IN THE SUPREME COURT OF FLORIDA

JAMES ODELL ALLEN, :

Petitioner, :

vs. : Case No. 77,321

STATE OF FLORIDA, :

Respondent. :

_____:

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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PRELIMINARY STATEMENT

Petitioner, James Allen, was the defendant, Appellee, and cross-appellant in the matter of State v. Allen, 16 F.L.W. (Fla. 2d DCA opinion filed January 16, 1991), wherein the Second District Court of Appeals certified the following question to this Honorable Court:

> Has the 1988 Amendment of Section 775.084, Florida Statutes, altered the Supreme Courts' ruling in Brown, holding that the Legislature intended sentencing under Section 775.084-(4)(a) to be permissive rather than mandatory, as stated in Donald?

Respondent, the State of Florida, was the Appellant and cross-appellee, as well as the prosecuting authority below.

STATEMENT OF THE CASE AND FACTS

On August 28, 1989, Petitioner, James Allen, was charged by information in the Tenth Judicial Circuit with trafficking in cocaine. (R2-3) The information was amended on November 8, 1989, changing the charged offense to armed possession of cocaine with intent to sell contrary to Section 893.135, Florida Statutes (1989) and Section 775.087, Florida Statutes (1989). (R4-5)

The Honorable Dennis Maloney, Circuit Judge, presided over Petitioners' jury trial held on February 7, 8, and 9, 1990. At issue in the trial was whether Petitioner had thrown down a pouch containing 21.6 g. of cocaine after being chased by Lakeland police Officer Joe Halman.

The incident occurred during the execution of a search warrant at a home suspected of drug sales. Deputy Halman was on the lookout for Mr. Allen, who was purported to be dressed in red pants. (R30-31) When Halman arrived at the scene he saw Mr. Allen seated in a chair in the yard of the house to be searched. (R32) When Mr. Allen saw the officers, he ran from the chair, crossed the street, and was chased by Halman. (R33) During the chase, Petitioner dropped a gun and a pouch containing cocaine packaged in eight "croners." (R37-38) The gun was loaded and capable of firing. (R35-36) Petitioner initially stated the gun belonged to a white man, then a black man. (R35-36)

Halman's version of events was contradicted by other state witnesses who either did not see Petitioner seated in the

chair or run across the street or saw someone other that Petitioner in the chair. (R69-71, 78, 115, 123, 198-200)

Other witnesses stated Mr. Allen was lying in the road when the police arrived. (R134-137)

Mr. Allen admitted to being in the area, dozing in street. (R240) He heard someone say to "get out of the road," so he jumped up and ran with another guy. (R242) He didn't realize he was being chased until Deputy Halman told him to come out. (R243) He denied ownership of both the pouch and gun. (R245)

Petitioner was convicted as charged. (R354-355, 359)

On March 21, 1990, the State filed Notice of its' intent to seek a sentence as a Habitual Offender under Section 775.084, Florida Statutes (1988). (R360) On April 2, 1990, Petitioner was sentenced. Defense counsel did not contest that Mr. Allen met the statutory criteria for habitualization in terms of his prior convictions, but argued to the court that the protection of the public did not warrant a life sentence. (R364-367) Counsel argued the facts of the case, the type of record Mr. Allen had, his age, and the guidelines recommendation in did not warrant a life sentence. (R365-367) The court sentenced Petitioner to 40 years incarceration followed by 10 years probation. (R368, 372-376) The court checked the habitual offender space on the scoresheet and in the space provided for departure reasons wrote "habitual offender."

On April 10, 1990, a notice of appeal was filed by the State. (R380) On May 2, 1990, a notice of cross appeal was filed by Petitioner. (R389)

On January 16, 1991, the Second District Court of Appeal issued an opinion in Petitioner's case. The court affirmed the convictions and reversed the sentence imposed. The Second District ruled that Section 775.084(1)(a), Florida Statutes (1988) requires that a life sentence be imposed upon a conviction for a first degree felony if the court sentences the defendant under the provisions of Section 775.084, Florida Statutes (1987).

