IN THE SUPREME COURT OF FLORIDA

JOHN OVERSTREET,

Petitioner,

vs. CASE NO.: 81,445

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, John Overstreet, defendant below, will be referred to herein as "the defendant" or by his last name. Respondent, the State of Florida, will be referred to herein as "the State." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State accepts the defendant's statement of the case and facts, but would make the following additions:

The defendant was serving the "incarcerative" portion of a youthful offender split sentence, consisting of 4 years in "boot camp" followed by 2 years on probation (R 17), when he battered a fellow inmate on March 28, 1991. (R 1). As part of the plea agreement, the defendant plead nolo contendere to the lesser included offense of aggravated assault. (R 5-6). The State filed notice of intent to seek a habitual offender sentence. (R 7). The trial court sentenced the defendant to a 5 year term as a habitual violent felony offender. (R 42-49). The plea agreement gave the trial court discretion as to the sentence to be imposed. (R 5-6). The guidelines recommended sentence was 9-12 years and the permitted sentence was 7-17 years. (R 30).

SUMMARY OF ARGUMENT

The certified question should be answered in the affirmative. The defendant argues that "incarceration" is not listed under section 775.084(2), and therefore he could not be classified as a habitual violent felony offender. However, the legislature clearly intended that convicted felons should not be allowed to benefit from having adjudication withheld if they commit a subsequent felony before the term of probation, community control or any other sentence has expired. The rule of strict construction requires that where the legislature's intent is reasonably certain, the statute should not be read literally if to do would contravene public policy. Accordingly, this Court should affirm the First District's decision.

ARGUMENT

ISSUE I

PURSUANT TO SECTION 775.084(2), FLORIDA STATUTES, WHEN ADJUDICATION IS WITHHELD AND A DEFENDANT SENTENCED AS A YOUTHFUL OFFENDER TO INCARCERATION FOLLOWED BY PROBATION SUBSEQUENTLY COMMITS A FELONY WHILE INCARCERATED FOR THE PRIOR OFFENSES, CAN THE PRIOR OFFENSES INVOLVING WITHHELD ADJUDICATION BE TREATED AS PRIOR CONVICTIONS FOR PURPOSES OF HABITUAL FELONY OFFENDER SENTENCING?

John Overstreet has already benefitted from the leniency of the trial court judge who sentenced him.[1] He has also benefitted from the leniency of the prosecutor, who agreed to accept a plea to the lesser included offense of aggravated assault and who recommended the minimum term for a habitual violent felony offender. (R 9). John Overstreet has also benefitted from legislative leniency when he was sentenced to "boot camp" as a youthful offender under section 958.04(2)(c), Florida Statutes.[2] Now Overstreet seeks yet again to benefit[3] from governmental

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[1] The plea agreement left sentencing to the trial court's discretion. (R 5-6). The trial court could have sentenced Overstreet to 10 years imprisonment under section 775.084(4)(a)(3), Florida Statutes. (R 6). However, the trial court accepted the prosecutor's recommendation of a five year mandatory minimum habitual violent felony offender sentence (R 5).

[2] If the youthful offender sentencing option was not available to the trial court, the court would have had to either 1) withhold adjudication and put the defendant on a term of probation or 2) adjudicate the defendant guilty and sentence him to prison under the guidelines. In any event, the issue presented could not have arisen but for the legislatures creating a more lenient sentencing alternative for youthful offenders.

[3] By appealing his five year mandatory minimum sentence as a

leniency, arguing in this Court that the "rule of lenity,"[4] as codified by the legislature,[5] prevents his being sentenced as a habitual violent felony offender.

Presented with the same argument, the First District Court of Appeal reasoned that section 775.084(2), Florida Statutes, evinces legislative intent that an offender ought not evade classification as an habitual offender by virtue of a withheld adjudication, while serving the incarcerative portion of a youthful offender split sentence. Overstreet v. State, 18 Fla. L. Weekly 2660 (Fla. 1st DCA November 24, 1992). Accordingly, the First District affirmed Overstreet's sentence as an habitual violent felony offender. Id. But because a "literal interpretation" of section 775.084(2) would allow Overstreet to evade classification as a habitual felon, the First District certified the question as one of great public importance. Id.

