IN THE SUPREME COURT OF FLORIDA

MICHAEL RAY CLINES,

Petitioner,

v. CASE NO. SC04-1882
[1D03-4823]

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant before the trial court and the appellant in the lower tribunal. A one volume record on appeal and one volume supplemental record will be referred to as "I or II R," followed by the appropriate page number in parentheses.

Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Clines v. State, 29 Fla. L. Weekly D2065 (Fla. 1st DCA Sept. 15, 2004). This brief is also being submitted on a disk.

II STATEMENT OF THE CASE AND FACTS

The issue before the lower tribunal was whether petitioner could have been sentenced both as an habitual offender and a violent career criminal for the same crime of resisting arrest with violence.

By amended information filed below, petitioner was charged with resisting arrest with violence, two counts of battery on a law officer, and one count of grand theft (I R 3-4). The state filed written notices of habitual offender and violent career criminal sentencing (I R 48-49). On September 5, 2003, he entered a plea to the resisting arrest and grand theft only; the state dropped the two battery charges, and petitioner acknowledged that he could receive habitual offender and violent career criminal sanctions (I R 21-47).

Petitioner appeared for sentencing on October 8, 2003. The state introduced documents to establish that petitioner qualified as an habitual offender and a violent career criminal (I R 54-70). The judge found petitioner qualified as an habitual offender and a violent career criminal (I R 94-98).

The judge imposed a 10 year sentence on the resisting charge as an habitual offender, with a 10 year mandatory

minimum as a violent career criminal; on the grand theft charge, the judge imposed a concurrent five year sentence; and petitioner was awarded credit for 340 days served on each (I R 98-102; 126-32).

On November 6, 2003, petitioner filed a timely notice of appeal (I R 133). On January 20, 2004, petitioner filed a motion to correct sentencing error under Fla. R. Crim. P. 3.800(b)(2), alleging that he could not be sentenced on the resisting charge as both an habitual offender and a violent career criminal (II R 139-41). On January 23, 2003, the judge dismissed the motion as facially insufficient (II R 142-43).

On appeal, petitioner argued the dual sentences were illegal on authority of Grant v. State, 770 So. 2d 655 (Fla. 2000), Oberst v. State, 796 So. 2d 1263 (Fla. 4th DCA 2001), and Works v. State, 814 So. 2d 1198 (Fla. 2nd DCA 2002).

The lower tribunal held that the imposition of dual sentences as an habitual offender and a violent career criminal for the same crime did not violate double jeopardy, on authority of its prior brief decision in Inman v. State, 784 So. 2d 1265 (Fla. 1st DCA 2001). Appendix at 2.

The lower tribunal also held that these dual sentences did not violate legislative intent, but certified conflict with the Second and Fourth Districts:

> In our view, the entire statutory scheme of section 775.084 readily contemplates, in the case of a single criminal charge, a sentence under the habitual felony offender provision, with the mandatory minimum term provisions provided for by the violent career criminal designation. Accordingly, we AFFIRM the judgment and sentence on appeal and CERTIFY direct conflict with *Oberst* and *Works*.

Appendix at 5.

Petitioner filed a timely notice of discretionary review, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(vi), and Art. V, §3(b)(3), Fla. Const.

III SUMMARY OF THE ARGUMENT

The lower tribunal in this case held that a defendant may be sentenced both as an habitual offender [HO] and a violent career criminal [VCC] for the same crime.

The standard of review is de novo, since this issue involves only a question of law.

The lower tribunal was incorrect to reject the position of the Second and Fourth Districts that such a dual designation is contrary to legislative intent. This Court's reasoning that dual sentences as an habitual offender and a prison releasee reoffender are not authorized by statute applies equally to dual sentences as an HO and a VCC. This Court must hold that such dual sentences are illegal.

In his second issue, petitioner will argue that the Florida recidivist statute, §775.084, Fla. Stat., is unconstitutional in light of Blakely v. Washington, 542 U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (June 24, 2004).

The standard of review is de novo, since this issue involves only a question of law. Petitioner did not raise this issue in his direct appeal below, because the prevailing authority was against his position, but asks this Court to address it in the interest of judicial economy.

In Blakely, the Court held that the Washington sentencing guidelines could not be exceeded by a judge's finding of other sentencing factors, which were not found by a jury.