SUMMARY OF THE ARGUMENT

I.

The 1988 amendment to Section 775.084, Florida Statutes (1987) does not alter the prior ruling of this court in Brown v. State, 530 So.2d 51 (Fla. 1988), that the imposition of a life sentence is permissive rather than mandatory when a defendant is sentenced as a habitual offender upon his conviction of a first degree felony.

The intent of the Legislature is clearly to broaden the discretion of the trial court in imposing sentences under Section 775.084, Florida Statutes (1988) and is evidenced not only by the timing of the 1988 and 1989 amendments, but also by their content.

Had the Legislature wished to recede from the Brown analysis regarding the interpretation of may and shall it would have enacted a specific amendment doing so.

The First District incorrectly applies rules of statutory construction and civil case law to the interpretation of a criminal statute. In order to give effect to the intent of the Legislature to punish those who commit or have committed more serious crimes more severely, it would be irrational to impose a more severe sentence on a habitual felon as opposed to a violent habitual felon.

II.

By excluding life felonies and those first degree felonies punishable by life from habitual offender sentencing, the

Equal Protection Clause is violated as there then exists no reasonable relationship between a mandatory life sentence for a simple first degree felony and the Legislature's intent that those convicted of more serious and numerous offenses be sentenced more severely.

ARGUMENT

ISSUE I

HAS THE 1988 AMENDMENT OF SECTION 775.084, FLORIDA STATUTES (1987), ALTERED THIS COURT'S RULING IN BROWN V. STATE, 530 SO.2D 51 (FLA. 1988), HOLDING THAT THE LEGISLATURE INTENDED SENTENCING UNDER SECTION 775.084-(4)(A), FLORIDA STATUTES (1988), TO BE PERMISSIVE RATHER THAN MANDATORY?

The Second District Court of Appeal, in rendering their opinion in Petitioner's case, held that Section 775.084(4)(a), Florida Statutes (1988), mandates the imposition of a life sentence upon a defendant for a conviction of a first degree felony as a habitual offender. Petitioner respectfully contends that the decision of the Second District is incorrect. Petitioner appeared before the trial court following his conviction for armed possession of cocaine with intent to sell, a first degree felony, and was sentenced as a habitual offender to 40 years incarceration and 10 years probation. The State appealed, arguing a life sentence was mandatory and the Second District agreed. Analysis shows this to be incorrect.

Section 775.084, Florida Statutes (1988) permits the trial court, after specific preliminary criteria are satisfied, to impose an extended term of imprisonment by treating the defendant as a habitual offender. The relevant portion of that statute to the instant case, subsection (4)(a) provides that the "court ... shall sentence the habitual felony offender as follows: 1. In the case of a felony of the first degree, for life." On its face, this

section appears to mandate a life sentence for a defendant convicted of a first degree felony and classified as a Habitual Felony Offender (H.F.O.). However, this Court must consider the complete wording of Section 775.084 to determine legislative intent, resolve any conflicts and give each section of the statute a field of operation.

The habitual offender statute, since it's original enactment, has been undergone two recent amendments, in 1988 and 1989. In neither amendment was the language of Section 775.084-(4)(a), altered. In analyzing the question of whether the Legislature intended that a life sentence was mandatory because of the appearance of the word "shall" in subsection (4)(a) of the 1987 version of the statute this court in Brown v. State, 530 So.2d 51 (Fla. 1988), held that the Legislature did not intend such a result. As this Court discussed in Brown, the word shall first appeared in 1975 and its insertion was either "an editorial error or a misapprehension of the legislative intent by the editions." Brown, at 53. Given the Brown decision, the question next must be has any subsequent amendment to the Section 775.084, Florida Statutes (1988), altered the holding of this court? When established rules of statutory construction are applied, it is clear the answer is no, and the interpretation of Brown applies to the statute as amended in 1988.

One tool of statutory construction used to discern legislative intent is that the legislature is presumed to know the law and how it is being interpreted by the courts of this state.

