IN THE SUPREME COURT OF FLORIDA

JOHN E. WARD,

Appellant,

vs. Case No. 79,986

STATE OF FLORIDA,

Appellee.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This brief was largely complete when the Court issued its decision in Ross v. State, case no. 78,179 (Fla. June 18, 1992). The State has relied upon Ross several times, and kept the remainder of the brief as prepared.

However, Ross expressly refutes Petitioner's due process argument; and, by necessary implication, answers the certified question (double jeopardy) against him. The State suggests that the question certified in this case is no longer of great public importance. The State also suggests that this Court consider issuing an order declining review in light of Ross. Such action would end the parade of cases all certifying the same questions (e.g., Tillman v. State, case no. 78,715; Perkins v. State, case no. 78,613).

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement.

SUMMARY OF THE ARGUMENT

The answer to the certified question is "NO." While an habitual violent felon's past crimes do substantiate the greater penalty for the current offense; such felon is being punished only one time for the current offense, as authorized by statute.

It is long and well established that a defendant's criminal history may justify a harsher sentence for a present offense without violating double jeopardy. Petitioner's argument expresses only his personal disagreement with the Legislature's definition of a felon as both "habitual" and "violent." His personal disagreement is, in effect, a matter of policy not of constitutional significance and not within this Court's purview.

Before his double jeopardy argument, Petitioner improperly raises substantive due process. Such argument is outside the scope of the certified question, and was deliberately rejected by the court below as the basis for a separate question of great public importance. This Court should not consider it. Moreover, Petitioner does not have standing to raise substantive due process on the grounds alleged, which actually challenge the statute as applied to others not similarly situated. On the merits, the definition and punishment of habitual violent felons reasonably achieves the statute's obvious purpose of giving society greater protection from such felons.

ARGUMENT

ISSUE

WHETHER INCREASING THE PUNISHMENT FOR A DEFENDANT'S CURRENT OFFENSE, ONLY, BASED ON HIS CRIMINAL PAST VIOLATES THE DOUBLE-JEOPARDY BAR AGAINST MULTIPLE PUNISHMENTS FOR THE SAME CRIME.

A. Introduction

For convenience, the State will follow Petitioner's format. His part A ("Introduction") requires no substantive response. The State notes that Petitioner refers to the "constitutional Double Jeopardy clause" (initial brief, p. 5) without distinguishing between the U.S. and Florida constitutions. That he does not do so implicitly concedes the obvious: that both constitutional provisions are interpreted the same. *See,* Carawan v. State, 515 So.2d 161, 164 (Fla. 1977)("[The] double Jeopardy clause in Art. I, section 9, Florida Constitution, . . . was intended to mirror . . . the double jeopardy clause of the fifth amendment."). There are no independent state constitutional grounds upon which to decide the certified question. Petitioner does not allege any.

B. Statutory Construction

There is no need *to resort to* principles of statutory construction, as even Petitioner concedes the statute is not

ambiguous. He does so by interpreting the statute correctly, and noting that only one prior violent felony will substantiate a felon's classification as an "habitual violent felony offender." Since there is no ambiguity,' there is no need to resort to external rules to construe the statute. State v. Egan, 287 So.2d 1 (Fla. 1973); Bewick v. State, 501 So.2d 72 (Fla. 5th DCA 1987).

Otherwise, Petitioner's argument is transparent. He claims the "habitual violent felony provisions suffer internal conflict." (initial brief, p. 5). This observation relies on the dictionary meaning of "habitual;" as opposed to the violent felon statute's use of "habitual" to mean a two-time felon, with the earlier offense being one of eleven deemed "violent" by §775.084(2)(b)1, Florida Statutes (1989). However, the dictionary or common meaning of "habitual" is not applicable. Since the statute provides the definition, common usage is irrelevant. *See*, Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So.2d 1351, 1353 (Fla. 1984)(when statute does not define words of common usage, plain meaning is ascribed).

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[1] *See*, Ross v. State, case no. 78,179 (Fla. June 18, 1992), slip op., p. 6: "[T]his statute is highly specific in the requirements that must be met before habitualization can occur."

