IN THE SUPREME COURT OF FLORIDA

WILLIAM JAMES SIMMONS,

Petitioner,

v. CASE NO. 79,806

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
FLORIDA BAR #197890
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

WILLIAM JAMES SIMMONS,

Petitioner,

v. CASE NO. 79,806

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and will be referred to as petitioner in this brief. A one volume record on appeal, which includes a plea and sentencing transcript, will be referred to as "R" followed by the appropriate page number in parentheses. Attached hereto as Appendix A is the decision of the lower tribunal. Appendix B is petitioner's motion for rehearing. Appendix C is the order certifying two questions to this Court.

STATEMENT OF THE CASE AND FACTS

By information filed February 7, 1990, under lower court number 90-93, petitioner was charged with sale and possession of cocaine (R 8-9). By information filed February 7, 1990, under lower court number 90-94, petitioner was charged with burglary of a dwelling (R 10). By information filed February 7, 1990, under lower court number 90-95, petitioner was charged with possession of a firearm by a convicted felon, carrying a concealed firearm, and resisting an officer without violence (R 11-12).

By information filed March 20, 1990, under lower court number 90-288, petitioner was charged with sale and possession of cocaine (R 13-14). By information filed March 20, 1990, under lower court number 90-289, petitioner was charged with possession of cocaine with intent to sell, possession of paraphernalia, and resisting arrest without violence (R 15-16). By information filed November 16, 1990, under lower court number 90-1758, petitioner was charged with failure to appear while on bond for the above offenses (R 39-40).

The state filed notice of its intent to seek enhanced sentences (R 17-21). On March 14, 1991, petitioner appeared with counsel and entered pleas of no contest to the following: 90-93, as charged; 90-94, the lesser offense of trespass: 90-95, resisting arrest without violence, with the state dropping the other two charges: 90-288, as charged; 90-289, as charged: 90-1758, as charged: the court would be limited to a total sentence of 35 years as an habitual offender (R; 50-53;

179-80). The court accepted the pleas and requested a presentence investigation (R 181-84).

Petitioner appeared for sentencing on all charges on May 31, 1991. The prosecutor stated that petitioner had appeared before the court on May 8, 1991, at which time his prior judgments and sentences for aggravated battery, aggravated assault, and burglary (R 54-66) had been entered into evidence (R 187). The prosecutor stated that it would be asking for habitual violent offender sentencing, and that petitioner may wish to withdraw his plea (R 188).

The court offered to allow petitioner to withdraw his plea 9R 189). Petitioner declined, and his counsel did not dispute the prior convictions (R 190), but argued that petitioner was not an habitual or habitual violent offender (R 191-93).

Petitioner was adjudicated guilty and sentenced as an habitual violent offender to concurrent terms of 30 years on the second degree felonies, with a 10 year mandatory: 10 years on the third degree felonies, with a 5 year mandatory: and one year on the misdemeanors, to run concurrently, with credit for 266 days served (R 74-120; 195-96).

On June 7, 1991, a timely notice of appeal was filed in all cases (R 67). The Public Defender of the Second Judicial Circuit was designated to represent petitioner.

On appeal, the lower tribunal agreed with petitioner that a technical error had occurred on his judgment and sentence. Appendix A. The lower tribunal held that petitioner could receive habitual violent offender sentences for non-violent

crimes, but certified in Appendix C the same two questions it had previously certified in Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), review pending, case no. 78,715:

> 1. DOES IT VIOLATE A DEFENDANT'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN HE IS CLASSIFIED AS A VIOLENT FELONY OFFENDER PURSUANT TO SECTION 775.084, AND THEREBY SUBJECTED TO AN EXTENDED TERM OF IMPRISONMENT, IF HE HAS BEEN CONVICTED OF AN ENUMERATED FELONY WITHIN THE PREVIOUS FIVE YEARS, EVEN THOUGH HIS PRESENT OFFENSE IS A NONVIOLENT FELONY?
>
> 2. DOES SECTION 775.084(1)(B) VIOLATE THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY BY INCREASING A DEFENDANT'S PUNISHMENT DUE TO THE NATURE OF A PRIOR OFFENSE?

On May 5, 1992, a timely notice of discretionary review was filed. On May 14, 1992, this Court entered its briefing schedule order.

SUMMARY OF THE ARGUMENT

Principles of statutory construction require that an offense for which the state seeks an enhanced punishment as a habitual violent felony offender must be an enumerated, 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" 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.

If the Court rejects this interpretation and reaches the two certified questions, both should be answered in the affirmative. Thus interpreted, the statute bears no substantial and reasonable relationship to its objective of punishing repetition of violent crime. It permits imposition of an enhanced sentence as a habitual violent felon upon one who has committed but a single violent felony. The 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.

ARGUMENT

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; A CONTRARY CONSTRUCTION RENDERS THAT STATUTE VIOLATIVE OF CONSTITUTIONAL DUE PROCESS AND DOUBLE JEOPARDY PROVISIONS.

