offender law was October 1, 1988. Ch. 88-131, s. 9, Laws of Fla. Petitioner's prior enumerated violent felony of armed burglary was committed on July 25, 1988 (T 32).

mandatory minimum term. On its face, application of the amendment to petitioner creates an *ex* post facto violation.

Habitual offender and enhancement statutes have been upheld against challenges similar to the one made here, as long ago as 1948, on the grounds that the enhanced sentence was based not on the prior offenses but on the offense pending for sentencing, **See**, e.g., Gryger v. Burke, 334 U.S. **728, 68** S.Ct. **1256, 92** L.Ed. **1683 (1948).** In **Gryger**, the Court explained:

> The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.

Id. at **732,** 68 S.Ct. **at** 1258, 92 L.Ed. **1683.** Using the same reasoning, Florida's courts also have rejected challenges **based** on double jeopardy arguments. See generally, Reynolds v. Chochran, 138 So.2d 500 (Fla. 1962); Washington v. Mayo, 91 So.2d 621 (Fla. 1956); Cross v. State, 96 Fla. **768,** 119 **So. 380** (1928). If the provisions in question were more concerned with repetition, the inquiry might end here. The only repetition on which this portion of the statute dwells, however, is the repetition of crime, not the repetition of violent crime. Its focus on the character of the prior crime, without regard to the nature of the current offense, distinguishes Florida's habitual violent felony offender sentencing scheme from other enhanced sentencing provisions. **See** Hall v. State, 588 So.2d **1089** (Fla. 1st DCA 1991) (Zehmer, J., concurring). This

distinction is the point at which the amended statute runs afoul of constitutional double jeopardy clauses.

The First District Court of Appeal did not meaningfully address this distinction in Ross or Perkins. In Perkins, the court merely rejected Perkins' arguments on the authority of Washington, Cross and Reynolds, concluding that "the reasoning of these cases is equally applicable to this enactment." 583 So.2d at 1104. Perkins thus left unaddressed the constitutional implications identified by the panel in Henderson.

The amended statute also differs from recidivist schemes focused on repetition of a particular type of crime. In United States v. Leonard, 868 F.2d 1393 (5th Cir. 1989), enhancement of a sentence under a federal enhancement statute was upheld against an ex post facto attack. Leonard was convicted of possession of a firearm by a convicted felon and sentenced under the Armed Career Criminal Act, which authorized increased punishment for that offense upon proof of conviction of three prior enumerated violent or drug felonies. Id. at 1394-95. In contrast to the statute at issue here, the federal statute applied exclusively to persons convicted of a specific offense, possession of a firearm by a convicted felon. In that respect, the defendant was being punished primarily for the instant offense, and double jeopardy and ex post facto provisions were not violated. Id. at 1400, In contrast, the Florida provisions at issue focus not on any specific offense pending

for sentencing but on the character of a prior offense for classification purposes. Consequently, an offender subjected to the operation of section 775.084(4)(b), Florida Statutes, is being punished more for the prior offense than for the current one. In effect, as noted by Judge Zehmer in Hall, this then is a second punishment for the prior offense, barred by the state and federal constitutions. 588 So.2d at 1089 (concurring opinion).

CONCLUSION

Either the statute must be construed to require that the offense for which the sentence is imposed be an enumerated felony, or the statute must be held a violation of constitutional due process, equal protection, double jeopardy, and ex past facto provisions. As either result applies only to those sentenced as habitual violent felons for commission of a nonviolent felony, retroactive application would require resentencing of a relatively small portion of those sentenced as habitual offenders since the 1988 amendment. Petitioner therefore requests that this Honorable Court vacate his sentence and remand for resentencing without resort to the habitual violent felon provisions of section 775.084.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Nada M Carey

NADA M. CAREY
Assistant Public Defender
Fla. Bar No. 0648825
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Sara D. Baggett, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399; and a copy has been mailed to petitioner ROBERT ALTON BECKER, on this 17th day of March, 1992,

Nada M. Carey

NADA M. CAREY

IN THE SUPREME COURT OF FLORIDA

ROBERT ALTON BECKER,

Petitioner,

v. CASE NO. 79,392

STATE OF FLORIDA,

Respondent.

APPENDIX TO INITIAL BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

NADA M. CAREY
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR #0648825

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

ROBERT ALTON BECKER,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED,

v.

CASE NO. 91-1320

STATE OF FLORDIA,

Appellee.

_____/

Opinion filed February 7, 1992.

An appeal from the Duval County Circuit Court, John D. Southwood, Judge.

Nancy A. Daniels, Public Defender; Nada M. Carey, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Sara D. Baggett, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

We affirm the habitual violent felony offender sentence imposed upon appellant following his conviction for burglary of a dwelling, a second-degree felony. We reject appellant's constitutional challenges to the habitual violent felony offender provision as well as his argument that an enhanced sentence may not be imposed for a non-violent offense. See Perkins v. State,

583 So.2d 1103 (Fla. 1st DCA 1991); Henderson v. State, 569 So.2d 925 (Fla. 1st DCA 1990). As was done in Reeves v. State, 17 F.L.W. D281 (Fla. 1st DCA January 17, 1992), we certify to the Florida Supreme Court the following questions of great public importance:

(1) DOES SECTION 775.084, FLORIDA STATUTES (1989), AUTHORIZE HABITUAL FELON SENTENCING FOR A CRIMINAL DEFENDANT WHO HAS PREVIOUSLY BEEN CONVICTED OF A VIOLENT OFFENSE ENUMERATED IN THE STATUTE, BUT WHO IS CURRENTLY BEING SENTENCED FOR A NON-VIOLENT OFFENSE?

(2) IF SECTION 775.084, FLORIDA STATUTES (1989), AUTHORIZES HABITUAL FELON SENTENCING FOR A CRIMINAL DEFENDANT WHO IS CURRENTLY BEING SENTENCED FOR A NON-VIOLENT OFFENSE, DOES THE STATUTE VIOLATE THE CONSTITUTIONAL PRINCIPLES OF EQUAL PROTECTION, DUE PROCESS, DOUBLE JEOPARDY, OR EX POST FACTO?

SHIVERS, BOOTH and MINER, JJ., CONCUR.