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IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER LYNN PORTER, :

Petitioner, :

v. : CASE NO. 80,954

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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IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER LYNN PORTER,

Petitioner,

v. CASE NO. 80,954

STATE OF FLORIDA,

Respondent.

_______________________________/

PETITIONER'S BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

Christopher Lynn Porter 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 record on appeal will be by use of the symbol "R" followed by the appropriate page number in parentheses.

Filed with this brief is an appendix containing copies of the opinions issued by the lower tribunal as well 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, on July 20, 1991, burglarized a dwelling belonging to Holly Schrader with intent to commit battery and/or sexual battery, and during the offense battered Schrader by placing his penis in the mouth of Schrader, and was armed with a dangerous weapon, a knife, contrary to Section 810.02, Florida Statutes (1991). Count II alleged that petitioner, on July 20, 1991, committed sexual battery upon Holly Schrader, 23 years old, by oral penetration by the penis of petitioner, and in the process thereof used or threatened to use a deadly weapon, a knife, or used actual physical force likely to cause serious personal injury, contrary to Section 794.011, Florida Statutes (1991)(R-154-155).

Before trial, defense counsel filed a motion to suppress evidence of a lineup identification and any in court identification tainted by the illegal lineup identification (R-246-247). The record does not contain the disposition of this motion. The record does reflect that counsel did not object at trial when the identifications sought to be suppressed by the motion were made (R-38-41, 51-52, 63-67).

The first witness in the state's case was Holly Schrader. She testified that on July 19, 1990, she lived in Apartment B-107, Turtle Lake Apartments. During the evening hours, Schrader did her laundry, which involved making several trips by car between her building and the one containing the washing machines. She finished doing her laundry at approximately 10.00

p.m. Clad in only her panties and an oversized sweatshirt, Schrader laid down on her couch and watched television. She eventually drifted off to sleep.

When Schrader went to sleep, the television and some of the lights in the apartment were left on. She awoke when someone turned the television set off, and sensed that someone was in the apartment with her. No lights were on. A slender, white man with a knife, who smelled of cigarettes, ordered her to take off her panties, which she did. He then made sure that chain and deadbolt lock on the front door were secured. The intruder marched Schrader to her bedroom and made her remove her sweatshirt. She noticed that the blinds to her bedroom door were up, and she guessed that was where the man had obtained entry.

The man got on top of Schrader and made her kiss him. He performed oral sex. Calling her "Polly" instead of "Holly," the assailant told Schrader that she was a student whom he had seen on campus. The man then forced Schrader to perform oral sex on him. She told him she was having her period, hoping that he would let her go to the bathroom to remove her tampon, at which point she planned to lock herself in. The intruder got flustered, pushed himself off Schrader, said he was sorry and would not be back, and that he was leaving. Schrader stayed in her room until she heard her front door close shut.

She telephoned a friend, who encouraged her to notify the police, which Schrader did. Before the police arrived Schrader

vomited in her toilet. The police took Schrader to the station where she helped them compose a composite of the attacker.

At a later date, Schrader went to the police station and viewed a live lineup. She immediately recognized the assailant. She identified State's Exhibit #1 as being a photograph of the participants in the lineup. Petitioner was occupying the Number 2 position in the photograph. Petitioner was identified in court as being the attacker (R-19-41).

Paul Winterman, the next state witness, testified that he is an Investigator with the Panama City Police Department. After petitioner had been developed as a suspect, Winterman testified that he caused petitioner to be placed in a lineup with five other individuals on August 8, 1991. State's Exhibit #1, a photograph of the lineup in which petitioner occupied the second position, was introduced into evidence without objection. Schrader identified petitioner immediately.

Winterman testified further that, although head hair was collected from petitioner, the police were unable to collect any samples of petitioner's pubic hair because the area had been shaved.

After the composite photograph was made public, a person named Charles Hargraves contacted the police and stated he had seen someone who looked like the composite. A photographic lineup was compiled and displayed before Mr. Hargraves, who selected petitioner's picture from it as the person he had seen (R-47-63).

Detective Carl Woodall of the Panama City Police Department testified that he witnessed Schrader selecting petitioner from the live lineup (R-63-67).

Charles Edward Hargraves testified that, when he learned the description of a person suspected of committing a rape at Turtle Lake Apartments, he realized it fit a person he had seen doing laundry at Turtle Lake Apartments. He contacted the police who had him come to the station and make an identification from a group of photographs. Hargraves picked one of the photographs as being the person he had seen, and he identified petitioner in court as being that individual (R-76-80).

At the point in the proceedings the state, and then the defense, rested (R-83-84). Petitioner's motion for judgment of acquittal was denied (R-119).

