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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

WILLIE HARRIS,

Petitioner,

vs. **CASE NO. 82,165**

STATE OF FLORIDA,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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PRELIMINARY STATEMENT

When this appeal was initially prosecuted, the state public defender filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). On February 16, 1993, the Second District rendered its Anders order. See, Resp.App. 001. Thereafter, Mr. Harris, pro se, litigated the claim before that Court. The Second District rendered a subsequent order on March 23, 1993, declining to appoint appellate counsel. The Second District rendered its opinion on July 23, 1993. See, Pet.App. A1-3.

On July 29, 1993, Respondent received Petitioner's Brief on Jurisdiction filed by the state public defender in this Court; and, on that same date, Respondent received Petitioner's Notice to Invoke Discretionary Jurisdiction filed by the state public defender in the Second District. Subsequently, on August 2, 1993, Respondent received a Motion for Rehearing and Motion for Rehearing En Banc filed by Mr. Harris, pro se, in the Second District. See. Resp.App. 002. And, on August 5, 1993, Respondent received Appellant's Pro Se Motion for Certification of Conflict Between District Court of Appeals. See, Resp.App. 003. As of August 18, 1993, the Second District has not ruled on these pending pro se motions.

SUMMARY OF THE ARGUMENT

There is no conflict of decisions. Petitioner overlooks that in this case, the trial court never entertained habitualization as he determined that habitualization was not available. However, the prosecution objected. Mr. Harris prosecuted a direct appeal and the "State" prosecuted a cross-appeal on this claim. The "State" prevailed. And, on resentencing, the trial court complied with the mandate of the Second District. There has been no double jeopardy violation.

ARGUMENT

ISSUE I

WHETHER THE INSTANT DECISION IS IN CONFLICT WITH THE DECISIONS RENDERED IN DAVIS V. STATE, 587 SO. 2D 580 (FLA. 1ST DCA 1992), WILLIAMS V. STATE, 595 SO. 2D 936 (FLA. 1992), AND GRIMES V. STATE.

(As Restated by Respondent)

In an attempt to establish conflict of decisions, the state appellate public defender relies on Davis v. State, 587 So. 2d 580 (Fla. 1st DCA 1992) and Williams v. State, 595 So. 2d 936 (Fla. 1992). Mr. Harris, pro se, has relied on Grimes v. State, 616 So. 2d 996 (Fla. 1st DCA 1992) in his request for certification of conflict. See, Resp.App. 003. The subject decision is presently reported as Harris v. State, ___ So. 2d ___, 18 Fla. L. Weekly D1659, 1993 WL 274463 (Fla. 2d DCA No. 92-02760)(Opinion filed July 23, 1993). See, Pet.App. A1-3.

The Harris II decision can be distinguished from Davis; Williams; and, Grimes. In Harris I, when he was initially sentenced the trial court did not impose habitual offender sanctions because he incorrectly concluded that a first-degree felony punishable by life was not subject to habitualization. The Second District affirmed Mr. Harris' conviction but, on the cross-appeal, the Second District reversed and remanded because habitualization had been improperly refused by the trial court. See, Harris v. State, 593 So. 2d 301 (Fla. 2d DCA 1992) [Harris I]. On the record before the Second District, the trial court

believed that Florida law limited him to a Hobson's choice in the sentencing of Mr. Harris; and, in the trial court's mind, the "horse named Habitualization" was not nearest the stable door. This was an incorrect declaration which was corrected. And, Mr. Harris has not suffered either a state or federal double jeopardy constitutional deprivation in his resentencing. Judge Frank writes:

> In any event, it is apparent that the trial court would have originally sentenced Harris as a habitual offender but for the uncertainty in the then state of the law regarding the habitualization of first degree felonies punishable by life. Harris, in essence, received his initial guidelines sentence somewhat as a matter of grace based upon the arguments he advanced at sentencing. That was not the situation where a judge habitualizes a defendant but exercises his discretion not to sentence him to an enhanced term. See King v. State, 597 So. 2d 309 (Fla. 2d DCA 1992)(en banc). When he chose to appeal from his convictions and sentences, however, Harris risked having the trial court's misperception of the law corrected. The imposition of the habitual offender sentence, pursuant to the mandate of this court, was effected without a scintilla of the vicdictiveness focused upon in North Carolina v. Pearce. See Wood v. State, 582 So. 2d 751 (Fla. 5th DCA 1991).
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> Pet. A3.