The decision in Brown, supra, was issued on June 16, 1988. The legislature amended Section 775.084 in both 1988 and 1989. The amendment of 1988, although substantial, did not alter the sentencing language provision of subsection (4)(a), although it removed habitual offender sentences from the constrictions of the guidelines. Neither did the 1989 amendment alter the sentencing provisions of subsection (4)(a). Since the legislature is presumed to know that this court held that the "shall" of subsection (4)(a) was permissive rather than mandatory, had the Legislature wished a different construction which would require a mandatory life sentence, they could have included an amendment making that declaration. Obviously, the Legislatures' failure to include any such directive in the either of the last two amendments conclusively shows that it is content with the Brown holding.

Secondly, one can analyze what in particular in a statute is the subject of amendments in order to determine whether the amendment is designed to alter the entire statute or just portions of it. For example, in State v. Watts, 558 So.2d 994 (Fla. 1990), in addressing legislative amendments to be Youthful Offender Act, this Court held that what portion of a statute that is amended may shed light on whether the Legislature intended to alter the entire statute. In looking at the 1988 and 1989 amendments, it is clear the Legislature did not primarily focus its attention on the sentencing penalties, but instead significantly altered the definition of a habitual offender and the findings which are necessary in order to impose an extended term of incarceration.

The only significant alternation dealing with sentencing was the exemption of habitual offender sentences from the guidelines. Although this particular amendment seems to undercut that portion of the Brown decision requiring harmony between the guidelines and the habitual offender statue, it does not require a different interpretation be given to the "shall" contra "may" ruling of Brown. Obviously, if the legislature wanted to affect the mandatory/permissive nature of subsection (4)(a), it would have done so specifically, as it specifically addressed the applicability of the guidelines. The removal of the habitual offender from the guidelines clearly provides courts with broader discretion in sentencing. It would be an illogical result to on one hand give greater latitude to judicial discretion and then to severely curtail it on the sentencing of first degree felonies. Thus, the Legislature intended that the courts need no longer provide written departure reasons when sentencing or comply with guidelines as a habitual, and are still not required to impose any specific sentence such as a mandatory life term.

The Legislature is clearly relying more heavily on judicial discretion in fashioning a sentence under the Habitual Offender Act. To require a mandatory sentence of life is an illogical reading of the statutes' history, especially considering the timing and language of its' amendments. The 1988 amendment should not be construed as altering the Brown decision in its' analysis of the mandatory/permissive nature of subsection (4)(a), rather it should be looked upon as the desire of the Legislature to

afford greater discretion to the trial court when sentencing habitual offenders.

Further supporting the interpretation of subsection (4)(a) as urged by Petitioner, in another tool of statutory construction which requires criminal statutes to be strictly construed and in favor of the accused. See State v. Jackson, 526 So.2d 58, 59 (Fla. 1988) and Section 775.021(1), Florida Statutes (1989). This rule of lenity clearly mandates a permissive as opposed to a mandatory interpretation be given to the word "shall." If one examines each of the sentencing alternatives under both the habitual felony offender provisions and the violent habitual felony provisions found at Section 775.084(4)(b), Florida Statutes (1988), it is immediately clear that each one of other sentences utilizes permissive language, (may), in setting forth the allowed sentence. Even the sentencing of a violent felony offender upon a conviction for a first degree felony because of the word "may" clearly allows the court discretion in imposing a life sentence. It would be irrational for the Legislature to require a more severe sentence for the "regular" habitual felon in only one instance, that being those with first degree felony convictions, than for the violent habitual felon, when it is clear the intent was for more severe sanctions to be applied against the violent offender. Consequently, this Court must remove this irrationality and resolve this conflict between these Sections by deciding that the term "shall" in Section 775.084(4)(a) means "may." See Debolt v. Department of Health and Rehabilitative Services, 427 So.2d 221 (Fla. 1st DCA

1983), (court must try to resolve conflicts between conflicting statutes or sections of statutes).

Section 775.0841, Florida Statutes (1989), expresses the Legislative intent concerning the prosecution of career criminals (Habitual Offenders). Section 775.0841 states that priority should be given to certain career criminals given the constraints or the use of available prison space. This expression of intent reflects the understanding that the limited available prison space requires discretion and priority-setting so that certain career criminals are properly sentenced. This intent is expressed in the discretion given to the trial judge in sentencing a habitual offender.