Our statute allows the judge alone to find a defendant qualifies as an habitual offender, by a preponderance of the evidence, and allows the judge alone to impose a sentence which is twice that of the normal statutory maximum. Our statute allows the judge alone to find a defendant qualifies as a violent career criminal, by a preponderance of the evidence, and to impose a sentence which is three times that of the normal statutory maximum, with a 10 year mandatory minimum.

Blakely now requires that a jury be empaneled to find the recidivist status to be proven by a reasonable doubt. This Court's previous opinions to the contrary are no longer valid. This Court must now hold that Blakely requires that a jury find the HO and VCC recidivist sentencing factors beyond a reasonable doubt.

IV ARGUMENT

ISSUE I

THE IMPOSITION OF DUAL SENTENCES AS AN HABITUAL OFFENDER AND A VIOLENT CAREER CRIMINAL FOR THE SAME CRIME IS ILLEGAL.

The judge imposed a 10 year sentence on the resisting arrest charge as an habitual offender, with a 10 year mandatory minimum as a violent career criminal (I R 98-102; 126-32). The standard of review is de novo, since this issue involves only a question of law.

The lower tribunal was incorrect to reject the position of this Court and the Second and Fourth Districts that such a dual designation is contrary to legislative intent.

In Grant v. State, *supra*, this Court held that the imposition of concurrent 15 year habitual offender [HO] and prison releasee reoffender [PRR] sentences were not authorized by statute.

In Oberst v. State, *supra*, the court relied on Grant, and held that one may not be sentenced on the same crime as an HO and a violent career criminal [VCC], because the legislature had not authorized such a dual sentence:

> *Using legislative intent as our guide*, **we conclude that the dual designation in this case is not proper.** A HFO is defined in section 775.084(1)(a), Florida Statutes (1999), and a VCC is defined in subsection (d). Subsections

775.084(3)(a), (b), and (c) all require that the court make certain findings in a separate proceeding which will qualify the defendant as either a HFO, three-time violent felony offender, or a VCC. However, subsection (4)(f) states that "[a]t any time when it appears to the court that the defendant is eligible for sentencing under this section, the court shall make that determination as provided in paragraph (3)(a), paragraph (3)(b), ***or*** paragraph (3)(c)." (Emphasis added). Further, (4)(g) and (h), both refer to "a" sentence imposed under this section. Thus, the legislative language is in the disjunctive in section (4)(f) and the singular in sections (g) and (h). In contrast, in *Grant*, the court noted that in the PRRA the language was in the conjunctive and ordered that an offender "be punished to the fullest extent of the law and as provided in this subsection." Grant, 770 So.2d at 658 (emphasis added). The use of the disjunctive "or" in section 775.084(4) reflects a **legislative intent to require the court to designate a defendant as either a HFO or a three-time violent felony offender or a VCC, but not any combination.**

Because there are differences between the provisions for discretionary early release, designation as both a HFO and a VCC does make some difference to appellant. Therefore, the trial court must choose one or the other but not both. Unlike the PRRA, there is no mandatory duty on the court to sentence as a VCC. *Compare* § 775.082(9)(a)(3), Fla. Stat. (1999), *with* 775.084(3)(c)(5), Fla. Stat. (1999).

We therefore reverse and remand for resentencing of appellant as either a HFO *or* a VCC on the three burglary counts

involved in these proceedings.

Id., 796 So. 2d at 1264-65; italics in original; bold emphasis added. Notwithstanding the lower tribunal's view to the contrary, the Legislature plainly, by the use of the term "or," has expressed its intent that one may not be sentenced as an HO and a VCC under the statute.

In Works v. State, *supra*, the court followed Oberst and also held that one may not be sentenced on the same crime as an habitual offender and a violent career criminal. In Rivera v. State, 837 So. 2d 569 (Fla. 4th DCA 2003), the court followed Oberst and held that the defendant could not be sentenced as an habitual offender and a three-time violent felon.

Thus, petitioner's dual sentences on the resisting charge are illegal, because they contain the dual declarations of habitual offender and violent career criminal, which are contrary to legislative intent. This Court must hold that these dual sentences are illegal.

ISSUE II

THE IMPOSITION OF HABITUAL OFFENDER AND VIOLENT CAREER CRIMINAL SENTENCES BY THE JUDGE WITHOUT A JURY IS ILLEGAL UNDER BLAKELY v. WASHINGTON.

The Florida recidivist statute, §775.084, Fla. Stat., is invalid in light of Blakely v. Washington, *supra*.

