IN THE SUPREME COURT OF FLORIDA

KEITH JEROME HARVEY, :

Petitioner, :

v. : **CASE NO. 93,334**

STATE OF FLORIDA, :

Respondent. :

_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER #0513253
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

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I ARGUMENT

ISSUE I

SECTION 322.34(1)(C), FLORIDA STATUTES (1995), VIOLATES THE CONSTITUTIONAL REQUIREMENT OF SEPARATION OF POWERS BECAUSE IT ALLOWS TRIAL JUDGES TO PRESCRIBE THE SEVERITY OF THE OFFENSE AND PERMISSIBLE PUNISHMENT VIA EXERCISE OF DISCRETION TO IMPOSE OR WITHHOLD ADJUDICATION OF GUILT.

The state's argument is based in large part on an incorrect premise: that felony driving while license suspended or revoked (DWLSR) is a sentencing enhancement (State's Brief (SB), p. 11), rather than a substantive offense. This court has already addressed this issue as to the misdemeanors enhanced to felonies - felony petit theft and felony DUI - which felony DWLSR most closely resembles. This court has previously held that the applicable statutes created substantive crimes, of which the prior convictions are an element, and as an element, must be charged in the information, but of which

procedurally, the jury is not to be informed. State v. Harris, 356 So.2d 315 (Fla. 1978)(felony petit theft is a substantive offense of which the prior convictions are an element); State v. Rodriguez, 575 So.2d 1262, 1265 (Fla. 1991) ("[t]he felony DUI statute is indistinguishable [from Harris] in this regard").

One specific way to distinguish an element of a substantive offense from a sentencing enhancement is by whether the factor must be charged in the information. The state has not, and petitioner assumes would not, seriously argue that the defendant need not be put on notice that felony DWLSR will be charged by alleging the prior convictions in the information. By comparison, notice of a true enhancement, such as habitual offender sentencing, is **not** charged in the information, and in fact, notice may be given for the first time after trial.

Thus, the state's reliance on the sentencing guidelines' definition of "conviction" (SB-8) and cases thereon is inapposite and not dispositive. For example, Canion v. State, 661 So.2d 931 (Fla. 4th DCA 1991) and Ryals v. State, 516 So.2d 1092 (Fla. 5th DCA 1987) (SB-10), involve the guideline definition of conviction.

Petitioner otherwise relies on the argument made in his initial brief on the merits on this and the other two issues.

II CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court quash the decision of the district court, declare section 322.34(1)(c), Florida Statutes (1995) unconstitutional, or in the alternative, find that the state did not comply with the plea bargain, and remand with directions to reduce petitioner's conviction to a misdemeanor.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
Fla. Bar No. 0513253
Assistant Public Defender
Leon County Courthouse
301 S. Monroe, Suite 401
Tallahassee, Florida 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to L. Michael Billmeier, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Keith Jerome Harvey, at his last known address, this 29 day of December, 1998.

KATHLEEN STOVER