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OCT 15 1992

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

WOODROW WILSON ALLEN,

Petitioner,

vs .

Case No. 80,561

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 Allen's statement, except to add that he **was** released from prison on February 16, 1992 (T 169; R 35) for his 1981 conviction for armed robbery. (R 34).

SUMMARY OF THE ARGUMENT

ISSUE I: Substantive Due Process

Omitted due to brevity of argument.

ISSUE 11: Double Jeopardy

The habitual violent felony offender statute enhances the **pena ty** for the present offense only. Therefore, it does not violate double jeopardy. The fact that the statute focuses on a recidivist felon's criminal history, and the fact that the current crime need not be violent, have nothing to do with double jeopardy. At most, these facts reflect legislative policy decisions that do not affect the constitutionality of the statute.

## ARGUMENT

### ISSUE I

WHETHER THE HABITUAL VIOLENT FELON  
STATUTE'S DEFINITION OF SUCH A FELON  
VIOLATES SUBSTANTIVE DUE PROCESS OR DOUBLE  
JEOPARDY

#### A. Substantive Due Process

This argument turns on the fact that the definition of an "habitual violent felony offender" in §775.084(1)(b), Florida Statutes, requires only one prior "violent" felony; and does not require a defendant's present crime to be violent. This argument, as Allen candidly concedes, was squarely rejected in Ross v. State, 601 So.2d 1190, 1193 (Fla. 1992). The State **relies** on Ross.

#### B. Double Jeopardy

Preliminarily, this issue was argued before the court on October 9, 1992, in Tillman v. State, case no. 78,715. The State relies on its argument in that case.

Even a cursory reading of the record indicates that the sentence for Allen's 1981 armed robbery conviction (R 34) was not altered. In fact, he had been released from prison on February 16, 1991 (R 35), about two months before the instant offense. (R 6).

When a recidivist statute enhances only the present offense, there can be no double jeopardy violation. Every court considering the issue has ruled against Allen on this point. *See, e.g., Hale v. State*, 600 So.2d 1128 (Fla. 1st DCA 1992) (eight citations omitted).

For decades, this court and the United States Supreme Court have rejected Allen's argument. Cross v. State, 96 Fla. 768, 119 So. 380 (Fla. 1928); Graham v. West Virginia, 224 U.S. 616 (1912); Washington v. Mayo, 91 So.2d 621 (Fla. 1956); Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962). The State relies on these cases.

Allen next urges earlier through the statute's focus on a defendant's prior record, without regard to whether the current felony is violent. (initial brief, p. 8). *See, Ross, supra* at 1193 ("The entire focus of the statute is not on the present offense, but on the criminal defendant's prior record."). While each statement is accurate, neither has anything to do with double jeopardy, which prevents punishing twice for the same offense.

Otherwise, the statute's focus on a felon's criminal past is a matter of legislative policy implicit in the definition of an "habitual violent felony offender." That policy was upheld when this court rejected the substantive due process argument presented in **Ross**. *Id.* at 1193 ("The State is entirely justified in enhancing an offenders present penalty for a nonviolent crime based on an extensive or violent criminal history." [e.s.]),

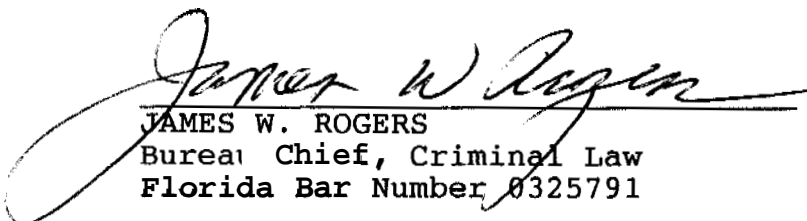
Allen's double jeopardy argument represents no more than his personal disagreement with the statutory definition of a habitual, violent felon. This argument is not of constitutional significance and must be rejected.

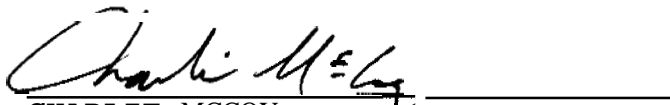
CONCLUSION

The first certified question was answered in the negative by Ross. The second certified question must also be answered in the negative, thereby affirming the decision below and upholding Allen's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits 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 15<sup>th</sup> day of October, 1992.

  
CHARLIE MCCOY