The standard of review is de novo, since this issue involves only a question of law. Petitioner did not raise this issue in his direct appeal below, because the prevailing authority was against his position, but asks this Court to address it in the interest of judicial economy.

The statute doubles the normal maximum penalty for petitioner as an habitual offender, from five years to 10 years.[1] The statute triples the normal maximum penalty for petitioner as a violent career criminal [VCC], from five to 15 years, and requires a 10 year mandatory minimum sentence.[2] While not at issue here, the statute also doubles the maximum penalty for an habitual violent offender [HVO], and requires a mandatory minimum sentence.[3] While not at issue here, the statute requires a mandatory minimum sentence for

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[1]§774.084(4)(a)3., Fla. Stat.

[2]§774.084(4)(d)3., Fla. Stat.

[3]§774.084(4)(b), Fla. Stat.

a three-time violent felony offender.[4]

In Blakely v. Washington, *supra*, the defendant entered a plea to kidnaping, which under Washington law carries a 10 year statutory maximum sentence. That state's version of the sentencing guidelines called for a sentence within the "standard range" of 49 to 53 months. That state's version of the sentencing guidelines allows the judge to impose a sentence greater than the range if he or she finds an enumerated reason to impose an "exceptional sentence." The judge found that the kidnaping was committed with "deliberate cruelty" and imposed a sentence of 90 months.

The Court found that the imposition of the 90 month sentence constituted error under Apprendi v. New Jersey, 530 U.S. 466 (2000), because the judge imposed the exceptional sentence without a jury finding of deliberate cruelty. Significantly, the Court rejected the state's argument that Apprendi did not apply because the 90 month sentence did not exceed the statutory maximum of 10 years:

> In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless

[4] §774.084(c), Fla. Stat.

> contends that there was no *Apprendi* violation because the relevant "statutory maximum" is not 53 months, but the 10-year maximum for class B felonies in § 9A.20.021(1)(b). It observes that no exceptional sentence may exceed that limit. See § 9.94A.420. Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See *Ring [*v. Arizona, 536 U.S. 584 (2002)]*, supra*, at 602, 122 S.Ct. 2428 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting *Apprendi, supra*, at 483, 120 S.Ct. 2348)); *Harris v. United States*, 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); *cf. Apprendi, supra,* at 488, 120 S.Ct. 2348 (facts admitted by the defendant).

Id. at 2537. The Court held that the statutory maximum under Washington law was 53 months, the upper limit of the defendant's sentencing range:

> In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [1 J.] *Bishop* [Criminal Procedure (2d ed. 1872)]*, supra,* § 87, at 55, and the judge exceeds his proper authority.
>
> The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted

> in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense," [*State v.*] *Gore*, 143 Wash.2d [288, 21 P.3d 262 (2001)], at 315-316, 21 P.3d, at 277, which in this case included the elements of second-degree kidnaping and the use of a firearm, see §§ 9.94A.320, 9.94A.310(3)(b). Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. See § 9.94A.210(4). The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).

Id. at 2537-38; footnote 7 omitted.

The Court reversed the 90 month sentence because no jury had found the exceptional sentencing factor of deliberate cruelty:

> Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid.

Id. at 2538; footnote 9 omitted.

THE HO STATUTE

The Florida habitual offender statute, §775.084(3)(a), Fla. Stat., allows the judge alone to make a finding that a defendant qualifies as an habitual offender, and sets forth

the burden of proof as a "preponderance of the evidence," as opposed to the standard of beyond a reasonable doubt, which would have to be employed by a jury under Apprendi and Blakely.[5]

This Court in pre-Blakely cases held that our recidivist statutes, such as HO, habitual violent offender [HVO] and prison releasee reoffender [PRR] are not subject to an attack under Apprendi, because they are based on a defendant's prior record, which is a "sentencing factor" for the judge to consider under McMillan v. Pennsylvania, 477 U.S. 79 (1986). *See, e.g.*, Gudinas v. State, 879 So. 2d 616 (Fla. 2004); and Smith v. State, 793 So. 2d 889 (Fla. 2001).

However, those decisions are of questionable validity in light of Blakely. This is because the HO statute increases the normal statutory maximum from five years (§775.082(3)(d), Fla. Stat.), to 10 years for a third degree felony (§775.084(4)(a)3., Fla. Stat.) This increase in the normal statutory maximum is subject to Apprendi and Blakely, because it is the judge and not a jury who determines if the defendant qualifies as an habitual offender.