Deprived of its central premise, Petitioner's legal point collapses. Factually, Petitioner is in no position to complain. One of his past felony convictions was for aggravated assault (R 240, 244), an offense deemed violent by §775.084(1)(b)1.f. His PSI report shows an adjudication of guilt for aggravated assault on November 19, 1989, in Leon County case no. 89-5523. (R 207). Petitioner had no objection to this item in his PSI report. (R 239). Even more telling is the fact that his present offenses included three attempted armed robberies, which are specified as violent felonies pursuant to §775.084(1)(b)1.c.

Unlike the defendants in Tillman and Ross,[2] Petitioner continues to commit violent felonies. Any questions arising from the statutory definition of "habitual violent felony offender" are irrelevant to him. His predicate felony was violent.[3] Three of his four current offenses were violent. The fourth was for

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[2] Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), *review pending,* case no. 78,715, and Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991), *review pending,* case no. 78,179 (oral argument held April 7, 1992).

[3] The State submitted certified copies of Petitioner's judgment and sentence in case no. 89-5523 for aggravated battery, and conviction in case no. 89-2071 for resisting arrest with violence. Defense counsel replied that he represented Petitioner on those offenses. (R 241). Note that these two offenses would substantiate sentencing Petitioner as an habitual, but nonviolent, felon. The only difference would be in the minimum mandatory sentences. While the ten-year minimum required by §775.084(4)(b)2 would fall away, the other minimum sentences would remain, as they are required by other statutes.

possession of a short-barrel shotgun, a device often associated with violent conduct.

Above all others, Petitioner was appropriately and constitutionally treated as an habitual, violent felon. Virtually all of his past and present crimes are violent, illustrating the danger of his habit. Given his criminal record, Petitioner's complaint that the statute requires only one prior violent felony conviction represents not "internal conflict," but only his personal disagreement with the statute. This disagreement is of no constitutional significance.

C. Constitutionality

1. Due Process

The State takes strong exception to Petitioner even making a due process argument, which should be disregarded as improperly presented. First, it is facially outside the certified question,[4] and not necessary to disposition of that question. *See*, Stephens v. State, 572 So.2d 1387 (Fla. 1991)("We do not reach the other issue raised by the parties, which lies beyond the scope of the certified question."); and Ross, *supra*, slip op.

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[4] The question reads: "Does section 775.084 (1)(b) violate the constitutional protection against double jeopardy by increasing a defendant's punishment due to the nature of the offense?" [e.s.]

at p. 6 (declining to address three ancillary issues that were "beyond the scope of the issue for which jurisdiction lies.").

Second, the court below deliberately chose not to certify the first of two Tillman questions here. The question which was not certified in Tillman addressed due process, when a defendant was classified as a violent habitual felon and his present offense was not "violent." 586 So.2d at 1269.

That only one prior felony need be "violent" under the statute is the basis of Petitioner's due process argument here. However, the decision below deliberately omitted the corresponding question certified in Tillman. The only reasonable inference is that the court below here did not consider the substantive due process question to be one of great public importance.

Nevertheless, Petitioner raises "due process" without regard to the decision below. He does not allege independent jurisdictional grounds for his argument, or even that this Court should exercise its unquestioned authority to entertain ancillary issues. This part of his brief (p. 6-9) must be disregarded.

If this Court is inclined to consider Petitioner's due process argument, the State will answer on the merits. Before doing so, the State notes that Petitioner's substantive due

process challenge turns on whether the statutory classification (i.e., the definition of "habitual violent felony offender") bears a reasonable relationship to the purpose sought. State v. Saiez, 489 So.2d 1125 (Fla. 1986). Petitioner claims the definition violates due process because it requires only one violent felony in the past, and that the present felony need not be violent.