A. INTRODUCTION

In 1988, the legislature amended Section 775,084, Florida Statutes, creating among other changes a new classification, habitual violent felony offender. Ch. 88-131, §6, Laws of Florida. Section 775.084(1)(b), Florida Statutes, 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 First District Court of Appeal has certified two questions, asking whether a sentencing scheme that permits enhancement of a sentence for a habitual violent felon violates constitutional Due Process and Double Jeopardy clauses when the offense for which the sentence is imposed is nonviolent. Petitioner addresses those questions below, First, however, this Court should determine whether an alternative construction which avoids these potential constitutional defects is possible.

B. STATUTORY CONSTRUCTION

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 felon 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 Natl. Auto Underwriters Assoc., 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 such 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. Section 775.021(1), Florida Statutes. The rule, which requires the construction most favorable to the accused when different constructions are plausible, extends to the entire criminal code, sentencing provisions included. Cf. Bifulco v. United States, 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.

Since all of petitioner's present crimes are non-violent, he should not have been eligible to receive violent habitual sentences.

C. CONSTITUTIONALITY

1. Due Process

If a construction of the statute which 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). This defect goes to the first of the two certified questions. As noted above, the label "habitual violent felony offender" purports to enhance the punishment of those who habitually commit violent felonies. Section 775.084(1)(b), Florida Statutes. 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 robbery, plus the instant, nonviolent drug felonies. On this record, there is no evidence of a habit of violent crime. 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 First District Court of Appeal rejected a similar due process argument in Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991), review pending, case no. 78,179, oral argument held April 7, 1992.[1] The court held that, "[i]n our view, just as the stat 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

---

'Petitioner is not arguing the statute is unconstitutional because the legislature failed to include aggravated battery in 1988 as one of the enumerated prior violent felonies.

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) (Cowart, J., dissenting), review dismissed, 581 So.2d 1309 (Fla. 1991). The manner in which the Ross court puts the word "propensity" to use 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 failure of the contested provisions to reasonably and substantially relate to this purpose renders its application a violation of due process of law.

2, Double Jeopardy

The state and federal constitutions both forbid twice placing a defendant in jeopardy for the same offense. U.S. Const., amend. V, XIV.; Fla. Const., art. 1, §9. 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).[2] The fixation of the habitual violent felony provisions on prior offenses renders application of this statute to petitioner a violation of these constitutional protections. This goes to the second of the certified questions.

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 -- not the case here -- the statute's use also violates prohibitions against ex post facto laws.

---

[2]The court labeled the undersigned's argument as "perfunctory." Id. at 927.

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 (1948). There 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 728. Using the same reasoning, Florida's courts have also 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, 16 FLW D2894 (Fla. 1st DCA Nov. 15, 1991) (Zehmer, J., concurring), questions certified by unpublished order dated Dec. 12, 1991, review pending, case no. 79,237:

> I view the imposition of the extent of punishment for the instant [non-violent] criminal offense based on the nature of the

> prior conviction as effectively imposing a second punishment on defendant solely based on the nature of his prior offense, a practice I had thought was prohibited by the Florida and United States Constitutions. This new statutory procedure is entirely different from the former concept of enhancing sentences of habitual offenders having prior offenses without regard to the nature of the prior felony, which has been upheld in this state and other jurisdictions.

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 Tillman or Ross, supra, or in Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), review pending, case no. 78,613. In Perkins, the Court rejected the same arguments made here, on the authority of Washington, Cross and Reynolds, concluding that "the reasoning of these cases is equally applicable to this enactment." Id. at 1104. Perkins thus left unaddressed the constitutional implications identified by Judge Zehmer in Henderson, supra.

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 1394-1395. In contrast to the statute at issue here, the U.S. 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, as held by the court. Id. at 1400. 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.

D. CONCLUSION

For these reasons, petitioner's sentences must be vacated and the case remanded for resentencing without resort to the habitual violent felon provisions of Section 775.084. Either the statute must be construed to require that the sentence for which the sentence is imposed be an enumerated felony, or the statute violates constitutional due process and double jeopardy provisions. In such case, the certified questions should be answered in the affirmative. 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.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court vacate his sentences and remand for resentencing with appropriate directions.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS-BRINKMEYER
ASSISTANT PUBLIC DEFENDER
Fla, Bar No. 197890
Leon Co. Courthouse
301 S. Monroe St., 4th Fl. N.
Tallahassee, FL 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that **a true and correct copy of the** ***foregoing*** has **been served upon James W. Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399, and a copy has been mailed to petitioner, #A-105118, P.O. Box 578, Crestview, Florida 32536, on this** 18th **day of May, 1992.**

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

WILLIAM JAMES SIMMONS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

CASE NO. 91-1965

Opinion filed March 27, 1992.

An Appeal from the Circuit Court for Okaloosa County.
G. Robert Barron, Judge.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Asst. Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and James W. Rogers, Asst. Attorney General, for Appellee.

PER CURIAM.

William James Simmons has appealed from sentencing as an habitual violent felony offender, occurring after he entered a plea of nolo contendere to ten non-violent felony charges. The state has moved to dismiss Simmons' appeal for lack of jurisdiction based on his nolo plea. We deny the motion to dismiss, and remand for correction of the sentencing documents.