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[5]The same is true with regard to a finding of HVO and three-time violent felon. §§775.084(3)(b) and (3)(c), Fla. Stat.

In Blakely, the Court squarely held that the Washington sentencing guidelines created a statutory maximum, which could not be exceeded by a judge's finding of other sentencing factors, and rejected the state's reliance on McMillan:

> The State defends the sentence by drawing an analogy to those we upheld in *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), and *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). Neither case is on point. *McMillan* involved a sentencing scheme that imposed a statutory minimum if a judge found a particular fact. 477 U.S., at 81, 106 S.Ct. 2411. We specifically noted that the statute "does not authorize a sentence in excess of that otherwise allowed for [the underlying] offense." *Id.*, at 82, 106 S.Ct. 2411; cf. *Harris, supra*, at 567, 122 S.Ct. 2406. *Williams* involved an indeterminate-sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death. 337 U.S., at 242-243, and n. 2, 69 S.Ct. 1079. The judge could have "sentenced [the defendant] to death giving no reason at all." *Id.*, at 252, 69 S.Ct. 1079. Thus, neither case involved a sentence greater than what state law authorized on the basis of the verdict alone.
>
> Finally, the State tries to distinguish *Apprendi* and *Ring* by pointing out that the enumerated grounds for departure in its regime are illustrative rather than exhaustive. This distinction is immaterial. Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in

> *Ring*), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. [FN8]
>
> > FN8. Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence.

Id. at 2538.

Likewise, the HO statute <u>increases</u> the penalty beyond the normal maximum sentence under <u>Blakely</u>, based on a finding by the judge <u>alone</u> that the defendant qualifies as an habitual offender and constitutes a danger to the community, §775.084(1)(a) and (4)(e), Fla. Stat. Thus, the HO statute is unconstitutional in light of <u>Blakely</u>.

<u>THE VCC STATUTE</u>

The VCC statute, §775.084(4)(d), Fla. Stat., allows the judge <u>alone</u> to sentence a defendant as a VCC if he commits an enumerated crime and otherwise meets the statutory criteria. This statute increases the normal statutory maximum from five to 15 years for a third degree felony, and requires the judge

to impose a 10 year mandatory minimum sentence. The defendant is not eligible for any form of discretionary early release. §775.084(4)(k)2., Fla. Stat.

Like the HO statute, the VCC statute, §775.084(3)(c), Fla. Stat., allows the judge alone to make a finding that a defendant qualifies as a VCC, and sets forth the burden of proof as a "preponderance of the evidence," as opposed to the standard of beyond a reasonable doubt, which would have to be employed by a jury under Apprendi and Blakely.

Again, this Court's post-Apprendi decisions are of questionable validity in light of Blakely. The VCC statute, which triples the normal statutory maximum and requires a 10 year mandatory minimum, violates Blakely.

This principle is illustrated by the decision in State v. Johnson, 766 A.2d 1126 (N.J. 2001). There the defendant was charged with robbery while armed with a deadly weapon. A state statute required that he serve at least 85% of his sentence if his crime was classified as a "violent crime" under the "No Early Release Act."

The New Jersey supreme court held that, even though the court in McMillan had held that the imposition of a mandatory minimum was a "sentencing factor" for the judge and not an element for the jury, that holding was called into doubt by

Apprendi, and the classification of the offense as a "violent crime" was a matter for the jury. This was true even though the "No Early Release Act" did not cause the sentence to exceed the normal statutory maximum, because it did increase the amount of time the defendant would actually serve.

The same is even more true with regard to the Florida VCC statute, which causes the sentence to exceed the normal statutory maximum of five years, and it requires the defendant to serve a 10 year mandatory minimum.

The VCC statute, like the HO statute, suffers from the same constitutional infirmity under Blakely, because it is based on a finding by the judge alone that the defendant qualifies as a VCC and constitutes a danger to the community, §775.084(1)(d) and (4)(e), Fla. Stat. Thus, the VCC statute is also unconstitutional in light of Blakely.

V CONCLUSION

Based upon the arguments presented here, the petitioner respectfully asks this Court to hold that petitioner cannot be sentenced as an habitual offender and a violent career criminal for the same crime. Petitioner also asks this Court to hold that the judge alone cannot find a defendant to be an habitual offender or a violent career criminal by a mere preponderance of the evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Trisha Meggs Pate, Assistant Attorney General, The Capitol, Tallahassee, Florida; and to petitioner, #727883, Liberty C.I., 11064 N.W. Dempsey Barron Road, Bristol, Florida 32321; on this ___ day of October, 2004.

