IN THE SUPREME COURT OF FLORIDA

ARRICES MERRIWEATHER,

Petitioner

v.

CASE NO.: 79,572

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Arrices Merriweather, defendant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred herein as either "Respondent" ok "the State." References to the record on appeal will be by the symbol "R" followed by the appropriate page number. References to the transcripts of proceedings will be by the symbol "T" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

ISSUE I: The record establishes that the petitioner has not properly preserved the issue presented in this brief. The issue presented by the petitioner was not raised in the trial court. Since the issue was not properly preserved and does not amount to fundamental error, this court should deny further review.

ISSUE 11: It is well settled law that habitual offender legislation is constitutional. Over the decades, it has withstood challenge after challenge. Petitioner's claims that habitual offender statute violates the due process clause, the prohibition against double jeopardy, and is ex post facto have been repeatedly rejected. His application of these long rejected arguments to the new habitual violent offender section fails to pump any validity into these tired old arguments. Therefore, this court should deny relief.

Petitioner's attempts to revitalize his argument by using certain principles of statutory construction to bolster his argument. His attempt to redefine the meaning of the statute must also be rejected. Petitioner's argument ignores the fundamental principle of statutory construction which is court must give unambiguous statutory language its plain meaning. Therefore, this court should deny petitioner the relief he requests.

ARGUMENT

ISSUE I

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

Petitioner has presented this court with an issue that was not properly preserved for review. Therefore this Court should dismiss the case on the ground that review was improvidently granted.

A. Jurisdictional Problems With Petitioner's Issue.

Totally absent from petitioner's attack upon the habitual violent felon statute is any reference to the manner in which this issue was raised in the trial court. Upon review of the record the reason for the omission becomes clear. Trial counsel did not challenge the constitutionality of the statute.[1] Thus, the issue petitioner raises was not properly preserved and this court should decline to review it.

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

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[1] Defense counsel instead raised the issues of the proof of the prior convictions, the intent of the habitual offender statute, and the alleged lack of threat to others posed by the petitioner (R 266-269).

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 contendre 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. [citations omitted]." Steinhorst v. State, 412 So.2d 332, 338

(Fla. **1982).** Therefore, unless Petitioner can show fundamental error, he has not established a basis for this court to exercise its jurisdiction.

Fundamental Error

Petitioner's claims do not amount to fundamental error, thus, petitioner has not established a basis for this court to exercise its jurisdiction.

The meaning of "fundamental error" has been frequently addressed by the Florida Supreme Court and the various 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. More specifically, the district court held a special act was unconstitutional because the title of the act did not fully reflect the contents of the act. This was contrary to Article 111, section 16 of the Florida Constitution of **1885** according **to** the court.

The Florida Supreme 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 reinstsuctions, 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.

The Supreme 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.")

The 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 are legion. Representative cases include:

(1) 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, the suggestion made in the brief do not properly present the validity of the law for consideration by this court". **Id.**

(2) Silver v. State, 188 So.2d **300, 301** (Fla. **1966)** (Court strongly criticizes and refuses to condone decision of

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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.

district court to indulgently address constitutionality of statute where constitutionality not raised in trial court).

(3) **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.)

(4) **Eutzy v. State, 458** So.2d 755, 757 (Fla. 1984) (Issue of constitutionality of statutory authority to override jury recommendation in death penalty case not cognizable for first time on appeal.)

The case of Davis v. State, **383** So.2d 620, 622 (Fla. 1980) is particularly instructive because 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. The Florida Supreme 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 any 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 judgment of the circuit court is not disturbed.

Id. In this connection, 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, i.e. must be reserved.

The above haldings are also reflected in other court's case law. See 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 first time on appeal).

It might be suggested that the above holdings apply only to the constitutionality of statutes under which a defendant is convicted and not to statutes under which he is sentenced. Such a suggestion would be ludicrous because it would illogically elevate sentencing issues to a position of supremacy over guilt issues. In any event, the courts have applied the same rule 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 in the trial court appellant did not challenge the constitutionality of the statute. Pursuant to the case law above, the issue here is whether the constitutionality of the habitual violent offender statute is so fundamental a concern as to violate due process and to justify consideration of the issue although it was not raised below. The answer of absolutely not is quickly apparent to the reader of the extensive case law discussed above.

Due process takes two forms, substantive and procedural. Substantive due process requires only that there be a rational basis for the legislative enactment of the habitual offender statute. **State v. Saiez, 489** So.2d 1125, 1129 (Fla. 1986); **State** v. Olson, 586 So.2d 1239 (Fla. 1st **DCA** 1991). **The** rational basis for habitual offender statutes is that society requires greater protection from recidivists and sentencing as habitual felons provides greater protection. Eutsey v. State, **383** So.2d 219, 223-224 (Fla. 1980).