The question certified by the First District Court of Appeal should be answered by this Court in the affirmative. The First District correctly applied the rule of strict construction. This

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habitual offender, Overstreet is exposed to being sentenced under the guidelines to a maximum term of 17 years in prison. (R 30). Given Overstreet's history of battering fellow inmates (R 1), if he is resentenced under the guidelines he may not accumulate gain time and could conceivably end up serving a longer period in prison. By pursuing this appeal, Overstreet has waived any claim to ineffective assistance of counsel if and when he is given a sentence which results in a longer prison term than he is currently serving.

[4] The rule of statutory construction that penal statutes shall be strictly construed, has also been termed the "rule of lenity." See, e.g., U. S. v. Callanan, 173 F.Supp. 98, 100 (1959).

[5] See §775.021, Fla. Stat.

Court should clarify the language in Perkins v. State, 576 So. 2d 1310 (Fla. 1991), and Jeffries v. State, 18 Fla. L. Weekly S7 (Fla. Dec. 24, 1992), to the effect that strict construction is synonymous with literal interpretation, and that the common law rule of strict construction ". . . emanates from Article I, section 9 and Article II, section 3 of the Florida Construction." Jeffries, 18 Fla. L. Weekly at S8.

The rule that penal statutes must be strictly construed is a common law rule of statutory construction. In U. S. v. Wiltberger, 5 Wheat. 76, 95 (1820), the Supreme Court stated that "[t]he rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." In fact, the rule of strict construction has not existed ever since there were penal statutes to construe. The doctrine of strict construction emerged in 17th century England in response to the unmitigated severity with which the death penalty was being imposed for all common-law felonies.[6] In any event, the rule of strict construction preceded the due process clause of the 5th amendment to the United States Constitution. While the Supreme Court continues to apply the rule of strict construction to federal statutes, see, e.g., Crandon v. U. S., 110 S.Ct. 997 (1990), the Supreme Court has never held that this rule is constitutionally required. Indeed, several states,[7] and even the

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[6] See Hall, Strict or Liberal Construction of Statutes, 48 Har. L.Rev. 748, 749-751 (1935).

[7] See Hall, supra note 7, at 752-56; Ala. Code 1975, §13A-1-6; Ariz. Rev. Stat. §13-104; Hawaii Rev. Stat. §701-104; Ky. Rev. Stat. 500.030; La. Stat. Ann. - Rev. Stat. 14:3; Minn. Stat Ann.

model penal code,[8] have abrogated the common law rule. Hence, this Court's dicta in Jeffries, 18 Fla. L. Weekly at S8, to the effect that the rule of lenity emanates from the due process clause of the Florida Constitution, does not comport with the history of the common law rule.

This Court has blurred the distinction between a constitutional challenge to a vague criminal statute based on due process of law, and a challenge to an ambiguous statute based on the doctrine of strict construction. The distinction between vague penal statutes, which must be stricken, and ambiguous penal statutes, which must be strictly construed, rests on whether the person potentially subject to the penal statute could (perhaps after consulting an attorney) reasonably foresee the limited alternative meanings which could be given the statute. See Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975) (Although the State "crime against nature" statute had never been expressly held to extend to the defendant's conduct (i.e., forcible cunnilingus) the statute was not unconstitutionally vague because "there was nothing to indicate, clearly or otherwise, that respondent's acts were outside the scope" of the

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§609.01; Mont. Code Ann. 45-1-102; N.H. Rev. Stat. Ann. 625:3; N.J. Stat. Ann. 2C:1-2; N.Y. - McKinney's Penal Law §5.00; Or. Rev. Stat. 161.025; Pa. Cons. Stat. Ann. tit. 18, §105; S.D. Cod. Laws 22-1-1; Vernon's Tex. Code Ann., Penal Code §1.05; Utah Code Ann. 1953, 76-1-106; West's Rev. Code Wash. Ann. 9A.04.020.

[8] The Model Penal Code §1.02(3) would require construction "according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this section and the special purposes of the particular provisions involved."

statute). In other words, there may be sufficient warning to justify subsequent construction and validation of the statute. On the other hand, if the means by which the statute might be rehabilitated could not reasonably be foreseen, the statute might be stricken for vagueness. See Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) (the Supreme Court would not allow the state court to narrowly construe the statute because there was no readily apparent construction which suggested itself as a vehicle for rehabilitating the statue in a single prosecution). Clearly, the question presented in this case has no constitutional implications whatsoever; and cases involving vagueness challenges to penal statutes are, therefore, of no relevance.