Another rule of statutory construction is that a reviewing court must give effect to legislative intent, notwithstanding contrary statutory language. See Speights v. State, 414 So.2d 574 (Fla. 1st DCA 1982); Parker v. State, 406 So.2d 1089 (Fla. 1981). The legislative intent will prevail, even if it contradicts the literal language of a statute. See State v. Webb, 398 So.3d 820 (Fla. 1981). The Legislature surely intended to give a trial judge the same discretion for sentencing habitual offenders as when sentencing more dangerous violent habitual felony offenders. This legislative intent is also reflected in Section 775.084(4)(c) which gives the trial court discretion to not classify a defendant as a H.F.O. or H.V.F.O. Otherwise, the sentencing scheme in Section 775.084(4)(a) is irrational and contrary to common sense.

The above discussion demonstrates that there is considerable doubt about whether the term "shall" in Section 775084(4)(a) means "shall" or "may," in light of the language used in Section 775.084(4)(b) and the legislative intent expressed in Sections 775.084(4)(c) and 775.0841, Florida Statutes. This Court should apply the strict scrutiny standard to Section 775.084(4)(a). The doubt about the meaning of Section 775.084(4)(a) should be resolved in favor of Appellant: the term "shall means may," consistent with the term used in Section 775.084(4)(b).

The First District in Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990) analyzed Section 775.084(4)(b)(1), Florida Statutes (1988), and concluded that the sentencing provisions are mandatory. The reasoning of the First District is incorrect and the Court in Donald was dealing with another issue, therefore that decision should have no bearing on the present action. In Donald, the defendant was convicted of a first degree felony and sentenced as a violent habitual offender. Initially, a sentence of 20 years was imposed with a fifteen year minimum mandatory. The court then resentenced the defendant to a straight 30 years with no minimum mandatory. The court further filed reasons for upward departure. The First District was initially correct in their analysis that the habitual statute allows the court discretion in determining whether to habitualize, however, they were incorrect in determining that this discretion does not also apply to sentencing. The First District held that in order to invoke the fifteen year minimum mandatory provisions of (4)(b)(1), a life sentence had to be given

and that only a life sentence or guidelines sentence could be given. This decision completely ignores the "shall"/"may" analysis of Brown and the legislative history particular to this section.

Counsel also submits that the Donald court's reading of Section 775.084(4)(c), Florida Statutes (1988), is incorrect. The First District held this section is interpreted to mean that if the public protection is not warranted, then a habitual sentence may not be imposed. Rather, a differing interpretation is that while the court may find someone is a habitual offender due to the requisite number of prior convictions, if the protection of the public does not mandate the imposition of the maximum penalty permitted under the statute, than the court may impose a less severe penalty. However, due to the "habitual offender" designation, the defendant would still loose various forms of gain time resulting in longer actual time being served. Thus, there are 3 sentencing alternatives within the court's discretion: to not habitualize and impose a guideline sentence; to habitualize and impose a sentence under the maximum provided by the statute, or to habitualize and impose the maximum penalty provided for by the habitual offender sentencing provisions. Once again, this three sentencing scheme interpretation is consistent with a broadened discretion in the hands of the trial court to fashion a sentence commensurate with the needs of society and appropriate to the particular defendant. Counsel suggests the Donald decision is too narrow in its' interpretation of the sentencing scheme and the Legislative intent of Section 775.083, Florida Statutes (1988).