_____
P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief was prepared in Courier New 12 point type.

_____
P. DOUGLAS BRINKMEYER

IN THE SUPREME COURT OF FLORIDA

MICHAEL RAY CLINES,

Petitioner,

v. CASE NO. SC04-1882

1D03-4823

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

APPENDIX: Opinion of Lower Tribunal.

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29 Fla. L. Weekly D2065a

Criminal law -- Sentencing -- Violent career criminal -- Habitual offender -- Sentencing defendant as both violent career criminal and habitual felony offender on one count of resisting arrest with violence does not violate either double jeopardy protections or legislative intent -- Conflict certified

MICHAEL RAY CLINES, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 1D03-4823. Opinion filed September 15, 2004. An appeal from the Circuit Court for Escambia County. T. Michael Jones, Judge. Counsel: Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant. Charles J. Crist, Jr., Attorney General, and Trish Meggs Pate, Assistant Attorney General, Tallahassee, for Appellee.

(KAHN, J.)

Does section 775.084, Florida Statutes (2002), authorize the trial court to sentence a criminal defendant as both a violent career criminal and a habitual felony offender on one count of resisting arrest with violence? We find that such a sentence violates neither double jeopardy protections nor legislative intent. We certify conflict to the Florida Supreme Court.

In the judgment and sentence entered below, the circuit court designated appellant Michael Ray Clines as a habitual felony offender and a violent career criminal. Accordingly, appellant received a ten-year habitual offender term with a violent career criminal minimum mandatory of ten years. On appeal, Clines argues that his sentence is illegal as contrary to legislative intent. He relies upon the reasoning of the Fourth District Court of Appeal in *Oberst v. State*, 796 So. 2d 1263 (Fla. 4th DCA 2001). The Second District followed *Oberst in Works v. State*, 814 So. 2d 1198 (Fla. 2d DCA 2002).

In response, the State relies upon our decision in *Iman v. State*, 784 So. 2d 1265 (Fla. 1st DCA 2001), holding in a similar situation that no double jeopardy violation is shown because the resulting sentence is only one sentence with a

minimum mandatory term. Appellant counters that *Iman* does not control because *Iman* only looked at double jeopardy and not legislative intent.

The *Oberst* court, relying upon its view of legislative intent, concluded that a dual designation as a habitual offender and violent career criminal "is not proper." 796 So. 2d at 1264. The court did not, however, completely eschew the language of double jeopardy. In fact, the court considered *Grant v. State*, 770 So. 2d 665 (Fla. 2000), which in turn borrowed from *Ohio v. Johnson*, 467 U.S. 493 (1984), to observe, "one function of the double jeopardy clause is to protect against multiple punishments for the same offense, so as 'to ensure that the sentencing discretion of the courts is confined to the limits established by the legislature.' " 796 So. 2d at 1264 (quoting *Johnson*, 467 U.S. at 499).

Oberst then examined section 775.084(4)(f), which directs: "At any time when it appears to the court that the defendant is eligible for sentencing under this section, the court shall make that determination as provided in paragraph (3)(a) [habitual felony offender], paragraph (3)(b) [three-time violent felony offender], or (3)(c)[violent career criminal]." According to the *Oberst* court, the Legislature's use of the disjunctive "or" "reflects a legislative intent to require the court to designate a defendant as either a HFO or a three-time violent felony offender or a VCC, but not any combination." *Id.* at 1265; *cf. Rivera v. State*, 837 So. 2d 569 (Fla. 4th DCA 2003) (following *Oberst* and holding a defendant could not be designated both as a habitual felony offender and as a three-time violent felony offender). We respectfully disagree with this analysis.

We have previously held in *Iman* that a sentence identical to appellant's shows no double jeopardy violation. Appellant's argument in the present case implies that *Iman* is not controlling because *Oberst* relied strictly upon statutory interpretation, while *Iman* only considered double jeopardy. The plain language of *Oberst* does not support this argument because the *Oberst* court acknowledged that its exercise in statutory interpretation was a function of the double jeopardy clause. Moreover, and going a step beyond the straight double jeopardy holding of *Iman*, we conclude that the statute itself

does not support the result reached in *Oberst* and followed in *Works*.