To begin with, there is no need to construe a penal statute "strictly" or otherwise unless an ambiguity exists. U. S. v. Cuthbert, 435 U.S. 371, 98 S.Ct. 1112, 55 L.Ed.2d 349 (1978). In the present case, an ambiguity exists as to whether a defendant for whom adjudication of guilt was withheld, but who was subsequently "incarcerated"[9] under the youthful offender statute,

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[9] Section 958.04, Florida Statutes uses the term "incarceration," but the incarceration contemplated is separate and distinct from a prison sentence. Section 958.11, Florida Statutes, states that "(1) the department shall by rule designate separate institutions and programs for youthful offenders . . ." (2) youthful offender institutions shall contain only those youthful offenders sentenced as such by a court . . . (3) The department may assign a youthful offender to a facility in the state correctional system which is not designated for the care, custody, control, and supervision of youthful offenders in the following circumstances: (a) If the offender is convicted of a new crime which is a felony under the laws of this state . . ." The statement of legislative intent under section 958.021 further provides: "The purpose of this act . . .

can be habitualized when he commits a violent felony during the term of his incarceration. The legislature did not amend section 775.084(2) when it enacted section 958.04 to account for the new sentencing alternatives to probation. Under section 958.04(2)(a), the defendant may be placed on probation or in a community control program. Section 958.04(2)(b) provides for incarceration for up to 364 days as a condition of probation. Section 958.04(c) provides for a youthful offender split sentence, with up to 4 years incarceration followed by probation or community control. Prior to the adoption of this statute, it would have been impossible for the court to withhold adjudication of guilt and then proceed to "incarcerate" the youthful offender in a "boot camp" program. Accordingly, an issue exists when reading these statutes together. The "issue" is whether the legislature intended to permit habitualization of a youthful offender on probation, as it clearly does, but not a youthful offender serving a term of imprisonment.

The doctrine of strict construction has never required literal interpretation.[10] A penal statute is "not to be

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[10] Statutory construction and interpretation, as terms of art, are not synonymous. "Interpretation" precedes construction, but stops at the written text. Black's Law Dictionary, 818 (6th Ed. 1990) (citing In re Union Trust Co., 89 Misc. 69, 151 N.Y.S. 246, 249). Interpretation includes the dictionary definition of terms used in the statute or other written instrument. Id. at 817. The term "construction" is defined as "[t]he process, or the art, of determining the sense, real meaning, or proper explanation of ambiguous terms or provisions in a statute, written instrument or oral agreement, or the application of such subject to the case in question, by reasoning in the light derived from extraneous connected circumstances or a connected matter, or by seeking and applying the probable aim and purpose of the provision." Id. at 312 (emphasis supplied).

construed so strictly as to defeat the obvious intention of the legislature." American Co. v. U. S., 2 Pet. 358, 367, 7 L.Ed. 450 (1829); Huddleston v. U. S., 415 U.S. 814, 831, 94 S.Ct. 1262, 1271, 39 L.Ed.2d 782 (1974); Barrett v. United States, 423 U.S. 212, 96 S.Ct. 498, 46 L.Ed.2d 450 (1976). Along the same lines, the Supreme Court has more recently stated that "[a]lthough the rule of lenity is not to be applied where to do so would conflict with the implied or express intent of Congress, it provides a time-honored interpretive guideline when the congressional purpose is unclear." Liparota v. U. S., 471 U.S. 419, 428, 105 S.Ct. 2084, 2089, 85 L.Ed.2d 434 (1985). Thus, where the legislative intent is unclear, the rule of lenity operates to the defendant's benefit; but where the legislative intent or purpose behind a penal statute is "clear" or "obvious," that intent should not be defeated by an overstrict interpretation. The rule of strict construction should not be taken to extremes and a penal statute given only its "narrowest meaning." U. S. v. Moore, 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975). It follows as a corollary that the rule should not "override common sense." Id.