The Donald court cited Allied Fidelity Insurance Co. v. State, 415 So.2d 109 (Fla. 3d DCA 1982), as authority for it's belief that may of subsection (4)(b) was mandatory. In Allied Fidelity Insurance Co. v. State, supra, the Third District Court of Appeal considered whether "shall" was mandatory or permissive. Allied Fidelity is a civil case involving the issue of whether a court may enter a judgment against a bail bond surety upon undischarged forfeitures where written notices were not given within 72 hours of the forfeitures pursuant to Section 903.26(2), Florida Statutes (1976). Consequently, the Third District Court did not rule upon the question relied upon by the Court in Donald v. State, supra. However, the Third District cited, in in dicta, Mitchell v. Duncan, 7 Fla. 13 (1857), as authority for the argument that "may" can mean "shall." The court in Allied Fidelity, supra, used this citation to support the argument that "shall" can mean "may" and conversely "may" can mean "shall." Mitchell v. Duncan, supra, was a civil case involving a law of sureties for the execution of a judgment. One part of the statute was directory and another part was permissive. This Supreme Court construed "may" to mean "shall" for the sake of the justice of giving the whole statute its intended effect. In Jones v. State, 17 Fla. 411 (Fla. 1880), this Court again decided that "may" meant "shall" in a statute covering the assessment of ad valorem taxes for a school district.

Counsel has been unable to find a prior criminal case which has decided that "may" means "shall." The above-cited cases

were all civil cases which involved property or monetary interests which were protected in one part of a statute by mandatory directions (by use of the word "shall"), but were ostensibly unprotected by another section which used permissive language (by use of the word "may"). These civil cases held that "may" could mean "shall" if a statute directs the doing of a thing for the sake of justice. See Mitchell v. Duncan, supra. In other words, the general statute directed that a thing be done but a certain part of the statute made the thing to be done permissive, instead of mandatory. To achieve the sake of justice which the statute required, the above-described courts construed "may" to mean "shall."

The Court in Donald v. State, supra, did not properly analyze Section 775.084(4)(b) in light of these precedents. A general reading of Section 774.084 does not direct that all habitual offenders "shall" be sentenced in a certain way. The general provisions of the act give discretion to the trial judge on whether to find a defendant to be a habitual offender and this discretion could be further expressed in the discretion inherent in Section 775.084(4)(b). The Court in Donald v. State also did not consider the appropriate "sake of justice" because, in this context, there is no fairness for the defendant. As the intent of the legislature was not clearly expressed in Section 775.084, the court should not have assumed that the sake of justice meant the State's definition of justice. The Legislature could have also intended that "may" should mean "may"; this reading would permit

the trial court discretion to not mete out the draconian sentences in Section 775.084(4)(b).

The Court in Donald v. State implicitly conceded that there was some doubt about whether the word "may" in Section 775.084(4)(b) meant "may" or "shall." To resolve this uncertainty, this Court improperly used the "may means shall" doctrine from civil cases. The use of this civil doctrine was incorrect because: 1) the Court improperly found the thing to be for the sake of justice was, by definition, a harsher sentence than that which was prescribed by the plain language of the statute; and 2) the proper standard of review in this case was strict scrutiny, not the civil doctrine of "may means shall" when a statute directs the doing of a thing for the sake of justice.

Thus, when section 775.084, Florida Statutes (1988), is subject to analysis in order to determine the Legislative intent it is clear that the trial court must still retain discretion in whether to impose a life sentence for a conviction of a first degree felony as a habitual offender.

ISSUE II

TO REQUIRE A MANDATORY LIFE SENTENCE FOR THE CONVICTION OF A FIRST DEGREE FELONY VIOLATES PETITIONERS' CONSTITUTIONALLY PROTECTED RIGHTS OF EQUAL PROTECTION.

In attacking the constitutionality of a statute, Petitioner acknowledges that he bears the burden of demonstrating its' invalidity. Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986), rev. denied, 511 So.2d 299 (1986), Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974). Further, a statute will not be declared unconstitutional unless it is shown to be invalid beyond a reasonable doubt. Bunnell v. State, 453 So.2d 808 (Fla. 1984). Even given the burden on Petitioner, Section 775.084(4)(a), Florida Statutes (1988), if interpreted a requiring a mandatory life sentence, fails to pass constitutional muster.