Procedural due process has two components: reasonable notice and a fair opportunity to be heard. State **v.** Beasley, 580 So.2d 139 (Fla. 1991); Goodrich **v. Thompson,** 96 Fla. **327,** 118 So. 60, 62 (1928). There can be no suggestion here that appellant

was not given reasonable notice and a fair opportunity to be heard. As the Florida Supreme Court said in, e.g., Davis, 383 So.2d at 622: "[H]e only had to raise a constitutional question before the trial court and, in the 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."

In addition to the doctrine of fundamental error/due process, the facial validity of a statute may be challenged for the first time on appeal. Trushin v. State, 425 So.2d 1126 (Fla. 1983). This is also a very narrow exception to the rule that issues not raised in the trial court may not be raised on appeal. There are two aspects to the facial challenge: overbreadth and vagueness. Overbreadth only arises when the statute in question impinges on behavior protected by the first amendment to the United States Constitution and by Article I, §4 of the Florida Constitution. State v. Olson, 586 So.2d at 1243-1244. There can be no suggestion here that the statute somehow facially impinges on first amendment rights. The same conclusion applies to facially void-for-vagueness. Nothing in the statute would cause a person of common intelligence to guess at its meaning. In any event, Florida courts has repeatedly upheld the constitutionality of the statute against such challenges. See, e.g., Burdick v. State, 584 So.2d 1035 (Fla. 1st DCA 1991), Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991) and cases cited therein.

Finally, respondent notes that there is no legal basis for petitioner's assertion of jurisdiction based on a claim that the sentence is illegal (IB 5). Respondent acknowledges that a defendant is statutorily authorized to appeal an "illegal sentence". However, the provision of section 924.06 Fla. Stat. which authorizes such an appeal applies to sentences which facially exceed the statutory maximum sentence. Infante v. State, 197 So.2d 542 (Fla. 3rd DCA 1967), Bouie v. State, 360 So.2d 1142 (Fla. 2nd DCA 1978). In Gonzalez v. State, 392 So.2d 334 (Fla. 3rd DCA 1981), the court explained that challenges to sentences which exceed the authorized statutory maximum or are not authorized by statute can be raised for the first time on appeal. However, petitioner is not doing that for the statute authorizes the sentence he received. Petitioner is attempting to use the phrase "illegal sentence" to bootstrap his unpreserved challenge to the constitutionality of the statute. This is a claim relating to the application of the statute to the particular facts and circumstances of his case, not a claim that his sentence exceeded the penalty provided by statute. Therefore it would not be reviewable on direct appeal and certainly is not cognizable on discretionary review. Infante

Conclusion as to petitioner's issue

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 "no" leaps out at the reader.

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 an 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

THE LOWER TRIBUNAL PROPERLY AFFIRMED THAT THE HABITUAL VIOLENT FELONY OFFENDER PROVISIONS OF SECTION 775.084 FLA. STAT. (1989) MAY CONSTITUTIONALLY ENHANCE THE SENTENCE OF A DEFENDANT WHOSE CURRENT OFFENSE IS NOT AN ENUMERATED VIOLENT FELONY (restated)

The first and foremost principle of statutory construction is that courts do not engage in statutory construction unless the statute is ambiguous. Bewick v. State, 501 So.2d 72 (Fla. 5th DCA 1987); State v. Eqan, 287 So.2d 1 (Fla. 1973). The second principle is that you do not use statutory construction principles to create ambiguity. Eqan. Petitioner tries to do exactly that, and fails.

The Legislature has unambiguously defined the meanings of "habitual violent felony offender" and "habitual felony offender." See Fla. Stat. § 775.084(1)(a),(b) (1989). A habitual violent felony offender is a currently convicted felon whose previous record includes one or more of eleven specified violent felonies for which the defendant was sentenced to or released from incarceration within five years of the current offense. The distinction between a habitual violent felony offender and a habitual felony offender is that habitual felony offender status requires two previous felony convictions, neither of which have to be for violent offenses. In other words, a previous violent felony counts as two nonviolent felonies when determining the appropriate habitual offender status, Because of

the Legislature's plenary authority in defining and punishing crime, there is no constitutional impediment to the legislature's definitions. It may require one prior felony, violent or otherwise, or two prior felonies, or three, or any other number, as the defining characteristics of "habitual." If it desired to do so it could extend the definition to include those individuals who commit multiple acts of violence in one criminal episode. These definitions are not ambiguous so they need no clarification.

Petitioner's argument turns the principles of statutory construction on their head. Besides ignoring the legislative definition of Habitual Violent Felony Offender, petitioner mainly quarrels with how the legislature defined the term. Petitioner's basic problem is that he dislikes the threshold chosen by the legislature for the recidivist statute. Under our government with its separation of powers, see **Chiles v. Children, 589 So.2d 260** (Fla. 1991), neither his disagreement nor even a court's disagreement as to the wisdom of the statute provides a basis for invalidation. Barnes **v. B.K. Credit Service,** 461 So.2d 217 (Fla. 1st DCA 1984). Petitioner's attempts to distort the plain meaning of this section should be rejected.