After argument of counsel and the trial court's instructions on the law, and after deliberation, the jury returned verdicts finding petitioner guilty of burglary of a dwelling while armed and sexual battery with a deadly weapon as charged (R-120, R-257).

Petitioner appeared for sentencing March 3, 1992, on the instant case and some other cases pending violation of probation. The sentencing guidelines scoresheet recommended a life sentence. The state introduced into evidence several prior judgments and sentences for felony offenses. The prosecutor argued that, in the event the trial court deemed petitioner to be a habitual felony offender, the trial court was mandated to impose a life sentence for the burglary offense. The defense

argued that the trial court retained some degree of discretion. Petitioner was deemed a habitual felony offender with regard to the burglary charge. He was adjudged guilty and sentenced to life in prison as a habitual offender for burglary, and to a consecutive life sentence under the guidelines for sexual battery.

The parties again appeared before the Court in March 17, 1992. The trial court indicated that it was the Court's intent to impose a life sentence for burglary, even if the Court had discretion to impose a lesser sentence (R-125-147).

Notice of appeal was timely filed (R-312), petitioner was adjudged insolvent (R-315), and the Public Defender of the Second Judicial Circuit was designated to handle the appeal.

By opinion dated September 28, 1992, the district court issued a "PCA" affirmance of petitioner's judgements and sentences (A-1). Petitioner timely filed motions for rehearing, certification, and rehearing en banc (A-2-5).

On November 18, 1992, the district court granted petitioner's motion for certification, and the district court certified to this court the same question certified in Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992) and Brazil v. State, 604 So.2d 915 (Fla. 1st DCA 1992)(A-6).

Notice to invoke the discretionary jurisdiction of the Court was timely filed December 18, 1992 (A-7-8).

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.

On rehearing, the district court in this case certified to this Court the same issue certified in Hodges and Brazil, supra (A-6). In both cases, the following issue was certified:

> 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?

604 So.2d at 916. Petitioner requests the Court to answer the certified question "yes," for the reasons that follow.

The record indicates petitioner was found guilty of armed burglary and other offenses. At sentencing, petitioner was treated and sentenced as a habitual felony offender pursuant to Section 775.084, Florida Statutes (1991), with respect to the burglary charge (R-280-281, 283-287).

Petitioner contends the trial court erred in sentencing him as a habitual felony offender on the burglary charge 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

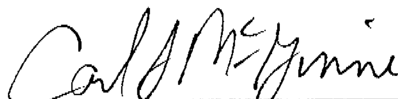
constitutional guarantees of due process because the means selected to achieve its purpose--and the tremendous disparities in sentences it produces--are unreasonable, arbitrary, and capricious; it eliminates any notion of due process because the means selected to achieve its purpose are inarticulable, 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 sentence imposed for burglary, and remand the cause to the trial court with directions to resentence petitioner to a non-habitual felony offender sentence.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(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. Charlie McCoy, Assistant Attorney General, Criminal Appeals Division, The Capital, Plaza Level, Florida, 32301; and a copy has been mailed to petitioner, Christopher Lynn Porter, on this 21st day of January, 1993.

CARL S. McGINNES

IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER LYNN PORTER,	:	
Petitioner,	:	
v.	:	CASE NO. 80,954
STATE OF FLORIDA,	:	
Respondent.	:	

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APPENDIX

TO

PETITIONER'S BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CHRISTOPHER LYNN PORTER,)

Appellant,)

v.)

STATE OF FLORIDA,)

Appellee.)

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

CASE NO. 92-1053

Opinion filed September 28, 1992.

An Appeal from the Circuit Court for Bay County.
N. Russell Bower, Judge.

Nancy A. Daniels, Public Defender, and Carl S. McGinnes, Asst. Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Charlie McCoy, Asst. Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

JOANOS, C.J., and WOLF and KAHN, JJ., CONCUR.

RECEIVED
SEP 28 1992
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

CHRISTOPHER LYNN PORTER,

Appellant,

v. CASE NO. 92-1053

STATE OF FLORIDA,

Appellee.

_______________________________/

MOTIONS FOR REHEARING, CERTIFICATION, AND REHEARING EN BANC

Appellant Christopher Lynn Porter, through his undersigned attorney, pursuant to Florida Rules of Appellate Procedure 9.330(a) and 9.331(c), hereby moves the Court for rehearing, certification, and rehearing en banc with respect to the Court's opinion dated September 28, 1992, and as grounds would show:

Motion For Rehearing

In this appeal, appellant argued the habitual felony offender statute was unconstitutional. On page 14 of his initial brief, it was observed that the issue had been certified to the supreme court in Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 19920. Appellant requested this Court to also certify the issue. The Court's opinion dated September 28, 1992, did not certify the issue.