In Davis v. State, 587 So. 2d 580 (Fla. 1st DCA 1991), Roosevelt Davis was charged with the crime of possession of a firearm by a convicted felon; and, he was sentenced as an habitual offender. On February 2, 1990, the trial court considered sentencing Mr. Davis as a habitual offender but, for

whatever reason, declined to do so. Three weeks later, on February 27, 1990, the trial reconvened the parties and sua sponte set aside the former sentence and declared Mr. Davis to be an habitual offender and sentenced him as same. Obviously, the trial judge at the February 2, 1990, hearing presided over a full habitualization proceeding and declined to habitualize Mr. Davis. At that hearing, the trial judge believed that twenty-two years of incarceration was the upper limit of the permitted guidelines range and the trial court declined to habitualize Mr. Davis. There is no question but that at the former hearing, the trial court considered habitualization and, as a matter of law, acquitted him of habitualization. Thus, at the latter hearing, that former decision not to impose a habitual offender sentence operates as an acquittal for double jeopardy purposes.

The state public defender also relies on this Court's decision in Williams v. State, 595 So. 2d 936 (Fla. 1992). There, Horace Williams had been found guilty of first-degree murder. The trial court permitted Mr. Williams to waive the jury for Phase II consideration; but, there was no consent of the state. See, Williams v. State, 573 So. 2d 875, 876 (Fla. 4th DCA 1990). The prosecution objects and cross-appeals after the jury had been dismissed and Mr. Williams had been sentenced to life imprisonment. But, this is too late. And, in the case at bar, the prosecution never procedurally defaulted its position that Mr. Harris could be habitualized.

Mr. Harris, pro se, relies on Grimes v. State, 616 So. 2d 996 (Fla. 1st DCA 1992), review dismissed, Grimes v. State, 617 So. 2d 319 (Fla. 1993)[Table Opinion]. See, Resp.App. 003. There, Ural Grimes was convicted of (1) eights counts of armed robbery; (2) one count of dealing in stolen property; and, (3) one count of stealing an automobile. Mr. Grimes was habitualized on the latter two offenses; and, he was given a non-habitual sentence on the armed robbery offense. On direct appeal, the First District concluded that there was a failure of proof to habitualize Mr. Grimes. Further, the First District held that when the written sentences were corrected to comply with the oral pronouncement on the non-habitualized offenses, the trial court was barred from reconsideration of habitualizing him. Why? Because the trial court's initial decision not to find Mr. Grimes an habitual offender was an acquittal on that charge. And, because there had been a full hearing on habitualization and the trial court had declined to habitualize, the prosecution was barred from seeking habitual offender status for Mr. Grimes as to the eight first-degree felonies punishable by life.

Here, the case is most narrow; and, the case is restricted to its facts. Most simply, the trial court never considered habitualization in its sentencing because of a misperception of the law. Once a proper cross-appeal was prosecuted [which is possible with any direct review], then it is most appropriate to address these legal issues de novo.

Neither the state public defender, here, nor Mr. Harris, pro se below, have established express and direct conflict of decisions.[1] Respondent would pray that this Court would decline to grant a review.

[1] Respondent would pause to point out that it has been decided that §775.084(1)(b) does not violate the constitutional protection against double jeopardy by increasing an individual's punishment due to the nature of the prior offense. See, Maeweather v. State, 599 So. 2d 733 (Fla. 1st DCA 1992), approved, Maeweather v. State, 616 So. 2d 16 (Fla. 1993)[the majority declines to address the certified question of double jeopardy]; Warren v. State, 601 So. 2d 1252 (Fla. 1st DCA 1992), approved, Warren v. State, 609 So. 2d 133 (Fla. 1992)[certified questions answered in the negative]; and, Hale v. State, 600 So. 2d 1228 (Fla. 1st DCA 1992), review granted, Hale v. State, 618 So. 2d 209 (Fla. 80,242)(table decision)[submitted and awaiting decision on certified question].

CONCLUSION

WHEREFORE, based upon the foregoing facts, arguments and authorities, Respondent would pray that this Court would make and render an Order denying Petitioner's application for discretionary jurisdiction as Petitioner has failed to demonstrate a decisional conflict.

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 Andrea Norgard, Assistant Public Defender, Office of the Public Defender, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, FL 33830 and Willie B. Harris, pro se, 3189 Little Silver Road, Crestview, Florida 32536 on this 18th day of August, 1993.

COUNSEL FOR RESPONDENT