IN THE SUPREME COURT OF FLORIDA

MARBLEE SEABROOK, :

Petitioner, :

v. : CASE NO. 80,953

STATE OF FLORIDA, :

Respondent. :

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

MARBLEE SEABROOK,

Appellant,

v. CASE NO. 80,953

STATE OF FLORIDA,

Appellee.

_____/

PETITIONER'S BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

Marblee Seabrook was the defendant in the trial court, appellant before the District Court of Appeal, First District, and will be referred to in this brief as "petitioner," "defendant," or by his proper name.

Reference to the volume of the record containing the pleadings and orders filed in this cause will be by use of the symbol "R" followed by the appropriate page number in parentheses. Reference to the volume of the record containing a transcript of the jury selection conducted February 18, 1991, will be by use of the symbol "J" followed by the appropriate page number in parentheses. Reference to the volume of the record containing a transcript of appellant's jury trial, conducted February 22, 1991, will be by use of the symbol "T" followed by the appropriate page number in parentheses. Reference to the volume of the record containing a transcript of the sentencing

proceedings of March 25, 1991, will be by use of the symbol "S" followed by the appropriate page number in parentheses.

Filed with this brief is an appendix containing copies of the opinion filed in this case by the district court, as well as other matters pertinent to the case. Reference to the appendix will be by use of the symbol "A" followed by the appropriate page number in parentheses.

II. STATEMENT OF THE CASE AND FACTS

Count I of an information containing two charges alleged that petitioner and Tammy Coleman, on January 25, 1990, sold or delivered a controlled substance, cocaine, to a confidential informant, contrary to Section 893.13, Florida Statutes (1989). Count II alleged that petitioner and Coleman, on February 25, 1990, was in actual or constructive possession of a controlled substance, cocaine, contrary to Section 893.13, Florida Statutes (1989)(R-1).

Petitioner proceeded to a trial by jury which returned verdicts finding him guilty of both charges (T-52-53).

The state gave notice of intent to seek enhanced penalties as a habitual felony offender (R-14). At sentencing, defense counsel acknowledged receipt of the notice (S-13). The state introduced into evidence, without objection, certified copies of five prior felony convictions (S-13-14). The trial court found that they qualified for the predicate convictions required by statute for habitual felony offender purposes (S-14). Upon inquiry by the court, defense counsel indicated that the defense had no evidence that any of the predicate convictions had been pardoned or set aside. The court then found petitioner to be a habitual felony offender (S-15). Petitioner was adjudged guilty of both offenses and sentenced to two, concurrent, five-year terms of imprisonment and a habitual felony offender, with credit (S-1-22, R-101-106).

Notice of appeal was timely filed (R-99), petitioner was adjudged insolvent, and the Public Defender of the Second Judicial Circuit was designated to handle the appeal.

By opinion dated November 18, 1992, the district court affirmed petitioner's convictions and sentences, but certified to this Court the following issue, which had also been certified in Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992):

> DOES SECTION 775.084, FLORIDA STATUTES (1989), DENY EITHER DUE PROCESS OR EQUAL PROTECTION OF LAW UNDER EITHER THE FLORIDA OR THE UNITED STATES CONSTITUTION, OR VIOLATE THE DOCTRINE OF SEPARATION OF POWERS, AS SET FORTH IN THE FLORIDA CONSTITUTION?

(A-1-2).

The state filed a timely petition for rehearing (A-3-4), petitioner filed a reply (A-5-6) and, on December 14, 1992, the petition for rehearing was denied (A-7).

Notice to invoke discretionary jurisdiction was timely filed December 18, 1992 (A-8-9).

III. SUMMARY OF ARGUMENT

In this appeal, petitioner argues that Florida's habitual felony offender statute, Section 775.084, Florida Statutes (1991), deprives those sentenced under its provisions of equal protection and due process of law; violates the principle of separation of powers by depriving judges of sentence prerogative on a broad range of offenses, and further establishes a capricious system of selective punishment which has no standards of application, is non-appealable, and unreviewable by any tribunal, all contrary to the provisions of both the Constitution of the State of Florida and the Constitution of the United States of America.

IV. ARGUMENT

THE FLORIDA HABITUAL VIOLENT FELONY OFFENDER STATUTE IS UNCONSTITUTIONALLY INEQUITABLE, IRRATIONAL, VAGUE, AND SUBJECT TO ARBITRARY AND CAPRICIOUS APPLICATION; PROVIDES NO DUE PROCESS OF LAW; VIOLATES THE PRINCIPLE OF SEPARATION OF POWERS IN VIOLATION OF SECTION 9 AND 16 OF THE FLORIDA CONSTITUTION; AND TO THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

The district court in this case certified the following issue to this Court as involving a question of great public importance:

> DOES SECTION 775.084, FLORIDA STATUTES (1989), DENY EITHER DUE PROCESS OR EQUAL PROTECTION OF THE LAW UNDER EITHER THE FLORIDA OR THE UNITED STATES CONSTITUTION; OR VIOLATE THE DOCTRINE OF SEPARATION OF POWERS, AS SET FORTH IN THE FLORIDA CONSTITUTION?

