IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER LYNN PORTER,

Petitioner,

vs. CASE NO. 80,954

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The state accepts Porter's statement with the following addition:

1. Porter did not challenge the constitutionality of the habitual felon statute at sentencing (R 125-9) or any other time.

SUMMARY OF ARGUMENT

The constitutionality of section 775.084 was not raised in the trial court. Only the facial validity of the statute could be raised on appeal. The district court below erred in addressing claims not grounded on facial overbreadth and facial vagueness.

Porter was convicted for armed burglary of a dwelling, and armed sexual battery. (R 257). He was sentenced as an habitual felon, and does not dispute that he meets the statutory criteria.

Not having challenged the habitual felon statute below, Porter maintains his arguments attack the state's facial validity. (initial brief, p. 8.) Every one of his facial attacks have been rejected by this Court.

Since all of Porter's arguments -- and thus all facets of the certified question -- have been answered against him, the jurisdictional question is not of great public importance. Review should be dismissed as improvidently granted.

ARGUMENT

ISSUE I

DID THE DISTRICT COURT ERR IN ADDRESSING AND CERTIFYING ISSUES NOT PROPERLY COGNIZABLE UNDER A CHALLENGE OF FACIAL CONSTITUTIONALITY?

Porter was sentenced as an habitual (nonviolent) felon under section 775.084(1)(a), Florida Statutes (1989). No objections were entered and no sentencing issues were preserved. (R 125-9). Both here and in the district court below, Porter raises a broad challenge to the constitutionality of section 775.084(1)(a), as applied to him and to others. This broad challenge is contrary to the scope of a challenge permitted to the facial validity of a statute under case law from both this Court and the United States Supreme Court.

There are two permitted prongs to a facial validity challenge: overbreadth and vagueness. Sandstrom v. Lender, 370 So.2d 3 (Fla. 1979). Justice Overton, for this Court, set out the permitted scope of these two prongs in Southeastern Fisheries Association, Inc. v. Dept. of Natural Resources, 453 So.2d 1351, 1353 (Fla. 1984).

> Too often, courts and lawyers use the terms "overbroad" and "vague" interchangeably. It should be understood that the doctrines of overbreadth and vagueness are separate and distinct. The overbreadth doctrine applies only if the legislation "is susceptible of application to conduct protected by the First Amendment." Carricarte v. State, 384 So.2d 1261,

> 1262 (Fla.), cert. denied, 449 U.S. 874, 101 S.Ct. 215, 66 L.Ed.2d 95 (1980) (citing Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970)). See also McKenney v. State, 388 So.2d 1232 (Fla. 1980); State v. Ashcraft, 378 So.2d 284 (Fla. 1979). See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv.L.Rev. 844 (1970). The vagueness doctrine has a broader application, however, because it was developed to assure compliance with the due process clause of the United States Constitution.
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> A vague statute is one that fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement.

Id.

Overbreadth is a standing doctrine which permits parties in cases involving the first amendment to argue that the statute is invalid because of its effect on the first amendment rights of others not present before the court. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Similarly, "an attack . . . as unconstitutionally overbroad will not lie absent an assertion that the provision proscribes constitutionally protected speech or activities. [cites omitted.]" Sandstrom v. Lender, 370 So.2d 3, 5 (Fla. 1979).

The United States Supreme Court has spoken similarly in Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494-495, 102 S.Ct. 1186, 71 L.Ed.2d 362, 369 (1982).

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment if impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

Id. (footnotes omitted).

In footnote 5 to the above, the Court made it clear that a facial vagueness challenge faces an exceptionally high hurdle: "A 'facial' challenge in this context, means a claim that the law is "invalid in toto-and therefore incapable of any valid application.' [cite omitted]." Id.

Porter does not argue here, and did not argue in the district court, that his or anyone's first amendment rights are implicated by the recidivist statute, section 775.084(1)(a), or sentence. Thus, there can be no challenge for overbreadth. Southeastern Fisheries, Hoffman Estates, Sandstrom.

For similar reasons, Porter, except for labeling the challenge as facial, has not in substance challenged the facial vagueness of the statute. Sections 775.084(1)(a), (3) and (4)

are not merely unmistakably clear; they unmistakably apply to Porter who unquestionably meets the criteria for habitual felony sentencing. Thus, as a matter of settled law, Porter cannot argue that the statute might be unconstitutionally applied to some one else. Southeastern Fisheries, Sandstrom, Hoffman Estates.

This Court should hold that the mislabeled facial validity challenges here and in the district court were not cognizable for the first time on appeal.

The state acknowledges that the above analysis relying on the settled case law of this Court and of the United States Supreme Court may not survive this Court's recent expansive dicta in State v. Johnson, Case No. 79,150 & 79,204 (Fla. January 14, 1993). There, this Court arguably states that the constitutionality of any statute involving a liberty interest, i.e., any criminal statute, may be raised for the first time on appeal to determine if the statute has been unconstitutionally applied to the defendant. As this is written, the state is seeking rehearing and clarification of the Johnson decision.

ISSUE II

WHETHER THE HABITUAL FELON STATUTE IS FACIALLY CONSTITUTIONAL?

A. Substantive Due Process

Porter was convicted for two violent crimes, armed sexual battery and armed burglary. (R 257). Nevertheless, he has the audacity to claim the habitual felon statute facially violates due process by enhancing his sentence. Seldom is an argument so frivolous factually, and so weak legally. Ross v. State, 601 So.2d 1190, 1993 (Fla. 1992) ("The State is entirely justified in enhancing an offender's present penalty for a nonviolent crime based on an extensive or violent criminal history.").

Porter does not dispute that he meets the statutory requirements for an habitual felon, or that his present offenses are violent. If the state is "entirely justified" in enhancing the penalty for a recidivist felon whose current crime is not violent, it is entirely justified in doing so for felons such as Porter. The "due process" component of the certified question must be answered negatively.

B. Equal Protection

Porter does not state an equal protection claim different from his due process claim. However, it is obvious that he is part of a claim -- a recidivist felon (current offenses violent) as defined by statute -- that is significantly different from non-recidivist felons. On its face, the statute treats all

felons similarly situated alike. It is completely reasonable and plausible to treat Porter's claim more harshly. The statute does not violate equal protection. Ross, supra. See, Burdick v. State, 594 So.2d 267, 268 at n. 2 (Fla. 1992) (rejecting equal protection claim upon holding that sentencing under the habitual felon statute is permissive for violent and nonviolent recidivist felons). The equal protection component of the certified question must be answered negatively.

C. Separation of Powers

The habitual felon statute, through its definitions of nonviolent and violent recidivist felons, contains sufficient expression of legislative policy not to violate separation of powers. Pittman v. State, 570 So.2d 1045, 1046 (Fla. 1st DCA 1990), review denied, 581 So.2d 166 (Fla. 1991) ("[T]he procedures and criteria contained in section 775.084 provide sufficient guidelines to permit the judiciary to implement the unambiguous legislative police embodies in the habitual offender statute."). See, Ross, supra, at 1193 (rejecting vagueness challenge and declaring that the "[habitual felon] statute is highly specific in the requirements that must be met before habitualization can occur"). The separation of powers component of the certified question must be answered negatively.

CONCLUSION

All components of the certified question have recently and squarely been answered by this Court against Porter. Review of this case should be dismissed as improvidently granted. Alternatively, Porter's sentence must be affirmed.

Respectfully submitted,

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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 Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida 32301, this 10th day of February, 1993.

Charlie McCoy

CHARLIE MCCOY