The opinions of this Court were, prior to Perkins and its progeny, in harmony with the United States Supreme Court's strict construction analysis. In Ex Parte Bailey, 23 So. 552, 555 (Fla. 1897) this Court stated that "[t]he established rule is that a penal law must be construed strictly, and according to its letter. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not

clearly and intelligibly described in the very words of the statute, as well as manifestly intended by the legislature. Id. at 555. This statement is consistent with this Court's statement in Pillans & Smith Co. v. Lowe, 157 So. 649 (Fla. 1934) that "[t]he intent of a legislative act as deducible from its language and legislative setting is the law." Id. at 650. Likewise, this Court has stated that "In statutory construction, the legislative intent is the polestar by which the courts must be guided, even though it may appear to contradict the strict letter of the statute." State ex rel Hughes v. Wentworth, 185 So. 357, 360 (Fla. 1938).

This Court's early decision in Hawthorn v. Chapman, 152 So. 663 (Fla. 1933), provides the most complete statement of the rule of strict construction. In Hawthorn, a prisoner filed a writ of habeas corpus, contending that the inadvertent omission of the words "imprisonment for" from the sentencing statute prevented his imprisonment. Id. at 664, 666. This Court stated that:

> [i]t is a well-settled rule that the intent of a valid statute is the law, and this is to be ascertained by a consideration of the language of the enactment. The purpose to be accomplished within constitutional limitations is to be considered as controlling and effect given to the act as a consistent and harmonious whole. [citations omitted]
>
> Thus the fundamental principle in the judicial interpretation of a statute is that the object is to determine what intention is conveyed by the language contained therein. The rule is well and aptly stated in Orvil Tp. v. Borough of Woodcliff, 64 N.J. Law, 286, 45 A. 686, 687, as follows: 'when the intention is expressed, the question is one

of verbal construction only; but, if the language be not express, and some intention must necessarily be imputed, then it must be determined by inference grounded on legal principles, one of which is that the legislature must have entertained some intention, and the interpreter must determine what it was, unless it be that the statute lacks the formal requisite needed in order to give it the effect of a law. It is the true sense of the form of words which is used which is to be discovered by the interpretation or construction of a statute, taking all its parts into consideration, and, if possible, giving them all effect. Speaking more concretely, when the intention can be ascertained with reasonable certainty, words may be altered or supplied in the statute so as to give it effect, and to avoid any repugnancy or inconsistency with the intention.'

If, therefore, the absence of the words "imprisonment for" from the above-quoted [omitted here] provision of the act restricts the penalty for its violation to a fine, the offense denounced is a misdemeanor, though in the very words of the penalty clause it is termed a felony, thus producing a contradiction if not an absurd conclusion. There is a strong presumption against absurdity in a statutory provision; it being unreasonable to suppose that the legislature intended their own stultification, so, when the language is susceptible of two senses, the sense will be adopted which will not lead to absurd consequences.

To supply the words "imprisonment for" before the words "ten years in the state penitentiary" is merely to supply words obviously intended to be used but inadvertently or accidentally omitted in transcribing the bill in the legislature, and for this there is ample precedent.

The intention of the legislature being apparent and easily gathered from the context of the act, the question then arises, what is the duty of the Court in the premises? From an inspection of section 2 of the act under consideration, the omission of the words "imprisonment for" was doubtless accidental, and supplying them merely gives effect to

> that intent which is ascertainable with reasonable certainty from the express words of the act, and thereby obviates the repugnancy and inconsistency.
>
> To go further and add the words "not more than" before the words "ten years in the state penitentiary" enters the realm of probability, and not that of reasonable certainty based upon the express language of the act itself; but, as stated in U. S. v. Wiltberger, 5 Wheat. 76, 105, 5 L.Ed. 37, 'Probability is not a guide which a court, in construing a penal statute, can safely take,' for, in construing a statute, the intention of the legislature is to be ascertained from the words employed to express such intent, and in the stated act there are no words which authorize the addition of the words "not more than."

Hawthorn, 152 So. at 664-666.