We would readily note that, in Florida law, use of the word "or" generally connotes "a disjunctive particle that marks an alternative . . . ." *Pompano Horse Club v. State*, 111 So. 801, 805 (Fla. 1927). Nevertheless, the question of legislative intent must be plumbed in order for a court to make an appropriate determination of whether use of the word "or" connotes only the disjunctive. As the Florida Supreme Court has observed:

> There are, of course, familiar instances in which the conjunction 'or' is held equivalent in meaning to the copulative conjunction 'and,' and such meaning is often given the word 'or' in order to effectuate the intention . . . of the Legislature in enacting a statute, when it is clear that the word 'or' is used in a copulative, and not in a disjunctive, sense.

Id. Accordingly, a connecting "or" should be read in the conjunctive sense if such is called for to insure that "the act is given its clear and obvious meaning." *Pinellas County v. Woolley*, 189 So. 2d 217, 219 (Fla. 2d DCA 1966). This court has acknowledged that the term 'or' would generally be construed as being disjunctive and thereby indicating alternatives, but recognizes that "the case law also indicates that there are instances in which the conjunctive "or" is held equivalent to the copulative conjunction 'and,' and such meaning is often given in order to effectuate the legislative intent in enacting a statute." *Suddath Van Lines, Inc. v. State, Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996). We must, therefore, properly determine legislative intent by analyzing the entire statute and not focus entirely upon the Legislature's choice of a particular conjunction in one subsection.

Here the Legislature had little choice but to use the disjunctive. Had the Legislature used the conjunctive "and," the statute would have been hopelessly confusing and would have suggested that the trial court must make all three sentencing determinations, a situation that would be impossible on the facts of many cases. Looking at section 775.084(4)(f), we read the word "or" in light of the Legislature's previous directive to the trial court to "make that determination." The phrase "make that determination"

refers to a sentence under section 775.084 (“this section”) -- a sentence that may be affected by any of the enhancement provisions referenced in section 775.084(4)(f). Of course, in the present case, the trial court did as the statute directs and made the sentencing determination as provided in paragraph (3)(a) (habitual felony offender) and paragraph (3)(c) (violent career criminal).

Notably, section 775.084(3), in mandatory language, directs that the trial court “shall determine” whether a defendant fits into any of the special sentencing categories provided by the statute. Under subsection (3)(a), the trial court “shall determine if the defendant is a habitual felony offender or a habitual violent felony offender;” Under subsection (3)(b), the trial court “shall determine if the defendant is a three-time violent career criminal;” and under subsection (e)(c), the trial court “shall determine whether the defendant is a violent career criminal. . . .” Thus, in three places, section 775.084(3) directs the trial court to conduct a separate proceeding, but does not limit the trial court to only one determination. Subsection (4)(f) of the statute, construed in ***Oberst***, merely reiterates the requirements of subsections (3)(a), (b), and (c), each of which directs the court to conduct separate proceedings and to make “findings required as the basis for such sentence.” § 775.084(3)(a)4., (b)4., (c)3., Fla. Stat. (2002).

Finally, election of only one of the sentencing alternatives contravenes the actual provisions of section 775.084(4). In the case of a habitual offender, including a habitual violent offender, the court retains discretion as to whether to impose the sentences called for in the subsection. ***See*** § 775.084(4)(a), Fla. Stat. (2002) (“The court . . . may sentence the habitual felony offender as follows. . . .”); § 775.084(4)(b), Fla. Stat. (2002) (“The court . . . may sentence the habitual violent felony offender as follows. . . .”). As to sentencing for three-time violent felony offenders and violent career criminals, however, the statute speaks in mandatory terms. ***See*** § 775.084(4)(c)1., Fla. Stat. (2002) (“The court . . . must sentence the three-time violent felony offender to a mandatory minimum term of imprisonment as follows. . . .”); § 775.084(4)(d), Fla. Stat. (2002) (“The court . . . shall sentence the violent career criminal as follows. . . .”). Thus, at least two prongs of the statutory sentencing scheme are mandatory provided a defendant qualifies

under one or both of these prongs. This further militates against a construction that would require the trial court to elect no more than one sentencing designation under the statute.

In our view, the entire statutory scheme of section 775.084 readily contemplates, in the case of a single criminal charge, a sentence under the habitual felony offender provision, with the mandatory minimum term provisions provided for by the violent career criminal designation. Accordingly, we AFFIRM the judgment and sentence on appeal and CERTIFY direct conflict with *Oberst and Works*.

(WOLF, C.J., and LEWIS, J., CONCUR.)