As noted above, Petitioner's criminal history includes at least one violent felony of aggravated assault. Equally important, his three current offenses (attempted armed robberies) are also "violent" under the statutory definition. Consequently, Petitioner is actually making an argument that the statute may be unconstitutional as applied to a defendant, unlike himself, who meets only the minimum requirements to be classified as an habitual, violent felon. Petitioner does not have standing to do so.[5] State v. Burch, 545 So.2d 279, 283 (Fla. 4th DCA 1989)("A person to whom a statute may constitutionally be applied may not challenge that statute on the grounds that it may conceivably be applied unconstitutionally to others in situations not before it.")(citations omitted), *aff'd with opinion,* 558 So.2d 1 (Fla. 1990). *See,* Olson v. State, 586 So.2d 1239 (Fla. 1st DCA

[5] The State suggests that Petitioner's lack of standing explains why the court below did not certify the first question certified in Tillman.

1991)("One who is not denied some constitutional right or privilege may not be heard to raise constitutional questians on behalf of some other persons who may at some future time be affected."), ***quoting*** 10 Fla. Jur. 2d "Constitutional Law" §2 at 285 (1979). ***See*** *also,* Francois v. State, 407 So.2d 885 (Fla. 1981), *cert.* ***denied,*** 485 U.S. 1122 (1982)(defendant did not have standing to argue that statute arbitrarily established a presumption of death sentence for felony murder when evidence showed defendant was the perpetrator of five premeditated murders, etc.).

The defendant in Francois, who faced a death penalty for first-degree murder, could not challenge the felony-murder statute. Certainly, Petitioner cannot challenge a mere sentencing statute -- that is, the definition of "habitual, violent felon" -- when his past and present offenses are violent.

As noted above, Saiez requires that the method of a statute be reasonably related to its purpose. Here, the question becomes whether the statutory definition of defendants who repeatedly commit felonies (with at least one in the past being violent) bears a reasonable relationship to protecting society from such felons.

For substantive due process purposes:

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

Saiez, 489 So.2d at 1129 (Barkett, J.) ***quoting with*** *approval,* State v. Walker, **444** So.2d 1137, 1138-9 (Fla. 2d DCA 1984)(Grimes, J.), ***affirmed and lower*** *court opinion* ***adopted,*** 461 So.2d 108 (Fla. 1984).

The obvious intent and purpose of the habitual felon statute is to punish recidivists more harshly than first-time felons; and to punish violent repeat felons more harshly still. ***See,*** Barfield v. State, 17 F.L.W. S32 (Fla. Jan. 9, 1992) ("Moreover, Florida's habitual offender statute provides a statutory means of dealing with persistent criminal conduct."); and Eutsey v. State, **383** So.2d 219, 223 (Fla. 1980)(noting purpose of earlier version of habitual offender statute). The entire statute does just that.

It takes only one prior felony conviction -- if "violent" -- to qualify as a violent repeat felon; as opposed to two prior convictions for nonviolent habitual felons. The current offense need not be violent. Minimum mandatory sentences

are imposed, whereas there are no minimum sentences for nonviolent habitual felons.[6]

A person whose criminal conduct includes past commission of a violent felony plus another felony in the present is subject to a lengthier sentence with a mandatory minimum. The question becomes whether such a sentence is a reasonable means to protect society. The question answers itself. A repeat felon strongly intimates a lack of rehabilitation, and presents a continuing threat to the public. Violent past crimes raise the possibility of violent future crimes, Simply because the present crime need not be violent does not render the statute unconstitutional. *See*, Ross v. State, case no. 78,179 (Fla. June 18, 1992), slip op. at p. 5-6:

> Ross contends that due process also is offended. . . . We disagree. . . . The State is entirely justified in enhancing an offender's present penalty for nonviolent crime based on an extensive violent criminal history.

Petitioner committed aggravated assault in the past, before escalating to three attempted armed robberies in the present. There is no reason to believe he would not commit violent crime again. Society, through the Legislature, need not

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

wait for him to shoot a convenience store clerk before deciding that lengthier imprisonment with a mandatory minimum is the appropriate penalty. Petitioner's criminal history refutes his lame due process argument. This Court must deny relief on that ground.

2. Double Jeopardy

Although quoted above in response to a due process claim, Ross sounds the death knell for Petitioner's double jeopardy argument. While acknowledging that the habitual felon statute focuses on the criminal offender's prior record Ross also declared that the State was "entirely justified in enhancing an offender's present penalty." (*Id.*, **p. 6)(e.s.).**

As this Court just recognized, the habitual violent felon statute enhances only the present felony. Consequently, it is simply impossible for such a felon to be punished twice for the past offense. There is no need to go further to deny relief.