(A-1-2). Petitioner requests the Court to answer the certified question "yes," for the reasons that follow.

The record indicates petitioner was found guilty of sale and possession of cocaine (T-52-53). At sentencing, petitioner was treated and sentenced as a habitual felony offender pursuant to Section 775.084, Florida Statutes (1991), with respect to both offenses (R-101-106, S-1-22).

Petitioner contends the trial court erred in sentencing him as a habitual felony offender because the statute is facially unconstitutional. Because petitioner is attacking the facial validity of the statute, the issue can be raised for the first time on appeal. Trushin v. State, 425 So.2d 1126 (Fla. 1983).

The Florida habitual offender statute is unconstitutional in several respects. Petitioner acknowledges the district court has ruled the previous version of the statute to be constitutional in Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), rev. den., No. 76,482 (Fla. Dec. 14, 1990); and that the conclusions of Barber apply equally to the amended statute [Love v. State, 569 So.2d 807 (Fla. 1st DCA 1990)]. The arguments set forth in each of those cases are adopted here, in addition to the arguments set forth below, not expressly addressed in Barber.

As was recognized in Barber, supra, substantive due process prohibits statutes which are discriminatory, arbitrary and capricious. The Florida habitual offender statute, as amended, is utterly arbitrary and capricious in its potential application. The broad sweep of the statute, the lack of standards governing its application, and the exemption of those sentenced under it from parole, the guidelines, and most types of gain-time virtually guarantee impermissible disparities in sentencing. The inherent capriciousness and unavoidable arbitrariness of application render the statute invalid.

Before inception of the sentencing guidelines in 1983, statutory maximums and the review of sentences by a parole commission provided some uniformity of sentences among those convicted of similar crimes. The guidelines then attempted to provide for similar sentences for those similarly situated, in exchange for the loss of the opportunity for parole.

Florida's earlier habitual offender statute provided for sentences outside the statutory maximums, but not outside the guidelines, unless other reasons for departure existed. And, arising contemporaneously with the sentencing guidelines were new forms of gain time, which were applied uniformly to most inmates serving guideline sentences.

Florida's present statute, however, destroys objectivity in sentencing. Its low-threshold requirements make the statute applicable to a substantial number, if not a solid majority, of those persons sentenced to prison in the State of Florida. Yet, of the tens of thousands who are eligible for sentencing under this statute, only those chosen by a prosecutor--in a NECESSARILY arbitrary manner--are actually sentenced under its provisions. Others who commit the same offense under the same circumstances and with the same prior records will escape the operation of the statute, for no expressible reason other than fortune.

The court stated in Barber, supra, that "[t]he type of discretion afforded the prosecutor under this law is constitutionally permissible, for it is no different from that afforded a prosecutor in other areas of the law." (at 1172) (emphasis supplied). The court then went on to give examples, i.e., that prosecutors choose who to prosecute, who to charge with capital offenses, who to offer plea bargains to, and which of two statutes to proceed under. (Id., at 1172) But each of those examples used by the court is distinguishable from the "discretion" used in applying the habitual felony offender statute in

this specific manner: in each of the instances cited, there is no necessary uniformity in the class of affected persons, and perceivable, articulable reasons could be given for each choice made.

Under the habitual felony statute, the very elements of the definition guarantee a homogenous class of highly similar, if not identical, affected persons. The choice by a prosecutor to proceed against some, and not all under the habitual offender statute, is, therefore, necessarily arbitrary, and that is the infirmity that distinguishes this situation from those cited in Barber.

Both the district court and the Supreme Court of the United States have stated that "only a contention that persons within the habitual-offender class are being selected according to some unjustifiable standard, such as race, religion, or other arbitrary classification, would raise a potentially viable challenge." Barber, at 1170, citing Bordenkircher v. Hayes, 434 U.S. 357 (1978); and Oyler v. Boles, 368 U.S. 448 (1962). Yet it is just such a contention that petitioner is unable to make under the rulings of the district court which do not require any demonstration or articulation of a prosecutor's reasons for seeking enhancement against one person as opposed to another.

There are no standards; there is no possibility of review. The district court, by its findings, would have all persons who qualify as habitual felony offenders to rely upon some hoped-for fairness in prosecutors, because nobody, no court anywhere,

is permitted to look over the shoulder of those prosecutors to determine if persons within the habitual offender class are being selected according to some unjustifiable standard, such as race, religion, or other arbitrary classification. Due process of law is not only violated; it is not provided.