This long excerpt from Hawthorn is included here for its thorough exposition of strict construction analysis. This analysis was followed in numerous other decisions by this Court requiring the strict construction of an ambiguous penal statute. Thus, in the more recent case of Griffis v. State, 356 So. 2d 297 (Fla. 1978), this Court stated that "[i]n construing a [penal] statute, this Court is committed to the proposition that a statute should be construed and applied so as to give effect to the evident legislative intent, regardless of whether such construction varies from the statute's literal meaning." Id. at 299. This Court reasoned that:

> [a]lthough a literal reading of the language contained in Section 943.42, Florida Statutes (1975), would support the trial court's finding that the statute does not require that a vehicle be used in an illegal drug "operation," this literal reading must give way to the legislative intent in enacting the

> statute which is plainly to the contrary. Id. at 299.

Accordingly, this Court read that section of the statute to require that the state must make a showing that the seized vehicle is involved in a drug trafficking operation before forfeiture can be ordered. Id. It is obviously absurd to hold, on the one hand, that a criminal defendant can invoke legislative intent to avoid the literal reading of a penal statute, but on the other hand that the state cannot avoid the undesirable literal meaning of a statute in order to give effect to clear legislative intent. In all cases, this Court should look to the polestar of legislative intent in strictly construing a penal statute.[11] Only where legislative intent is not reasonably certain should an ambiguity in a penal statute be resolved in favor of a criminal defendant. Hawthorn; Griffis.

In another case, Webb v. State, 398 So. 2d 820 (Fla. 1981), this Court reiterated the rule that "legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute." Id. at 824. This Court added that "construction of a statute which would lead to an absurd or

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[11] Section 775.021(1), Florida Statutes, titled Rules of Construction, provides that "[t]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." (emphasis supplied). This language indicates that the legislature intended to apply the rules of strict construction only to the definition of offenses, not to the definition of sentences. There is no reason to construe a statute strictly in favor of a convicted felon.

unreasonable result or would render a statute purposeless should be avoided." Id. In Webb, this Court construed "probable cause" to mean "reasonable belief" based on the legislative intent evidenced in the title of the Florida Stop and Frisk Act. Id. at 824-825. Accordingly, this Court held that the statute did not require "probable cause" in order to make a stop, notwithstanding the letter of the statute. Id. at 825.

In Williams v. State, 492 So. 2d 1051 (Fla. 1986), a convicted felon argued that the court erred in denying his motion for judgment of acquittal (on the charge of possession of a firearm by a convicted felon), because the gun in question was "an antique or replica thereof," under section 790.23, Florida Statutes. This Court stated that:

> Williams would have us construe the antique 'or replica' exceptions of section 790.23 in such a way as to condone the concealment, by a convicted felon, of a firearm which may possibly be a replica of an antique, but is obviously operable and loaded with live ammunition. We do not believe that the legislature, when enacting section 790.23, intended that a convicted felon could be acquitted when possessing a concealed, loaded weapon by using the excuse that the weapon is an antique or a replica thereof. This literal requirement of the statute exalts form over substance to the detriment of public policy, and such a result is clearly absurd. It is a basic tenet of statutory construction that statutes will not be interpreted to so as to yield an absurd result.

Id. at 1054 (citations omitted); see also Jackson v. State, 526 So. 2d 58 (Fla. 1988).

These earlier cases applying the strict construction rule differ from certain language in this Court's more recent opinions in Perkins and Jeffries. In Perkins, the defendant was charged with attempted trafficking and first degree murder. 576 So. 2d at 1311. The State argued that Perkins was barred from raising a claim of self-defense because he was involved in a "forcible felony," as defined under section 777.041(1), Florida Statutes. This section lists several felonies, and includes "any other felony which involves the use or threat of physical force or violence against any individual." This Court held that cocaine trafficking is not a felony that "involves" violence. Id. at 1313. The State does not now contend that Perkins was wrongly decided, only that certain language therein is inconsistent with the traditional rule of strict construction. For example, in Perkins this Court stated that "[o]ne of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter." Id. at 1312. (emphasis supplied). For this proposition this Court cited State v. Jackson, 526 So. 2d 58 (Fla. 1988); State ex rel. Cherry v. Davidson, 103 Fla. 954, 139 So. 177 (Fla. 1931); and Ex Parte Bailey, 39 Fla. 734, 23 So. 552 (Fla. 1897). As noted above, the case of Ex Parte Bailey stands for the proposition that penal statutes should be construed according to their letter "as well as its spirit" and "as manifestly intended by the legislature." Id. at 555. Furthermore, in Jackson this Court stated that "[a]n exception is made [to the rule that penal statutes are strictly construed] where a literal interpretation yields absurd results."