As part of his plea agreement, Simmons agreed to a sentence of up to 35 years as an habitual felony offender, and the plea was accepted. At the subsequent sentencing proceeding, the state indicated that, because Simmons did not qualify as an habitual felony offender, it now sought habitual violent felony offender classification. Simmons declined an affirmative opportunity to withdraw his plea based on this change. The trial court adjudicated him guilty, and imposed 30-year terms for the 2d-degree felony convictions, each with a 10-year minimum mandatory term, and 10-year terms for the 3d-degree felony convictions, each with a 5-year minimum mandatory term.

Simmons appealed, raising the validity of his sentencing as an habitual violent felony offender. Appellate counsel has filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), averring that prior case law forecloses good faith argument of error with regard to that issue. However, he points out that the sentencing documents indicate that Simmons' minimum mandatory terms were based on conviction for drug trafficking, with which he was not charged. The state moves to dismiss for lack of jurisdiction, arguing that Simmons' appeal is foreclosed by his nolo contendere plea. See § 924.06(3), Fla.Stat. (a defendant who pleads nolo contendere with no express reservation of the right to appeal shall have no right to a direct appeal).

We deny the motion to dismiss. A defendant can maintain a direct appeal, despite entering a nolo plea, if he raises issues occurring at the time the plea is entered, including a question

an to the legality of the sentence. Ford v. State, 575 So.2d 1335, 1337 (Fla. 1st DCA 1991). Here, Simmons' appeal raises the issue of the legality of his sentence on two grounds, to wit: 1) the propriety of his classification as an habitual violent felony offender, and 2) the imposition of minimum mandatory terms for an offense with which he was not charged and of which he was not convicted. Therefore, we find that, under Ford, we have jurisdiction to entertain Simmons' appeal, and deny the motion to dismiss.

On the merits of the appeal, we must agree with appellate counsel that there was no error in the imposition of the habitual violent felony offender sentences filed herein. See, e.g., Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991) (upholding violent habitual offender sentence for non-violent crimes); but see, Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991) (similarly affirmed, but certified a question regarding the possible violation of a defendant's due process rights when he is sentenced as a violent felony offender for a present, non-violent offense).

However, the issue of the erroneous written sentencing documents presents potentially reversible error, in that enhancement of a sentence based on a crime not charged or proved would be patently illegal. Further examination of the documents shows that, in addition to the erroneous indication, the trial court stated a valid basis for the minimum mandatory terms, namely sections 775.084(4)(b)2. and 3., Florida Statutes:

> The court may sentence the habitual violent felony offender . . . [i]n the **case** of a felony of the second degree for a **term** of years not exceeding 30, and such offender shall not be eligible for release for 10 years. In the case of a felony of the third degree, for a term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.

Therefore, we find that the additional indication that Simmons received the minimum mandatory terms for a drug trafficking conviction was merely a scrivener's error. On remand, the sentencing documents shall be corrected to eliminate the indication of a drug trafficking conviction as a basis for the minimum mandatory terms. The sentences imposed herein are otherwise affirmed.

JOANOS, C.J., ERVIN and MINER, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

WILLIAM JAMES SIMMONS,

Appellant,

v. CASE NO. 91-1965

STATE OF FLORIDA,

Appellee.

MOTION TO CERTIFY THE QUESTION

COMES NOW the appellant, by and through the undersigned, and moves this Court for the entry of an order certifying the question whether violent habitual offender sanctions may be imposed for non-violent felonies, and as grounds therefore says:

1) This Court's opinion noted that the question of whether violent habitual offender sanctions may be imposed on one who is convicted of non-violent crimes is pending before the Supreme Court in Ross v. State, case no. 78,179, and Tillman v. State, case no. 78,715. Ross appears to be the lead case, as it has been set for oral argument on April 7, 1992. The question is also pending in Perkins v. State, case no. 78,613. The questions certified in Tillman are:

> 1. DOES IT VIOLATE A DEFENDANT'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN HE IS CLASSIFIED AS A VIOLENT FELONY OFFENDER PURSUANT TO SECTION 774.084, AND THEREBY SUBJECTED TO AN EXTENDED TERM OF IMPRISONMENT, IF HE HAS BEEN CONVICTED OF AN ENUMERATED VIOLENT FELONY WITHIN THE PREVIOUS FIVE YEARS, EVEN THOUGH HIS PRESENT OFFENSE IS A NON-VIOLENT FELONY?

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

WILLIAM JAMES SIMMONS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-1965

Opinion filed April 17, 1992.

An Appeal from the Circuit Court for Okaloosa County.
G. Robert Barron, Judge.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Asst. Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and James W. Rogers, Asst. Attorney General, for Appellee.

ON MOTION FOR CERTIFICATION

PER CURIAM.

Appellee's motion for certification is granted. We hereby certify the same questions certified to the Supreme Court in Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), review pending Case No. 78,715.

JOANOS, C.J., ERVIN and MINER, JJ., CONCUR.

APPENDIX C