Turning to the issue of the constitutionality of the HVFO statute, petitioner refers to the questions certified in Tillman **v. State, Case** No. 78,715 (Fla. 1992) and claims that "the habitual violent felony provisions fail the due process test of

'a reasonable and substantial relationship to the objects sought to be obtained,"' because the statute does not attain the object saught: "to enhance the punishment of those who habitually commit violent felonies." Brief of Petitioner at 7. Again, petitioner's argument is premised on a false assumption. The clear and unambiguous language of the statute indicates that the Legislature intended to punish more severely those recidivist felony offenders with a previous violent felony. As previously stated, one prior violent felony is the functional equivalent of two nonviolent felonies for the purpose of habitualization.

In attempting to discredit an interpretation of the statute by the First District Court of Appeal, petitioner takes issue with the court's use of the word "propensity." Brief of **Petitioner at 8** (citing to **Ross v. State, 579** So.2d **877** (Fla. 1st **DCA** 1991), rev. pending, Fla. S. Ct. No. 78,179, wherein the First District stated, "In 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."). Correctly noting that the term connotes a tendency or inclination, Petitioner then spuriously[3] concludes that "a single, perhaps random act of violence does not fit within the common understanding of the word." Brief of

[3] Respondent was unable to find any authority requiring application of the laws of mathematics to sentencing under the laws of Florida.

Petitioner at 9. Quite the contrary, a "tendency" is "[a] demonstrated inclination to think, act, or behave in a certain way." The American Heritage **Dictionary 1252 (2d** Ed. 1985). It is certainly reasonable for the Legislature to decide that a single act of violence, when coupled with at least one other act of lawlessness, constitutes a sufficient basis for enhanced penalties, including mandatory minimum terms of imprisonment.

In rejecting the due process argument made in Perkins, infra, the First District stated:

> Although the burglary for which [the defendant] is now sentenced is not one of the enumerated violent offenses, section 775.084(1)(b) does not require that the current offense be violent. The appellant argues that this application of the statute is not sufficiently related to the apparent purpose of the enactment, thereby offending the requirements of due process. Habitual offender provisions are generally designed to allow an enhanced penalty when new crimes are committed by recidivist offenders. See e.g., Eutsey v. State, **383** So.2d **219 (Fla. 1980).** Section 775.084(1)(b) encompasses the general objective of providing additional protection to the public from certain repetitive felony offenders. When the statute is considered as a whole, section 775.084(1)(b) effectuates this objective by providing additional protection from repetitive felony offenders who have previously committed a violent offense. The decision to allow an enhanced sentence after only two felonies, and when only the prior felony is an enumerated violent offense, is a permissible legislative determination which comports with and is rationally related to this statutory purpose, so as to satisfy the requirements of due process.

Perkins v. State, 583 So.2d 1103, 1104 (Fla. 1st DCA 1991). Petitioner's arguments in the instant case do not provide a new basis for reversal of the lower tribunal.

Petitioner's double jeopardy challenge to the statute is equally specious, as it is likewise based on a false premise. Petitioner claims that the habitual violent felony offender statute violates state and federal constitutional provisions against double jeopardy because "the enhanced punishment is not for the new offense, to which the statute pays little heed, but instead for the prior, violent felony." Brief of Petitioner at 10. Acknowledging that the United States Supreme Court, this Court, and Florida district courts have rejected similar arguments over the past centuries, petitioner nevertheless maintains his position, relying on a concurring opinion from Judge Zehmer in another case. Brief of Petitioner at 12. Petitioner's position lacks even a scintilla of merit.

Although petitioner provides no analysis, he is apparently relying on the third protection provided by the double jeopardy clause, the prohibition against multiple punishments for the same offense. United States v. Di Francesco, 449 U.S. 117, 66 L.Ed.2d 328, 340, 101 S.Ct. 426 (1980). Obviously, the two offenses involved here, strong-arm robbery and possession of cocaine with intent to sell, are separate offenses for they have separate elements. See, 775.021(4) Fla. Stat. (1989). Therefore, the double jeopardy clause could be violated only if the punishment

is being imposed is for his prior robbery and not the current offense of possession of cocaine. The record is clear petitioner was sentenced for the offense of possession of cocaine (R 45-46) and his prior punishment for aggravated robbery was not altered in any way. No double jeopardy violation exists.

