IN THE SUPREME COURT OF FLORIDA

SYLVESTER MA" WARREN,

Petitioner,

vs. Case No. 80,199

STATE OF FLORIDA,

Respondent.

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# RESPONDENT'S BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

The State accepts Warren's statement as to the case. It accepts his statement as to the facts, with the following clarifications:

1(a) Warren's criminal record includes kidnapping and sexual battery committed in November, 1982, for which he was treated as a youthful offender. (R 117). Released in 1986, he violated release conditions and was imprisoned. He was again released upon expiration of his sentence on July 16, 1990. (R 117, 120).

(b) Warren's current crimes are robbery with a weapon, battery of a law enforcement officer, resisting arrest with violence, resisting arrest without violence, and criminal mischief (R 110-12); all committed on December 24, 1990. (R 107).

## SUMMARY OF THE

In light of this Court's recent decision in Ross, supra, the question certified is no longer of great public importance. The State respectfully suggests further review is improvident.

The answer to the certified question is "NO," While an habitual violent felon's past crimes do expose him to a 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 who is both "habitual" **and** "violent." His personal disagreement is, in effect, a dispute over public policy not of constitutional significance and not within this Court's purview,

## 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. Due Process

Correctly and candidly, Petitioner notes that his due process argument was specifically rejected by this Court in Ross v. State, 17 **F.L.W. S367** (Fla. **June** 18, 1992), rehearing denied July 28, 1992. The State relies on Ross.

B. Double Jeopardy

Ross also 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." [e.s.] **Id.**

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.**

Petitioner's argument begins with the observation that the "current offense need meet no criteria, other than it be a felony committed within five years ... [of] the prior 'violent' offense." (initial brief, p. 7). That observation shows exactly why the statute is constitutional and reasonable, as illustrated by Petitioner's criminal record. Originally incarcerated and released far kidnapping and sexual battery (R 117, 120), Petitioner violated conditions of his release and was re-imprisoned. He was again released in mid-July 1990 (R 117, 120), only to commit the instant crimes in late December of the same year. (R 107). One of his instant offenses, robbery with a weapon (R 110), is deemed violent by the habitual felon statute; that is, by §775.084(1)(b) and (1)(b)1.a (defining "habitual violent felony offender" as a defendant whose criminal record includes conviction for robbery within the preceding five years).

Petitioner not only repeatedly commits violent felonies, but does so fairly soon upon release. He committed the instant crimes only 5½ months after release from prison. Focusing on the nature and recency of his criminal record, the habitual felony statute reasonably treats Petitioner more harshly by authorizing[1] lengthier imprisonment and a mandatory minimum.[2]

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[1] Petitioner's most serious current offense, robbery with a weapon (R 110), is a first degree felony under §812.13(2)(b), Fla. Stat., for which a non-enhanced sentence of up to thirty years is authorized by §775.082(2)(b). Petitioner actually received a sentence of only 15 years imprisonment.

Nevertheless, Petitioner's argument is based on the third protection provided by the double jeopardy clause, the prohibition against multiple punishments far 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 five current offenses, and his earlier sexual battery,[3] 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 sexual battery, rather than for the current convictions. The record is clear, however, that Petitioner was sentenced by the trial court in the instant case for his 1990 crime, and that his prior punishment for the 1982 offense **was** not altered in any way. (R 127-36). 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 define 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

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[2] Petitioner received the 15 year minimum (R 128) required by §775.084(4)(b)1.

[3] Again, Petitioner was released in 1986, about four years before he committed the instant crimes,

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 far 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, §775.084(1)(b), Florida Statutes (1989), does not violate the constitutional prohibition against double jeopardy, and Petitioner's argument to the contrary must fail.

## CONCLUSION

Petitioner's due process claim has already been decided against him. His double jeopardy argument is without merit, and must be rejected. The certified question, if addressed on the merits in light of Ross, must be answered in the negative, thereby upholding his sentence.

Respectfully submitted,

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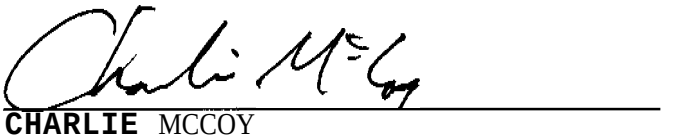

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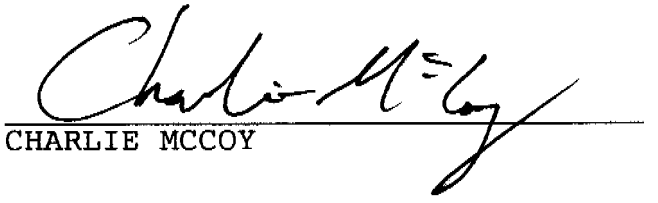
**CERTIFICATE OF SERVICE**

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 11th day of August, 1992.



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