Appellant contends this Court has overlooked, misapprehended, or failed to consider the fact that Hodges is still pending in the supreme court. Appellant submits it is incorrect to certify the issue is some cases, but fail to do so in other cases, when the issue is the same in all of the cases. See Jollie v. State, 405 So.2d 418 (Fla. 1981).

Appellant contends further that the Court has overlooked, misapprehended, or failed to consider that, as recently as September 4, 1992, this Court again certified the Hodges issue. Brazil v. State, 17 FLW D2064 (Fla. 1st DCA Sept. 4, 1992). Appellant argues he should be treated in the same manner as Mr. Hodges and Mr. Brazil, and accordingly this Court should grant rehearing and certify the issue to the supreme court.

Motion For Certification

For the reasons discussed in the **Motion For Rehearing**, supra, appellant requests the Court to certify the following issue to the supreme court, which is the same issue previously certified in Hodges and Brazil:

> 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?

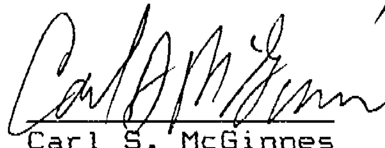
Motion For Rehearing En Banc

In the instant case, appellant presented to this Court the same issue presented in Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992) and Brazil v. State, 17 FLW D2064 (Fla. 1st DCA Sept. 4, 1992), namely, that the habitual felony offender

statute is unconstitutional. Although the Court rejected this claim in Hodges and Brazil, in both instances the Court certified the issue to the supreme court as a question of great public importance.

In the instant case, the Court issued a "PCA" affirmance dated September 28, 1992, but did not certify the question. Appellant contends that, by not certifying the issue in his case, but by certifying the issue in Brazil and Hodges, his case conflicts with Brazil and Hodges, and therefore rehearing en banc is necessary to resolve the conflict between appellant's case with Brazil and Hodges.

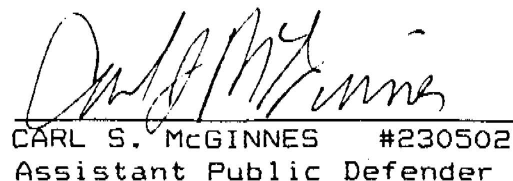
> I express a belief, based upon a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court: Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992) and Brazil v. State, 17 FLW D2064 (Fla. 1st DCA Sept. 28, 1992).



Carl S. McGinnes

WHEREFORE, appellant requests the Court to grant rehearing, certification, and rehearing en banc, and certify to the supreme court the same issue that was certified in Hodges and Brazil.

Respectfully submitted,



CARL S. McGINNES #230502
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion has been furnished by U.S. Mail to Mr. Charlie McCoy, Assistant Attorney General, 2020 Capital Circle, SE, Suite 211, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, on this 9th day of October, 1992.

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Fourth Floor, North
301 South Monroe Street
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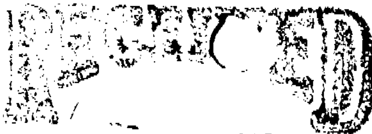
(904) 488-2458

ATTORNEY FOR APPELLANT



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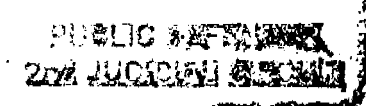

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CHRISTOPHER LYNN PORTER,)

Appellant,)

v.)

STATE OF FLORIDA,)

Appellee.)

CASE NO. 92-1053

Opinion filed November 18, 1992.

An Appeal from the Circuit Court for Bay County.
N. Russell Bower, Judge.

Nancy A. Daniels, Public Defender, and Carl S. McGinnes, Asst. Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Charlie McCoy, Asst. Attorney General, Tallahassee, for Appellee.

ON MOTION FOR REHEARING AND CERTIFICATION

PER CURIAM.

Christopher Lynn Porter has moved for rehearing, rehearing *en banc*, and certification in the above-styled case. The motions for rehearing and rehearing *en banc* are denied. The motion for certification is granted, and we hereby certify the same question certified in *Hodges v. State*, 596 So.2d 481 (Fla. 1st DCA 1992) and *Brazil v. State*, 17 F.L.W. D2064 (Fla. 1st DCA September 4, 1992).

JOANOS, C.J., WOLF and KAHN, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

CHRISTOPHER LYNN PORTER,	:	
Defendant/Petitioner,	:	
v.	:	CASE NO. 92-1053
STATE OF FLORIDA,	:	
Plaintiff/Respondent.	:	
	:	

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that CHRISTOPHER LYNN PORTER, Defendant/Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the original decision of this Court issued **November 18, 1992.** The 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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Assistant Public Defender
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Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to Mr. Charlie McCoy, Assistant Attorney General, Criminal Appeals Division, The Capitol, Tallahassee, Florida, 32302, on this 18th day of December, 1992.

CARL S. McGINNES