Petitioner's argument is that because the penalty for the current offense is being enhanced by the violent nature of the prior offense, the defendant is being twice sentenced for the original offense. If this court were to give credence to such a irrational concept it would have to reject two hundred years of habitual offender case law and reject all cases which denote the scope of the double jeopardy clause. Moreover, this court would be required to invalidate the sentencing guidelines and the capital sentencing procedures which also aggravate the current sentence based on the nature and seriousness of a defendant's prior offenses.

Such radical action is not necessary because, as this Court so aptly stated in Cross v. State, 96 Fla. 768, 119 So. 380, 386 (Fla. 1928):

> 'The propriety of inflicting severer punishment upon old offenders has long been recognized in this Country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted.' As was said in People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401: 'The punishment for the second [offense] is

> increased, because by his persistence in the perpetration of crime he [the defendant] has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense.' And as was said by Chief Justice Parker in Ross' Case, 2 Pick. (Mass.) 165: 'The punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself.' The statute does not make it an offense or crime for one to have been convicted more than once. The law simply prescribes a longer sentence for a second or subsequent offense for the reason that the prior convictions taken in connection with the subsequent offense demonstrates the incorrigible and dangerous character of accused thereby establishing the necessity for enhanced restraint. The imposition of such enhanced punishment is not a prosecution of or punishment for the former convictions. The Constitution forbids such action. The enhanced punishment is an incident to the last offense alone. But for that offense it would not be imposed.

Id. at 386 (quoting **Graham v. West Virginia, 224 U.S. 616 (1912)** (citation omitted)). See also **Washington v. Mayo,** 91 So.2d 621, 623 (Fla. 1956); Reynolds v. **Cochran,** 138 So.2d 500 (Fla. 1962); **Conley** v. State, No. 90-1745, slip op. (Fla. 1st DCA Jan. 2, 1992) Barber v. **State, 564 So.2d** 1169 (Fla. 1st DCA 1990) (again rejecting the same argument raised by Petitioner).

As is evident from the sampling of **cases** cited to above, "[recidivist] statutes are neither new to Florida nor to modern jurisprudence. Recidivist legislation . . . has repeatedly withstood attacks that it violates constitutional rights against ex post facto laws, constitutes cruel and unusual punishment,

denies defendants equal protection of the law, violates due process or involves double jeopardy." Reynolds, 138 So.2d at 502-03.

Petitioner's argument ignore other significant facts relating to habitual offender sentencing in Florida. One significant fact overlooked is that the 1988 changes to the habitual offender statute were changes which narrowed the pool of defendants who could be classified as habitual offenders. Under the statutory scheme **approved** in Reynolds, and in effect until October of 1988, any defendant with one prior felony of any type could have been habitualized. Since this court has previously determined that the legislature can constitutionally enhance the sentence of all defendant's based on the commission of one prior felony of any kind, it certainly has the authority to enhance the most serious offenses based on just that one felony. Since, it has been decided that the legislature can without violating the double jeopardy clause distinguish between the nature of the offenses (Felony vs. Misdemeanor) in determining the number of offenses required to habitualize, it certainly can distinguish between violent and nonviolent felons in determining how many offenses it will take to habitualize.

As noted in Reynolds, petitioner's ex post facto argument fairs no better than his other claims. His analysis of the facts and his application of Miller **v.** Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), is erroneous. Laws are ex post

facto if they make an act innocent at commission a crime, increase the punishment for a crime after its commission, or deprive an individual of a defense which was available when the crime was committed. **Dobbert** v. Florida, 432 U.S. 282, 53 L.Ed.2d 344,356, 97 S.Ct. 2290 (1977). In Miller, the court held that a guidelines change which was implemented after Miller had committed his crime and which increased his punishment could not be retroactively applied.

In petitioner's case, the statutory amendment occurred after his commission of the robbery. However, since the only sentence being enhanced is the offense committed after the statutory enactment, there is no retroactive application. Moreover, the limitation of a habitualization based on one prior felony is not a retroactive increase because petitioner could have been habitualized under the old statute for committing only one felony. Further, the maximum sentence under the old law is identical to the statutory maximum under the new habitual offender statute. Therefore, as to petitioner there is no enhancement of punishment of the type required for an ex post facto violation to exist. For the continued existence of the habitual offender statute served as an "operative fact" to warn the petitioner of the sentence the state could seek if he were convicted of a new felony offense. Dobbert, supra. Therefore, no ex post facto claim exists.

This court previously rejected the same ex post facto argument in both Cross and Reynolds, and petitioner's claims identify no changes in the law or the facts which would mandate a different result. After two centuries of rejection, petitioner's due process, double jeopardy and ex post facto challenges are no more viable now than they were when recidivist statutes were first created. This Court should affirm the decision of the First District.

CONCLUSION

Based on the above legal citation authorities, Appellee prays this Honorable Court affirm the decision rendered by the lower tribunal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to David P. Gauldin, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 21st day af May, 1992.

CHARLES T. FAIRCLOTH, JR.
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