Nevertheless, Petitioner's argument is based on the third protection provided by the double jeopardy clause, the prohibition against multiple punishments for the same offense. ***See,*** e.g., United States v. Di Francesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). It is obvious that Petitioner's three current offenses, and his earlier aggravated assault, are

separate because they are separate in time. Hence, the double jeopardy clause would be violated here only if the current punishment was imposed for the 1989 aggravated assault, rather than for Petitioner's current attempted armed robbery convictions. The record is clear, however, that Petitioner was sentenced by the trial court in the instant case for the 1991 attempted robberies, and that his prior punishment for the 1989 offense was not altered in any way. (R 183-9). Consequently, no double jeopardy violation exists.

If this Court were to give credence to Petitioner's claim, it would have to 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, both of which aggravate a defendant's current sentence based on the nature and seriousness of prior offenses.

Such radical action is not necessary. As this Court 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 County 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, case no. 90-1745 (Fla. 1st DCA Jan. 2, 1992); and Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990)(again rejecting the same argument raised here by petitioner).

As is evident from the above sampling of cases:

> [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 502-3.

Petitioner's argument ignores other significant facts relating to habitual offender sentencing in Florida. For example, the 1988 changes to the habitual offender statute actually 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 was subject to habitualization. Since this Court has previously determined that the Legislature may constitutionally enhance the sentences of all defendants based on the commission of one prior felony of any kind, the Court must likewise hold that the Legislature has the authority to enhance the sentences of defendants who commit the most serious offenses based on the commission of one prior violent felony. Further, because the Legislature can, without violating the double jeopardy clause, distinguish between the nature of an offense (felony vs. misdemeanor) in determining the number of offenses required to habitualize, it certainly can distinguish between violent and nonviolent felons in determining how may prior offenses will subject a defendant to habitualization.

Accordingly, 8775.084(1)(b), Florida Statutes (1989), does not violate the constitutional prohibition against double jeopardy, and Petitioner's argument to the contrary must fail.

CONCLUSION

The certified question must be answered in the negative, and Petitioner's due process argument must be rejected; thereby affirming the decision below.

Respectfully submitted,

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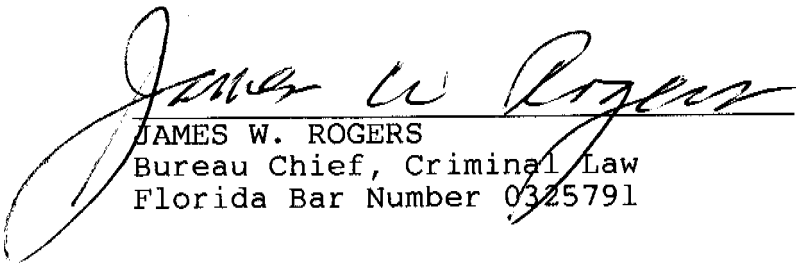

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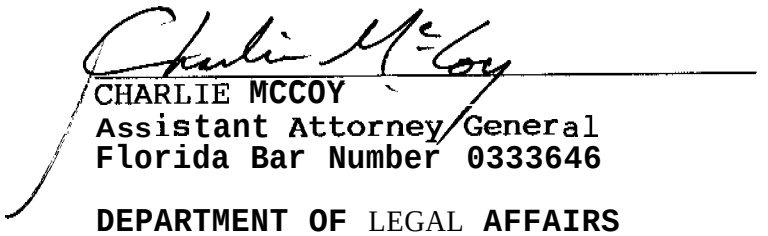

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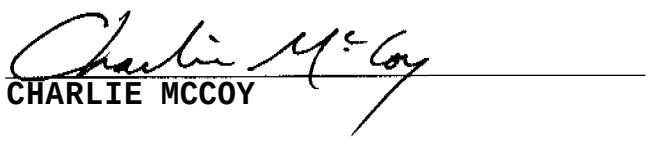
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to MR. P. DOUGLAS BRINKMEYER, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 17 day of June, 1992.



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