Id. at 59 (citing Williams v. State, 492 So. 2d 1051 (Fla. 1986)). Thus, to the extent that the above dicta from Perkins implies that penal statutes must be literally interpreted (i.e., without looking beyond the text to the legislative intent or the reasonableness of the result), it represents a departure from the cases cited.

In Perkins this Court stated further that "this principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited." This unwarranted dicta, as shown above, is not consistent with the history of the common law rule or with the United Supreme Court's decisions on the issue and was not necessary to the Perkins decision. The cases cited for this proposition all involve vagueness or overbreadth challenges to statutes. Brown v. State, 358 So. 2d 16, 21 (Fla. 1978) (Section 847.04, Florida Statutes, proscribing "open profanity," held overbroad); Franklin v. State, 257 So. 2d 21 (Fla. 1971) (section 800.01 and 800.02, Florida Statutes, proscribing the "abominable and detestable crime against nature," held vague); State v. Moo Young, 566 So. 2d 1380 (Fla. 1st DCA 1990) (Section 538.011, Florida Statutes, held not unconstitutionally vague). None of these cases grants criminal defendants the constitutional right to have ambiguous penal statutes construed absurdly in the favor of criminals.

This Court further stated in Perkins that "[w]ords and meanings beyond the literal language may not be entertained nor

may vagueness become a reason for broadening a penal statute." (emphasis supplied). The emphasized language seems to imply that penal statutes must be literally interpreted. To this extent, this dicta again represents an unnoted departure from traditional strict construction analysis. Hence, when this Court's "strict construction" analysis consisted in simply looking up the word "involves" in the dictionary to determine whether cocaine trafficking involves violence, rather than considering the intent of the legislature, it changed the law. Id. at 1313. More is required to construe a statute, even strictly, than looking simply to the text of the statute and the dictionary definition of the words used. Hawthorn.

Likewise, in Jeffries, this Court, citing Perkins, stated that statutes must be strictly construed "according to their letter." 18 Fla. L. Weekly at S8. This Court's analysis consisted of looking up the ambiguous term in the dictionary and then resolving the language ambiguity in favor of the convicted felon. Id. No recourse was made to legislative intent or to the reasonableness of the result, contrary to the prior decisions of this Court. Williams; Jackson; Griffis; Webb; Hawthorn.

In codifying the common law rule of strict construction, the legislature could not have intended that any defect or ambiguity in a statute, no matter how inadvertent or innocuous, should result in the contravention of public policy and the frustration of legislative intent. By seeming to alter the rule of strict construction in Perkins and Jeffries, such that legislative

intent is irrelevant, this Court has imputed to the legislature a self-stultifying intent. The traditional rule of strict construction requires only that ambiguities as to the legislature's intent be resolved in favor of the accused, not that every ambiguity of language in penal statutes be resolved in favor of the accused. The purpose of the rule of strict construction was never to allow those accused of criminal conduct (much less convicted felons), to "get off on a technicality." That very well may be, however, the effect of literally interpreting penal statutes.

In the present case, the legislature clearly intended that felons not be allowed to dip twice into the well of legislative leniency. Section 775.084(2) "evinces legislative intent," as the first district stated, "[t]hat an offender ought not evade classification as an habitual offender by virtue of a withheld adjudication, when he or she commits a subsequent felony while on probation." There is no reason whatsoever for the legislature to distinguish between probation, community control, incarceration as a condition of probation or incarceration followed by a period of probation. See §958.04, Fla. Stat. However, all of these sentences are possible notwithstanding the trial court's withholding of an adjudication of guilt. The legislature obviously omitted these possibilities under section 775.084(2) only inadvertently. The legislative intent being reasonably certain, it should be read to include a felony committed while incarcerated after adjudication of guilt is withheld.

CONCLUSION

Based on the foregoing argument, the State requests that this Court answer the certified question in the affirmative and affirm the First District.

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 David P. Gauldin, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 19th day of April, 1993.

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Assistant Attorney General