In the case of King v. State, 597 So.2d 309 (Fla. 2d DCA 1992),the Second District Court of Appeal concluded that "the 1988 amendment to subsection 775.084(3) changed that determination of habitual offender status from a discretionary determination to a ministerial determination." 597 So.2d at 313. The court then made the anomalous observation that:

> The trial judge, however, does retain the discretion to exercise leniency and to sentence a defendant found to be an habitual felony offender or an habitual violent felony offender to a sentence less severe than the maximum sentence that is permitted by subsections 775.084(4)(a) or (b).

597 So.2d at 314.

Once the ministerial designation of a person as an habitual felony offender is accomplished, all of the sanctions regarding loss of gain time are applicable, and sentencing discretion is effectively removed from the trial court. Even were the sentencing court to place a designated habitual felony offender on a probationary grant, a violation of that probation would result in maximum time served within the permitted one-cell bump up.

Further, the district court has construed the statute to remove from the sentencing judge any discretion over sentence length. Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990).

Once the prosecutor determines--under whatever nonreviewable standards employed (if, indeed, standards even exist)--to seek habitual offender status, the trial court's sentencing discretion is usurped, and the court must then impose the sentence mandated by the statute upon a showing that the defendant qualifies.

The power to fix maximum and minimum punishments properly rests with the legislature. Lightbourne v. State, 438 So.2d 380, 385 (Fla. 1983). That power does not extend, however, to fixing specific, required penalties for commission of any felony by repeat offenders, then granting to the executive branch the power to select some offenders, but not others, to receive this penalty. Unlike mandatory penalties fixed for capital crimes and those involving firearms, where the application of the required penalties is uniform, the habitual offender statute permits the executive branch to determine who shall and shall not receive enhanced penalties.

Thus, as interpreted by the district court in Donald, supra, section 775.084, Florida Statutes, and by the second district in King v. State, supra, violates the constitutional principle of separation of powers, and infringes on the judicial power established in Article V, section 1 of the Florida Constitution.

In summary, section 775.084 violates the equal protection clause because it creates irrational classifications and removes the levelling influence of the sentencing guidelines and parole eligibility from certain defendants; it violates

constitutional guarantees of due process because the means selected to achieve its purpose--and the tremendous disparities in sentences it produces--are unreasonable, arbitrary, and capricious; it eliminates any notion of due process because the means selected to achieve its purpose are inarticulable, and not subject to review; and, it violates the constitutional principle of separation of powers by taking from courts their inherent authority to fix punishments within the parameters established by the legislature, and granting said authority to prosecutors, without providing a means of review. For these reasons and others specifically rejected by the district Court in Barber, the Florida habitual felony offender statute is unconstitutional.

V. CONCLUSION

Because the habitual felony offender statute is unconstitutional, petitioner requests the Court to answer the certified question in the affirmative, vacate the sentences appealed from, and remand the cause to the trial court with directions to resentence petitioner to non-habitual felony offender sentences.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Carl A McGinnes

CARL S. McGINNES #230502
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(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits has been furnished by delivery to Mr. James Rogers, Assistant Attorney General, Criminal Appeals Division, The Capital, Plaza Level, Florida, 32301; and a copy has been mailed to petitioner, Marblee Seabrook, on this 21st day of January, 1993.

Carl A McGinnes

CARL S. McGINNES

IN THE SUPREME COURT OF FLORIDA

MARBLEE SEABROOK, :

Petitioner, :

v. : CASE NO. 80,953

STATE OF FLORIDA, :

Respondent. :

_____/

A P P E N D I X

TO

PETITIONER'S BRIEF ON THE MERITS

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

MARBLEE SEABROOK,	*	NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND
Appellant,	*	DISPOSITION THEREOF IF FILED.
V.	*	CASE NO. 91-939
STATE OF FLORIDA,	*	
Appellee.	*	

Opinion filed November 18, 1992.

An appeal from the Circuit Court for Levy County.
James Tomlinson, Judge.

Nancy A. Daniels, Public Defender; Carl S. McGinnes, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General; James W. Rogers, Senior Assistant Attorney General, Tallahassee, for appellee.

PER CURIAM.

Appellant was sentenced as an habitual felony offender. We affirm. However, as we did in Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992), we certify the following question to the supreme court as one of great public importance:

> DOES SECTION 775.084, FLORIDA STATUTES (1989), DENY EITHER DUE PROCESS OR EQUAL PROTECTION OF LAW UNDER EITHER THE FLORIDA OR THE UNITED

STATES CONSTITUTION; OR VIOLATE THE DOCTRINE OF SEPARATION OF POWERS, AS SET FORTH IN THE FLORIDA CONSTITUTION?

SMITH, WIGGINTON, and WOLF, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MARBLEE SEABROOK,

Appellant,

vs. CASE NO. 91-939

STATE OF FLORIDA,

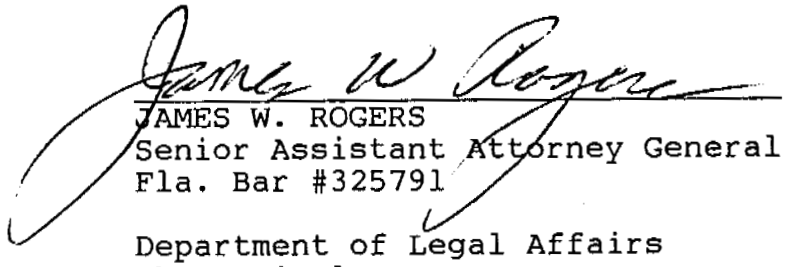
Appellee.

PETITION FOR REHEARING

The Florida Supreme Court in Tillman v. State, Case No. 78,715 (Fla. November 19, 1992) has again reiterated Ross v. State, 601 So.2d 1190 (Fla. 1992), Eutsey v. State, 383 So.2d 219 (Fla. 1980), Reynolds v. Cochran, 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), Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), and Henderson v. State, 569 So.2d 925 (Fla. 1st DCA 1990), all of which uphold section 775.084 and the constitutional authority of the Florida Legislature to impose habitual felon sentencing. The plenary authority of the Florida Legislature to define criminal offenses and to prescribe the punishment thereof having been upheld so frequently and consistently as to have become black letter constitutional law, the state urges the Court to grant rehearing and to withdraw the certified questions here.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



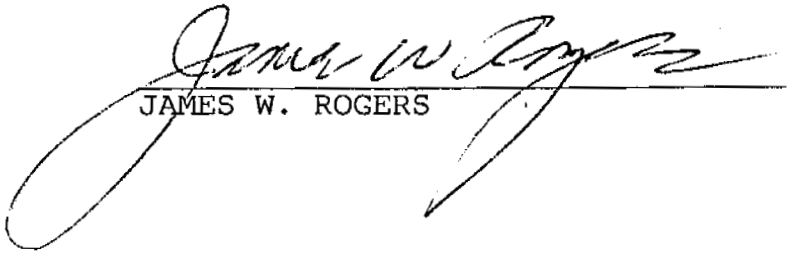
JAMES W. ROGERS
Senior Assistant Attorney General
Fla. Bar #325791

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32399-1050
904/488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida 32301, this 23rd day of November, 1992.



JAMES W. ROGERS

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MARBLEE SEABROOK,

Appellant,

v. CASE NO. 91-939

STATE OF FLORIDA,

Appellee.

_____/

REPLY TO PETITION FOR REHEARING

Appellant Marblee Seabrook, through his undersigned attorney, pursuant to Florida Rule Of Appellate Procedure 9.330(a), files this reply to the state's petition for rehearing, and requests that the state's petition be denied for the following reasons:

1. The state requests the Court to withdraw the certified question in light of Tillman v. State, 17 FLW S707 (Fla. Nov. 16, 1992).

2. Tillman involved an issue pertaining to the habitual violent felony offender statute and did not rule upon the issue certified in this case, in Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992), and in other cases.

3. Appellant was not sentenced as a habitual violent felony offender and, consequently, Tillman has little relevance to the instant case.

4. Hodges and the numerous other cases that have certified the same issue as Hodges are still pending before the supreme court.

5. Appellant stands in the same legal position as does the defendant in Hodges and should be accorded the same procedural rights.

WHEREFORE, appellant requests the Court to deny the state's petition for rehearing.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply has been furnished by hand-delivery to James W. Rogers, Assistant Attorney General, Criminal Appeals Division, The Capital, Florida, 32301, on this 14th day of December, 1992.

Carl S. McGinnes

CARL S. McGINNES

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

December 14, 1992

CASE NO: 91-00939

L.T. CASE NO. 90-215-CF

Marblee Seabrook v. State of Florida

Appellant(s), Appellee(s).

BY ORDER OF THE COURT:

Petition for rehearing, filed November 23, 1992, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

JON S. WHEELER, CLERK

By: Laurie Black
Deputy Clerk

Copies:

Steven A. Been
Marblee Seabrook
Carl McGinnes
James W. Rogers

RECEIVED
DEC 14 1992
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MARBLEE SEABROOK,	:	
Appellant/Petitioner,	:	
v.	:	CASE NO. 91-939
STATE OF FLORIDA,	:	
Appellee/Respondent.	:	
_____	:	

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that MARBLEE SEABROOK, Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered **December 14, 1992.** This decision passes upon a question certified to be of great public importance.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to James W. Rogers, Assistant Attorney General, Criminal Appeals Division, The Capitol, Tallahassee, Florida, 32301, on this 18th day of December, 1992.

Carl S. McGinnes

CARL S. McGINNES