The Equal Protection Clause of the United States Constitution and Article I, Section 2 of the Florida Constitution, allows for the creation, through legislative action, of various statutory classification. However, if those classifications impinge on fundamental rights guaranteed by the Constitution or are applied to suspect classes, strict scrutiny is used to determine the constitutionality of the classification. If there is no fundamental right involved, the rational basis test is then used in order to determine if the statute bears a reasonable relationship to a legitimate state purpose. See Rollins v. State, 354 So.2d 61 (Fla. 1978).

In reference to this appeal, the rational basis test applies because there is no suspect class or fundamental right infringed on. Clearly, the State has a legitimate State purpose in wishing to incarcerate those who are deemed to be dangerous for longer periods of time. Hence, crimes in Florida are divided into differing degree felonies and misdemeanors. There are four main degree of felonies - capital, first degree, second degree, and third degree. However, in assigning punishments, the Legislature has further differentiated first degree felonies into three groups - those punishable by a maximum of 30 years incarceration, (simple first degree felonies), those punishable by a minimum of 40 years incarceration or life (1 degree life), and those punishable by life (PBL's). See Section 775.081, Florida Statutes (1988). Clearly, those offenses deemed more serious are given more serious penalties.

In turning next to the habitual offender sentencing provisions under Section 775.084 4a and 4b, it becomes apparent that a mandatory life sentence for a simple or straight first degree felony bears no rational relationship to the legislative desire to punish more serious offenses more severely.

For example, a person convicted of a first degree life felony, such as sexual battery with a deadly weapon is not subject to habitualization. See Johnson v. State, 15 F.L.W. 2631 (Fla. 1st DCA 1990). Therefore, he will be sentenced under the guidelines for as little as 4 1/2 years under permitted ranges. See: Sentencing Guidelines Category 2 scoresheet, where a life felony

scores 262 points. If the same defendant has two prior convictions for third degree felonies, an additional 53 points would be added, giving a sentencing range from 7 to 17 years under the permitted ranges.

An individual convicted of second degree murder with a firearm, also a life felony, scores out to 186 points on a Category I scoresheet, with a sentencing range of 7 to 22 years. See Category 1 Scoresheet. If that individual has two prior third degree felonies, for an additional 11 points, his sentencing range does not change.

However, a person with two prior third degree felonies, (thus being eligible for habitualization), and who is convicted of a first degree felony such as purchase of cocaine within 1,000 feet of a school (relatively innocuous when compared to sexual battery with a deadly weapon or second degree murder with a firearm) would receive a life sentence if habitualized and the sentencing provisions of 775.084(4)(a) are construed as mandatory. Thus, a drug user would spend his life in prison, while a violent rapist or armed murderer could receive as low as 4 1/2 years and only as great as 22 years. Clearly, this result wholly fails to meet a rational basis test given the stated purpose is to protect the public from more violent offenders. The public is certainly not protected under these ridiculously possible results nor is the Legislative goal of more severe sentences for more severe crimes being met. Under this scheme, the more innocuous felons, those

convicted of life felonies, face less severe punishment than those convicted of statutorily defined less severe first degree felonies.

In addition to life felonies being excluded from the habitual offender statute, those first degree punishable by life felonies (1st degree PBL's) may not be subject to habitualization either, lending the same type of absurd results. See Gohlston v. State, 16 F.L.W. D46 (Fla. 1st DCA January 1991) (Habitual offender statute contains no provision to enhance Fl-PBL's; but see contra Paige v. State, 15 F.L.W. D2994 (Fla. 5th DCA Dec. 1990) (Fl-PBL is subject to habitualization).

Once again, a mandatory interpretation of the word shall in Section 775.084(4)(a), Florida Statutes (1988), serves to destroy the Legislative intent behind the Habitual Offender Statute and would render it unconstitutional under the Equal Protection doctrine.

Not only does a mandatory reading of Section 775.084-(4)(a) run afoul of Equal Protection as compared with other criminal statutes, it is also in conflict with section (4)(b).

An individual receiving a life sentence under Section (4)(a) is ineligible to receive parole. See 775.084(4)(e), Florida Statutes (1988). He is not awarded gain time on a life sentence. However, an individual who receives a life sentence under (4)(b) is eligible for release after fifteen years. Without parole, a regular Habitual Offender will never be released. Clearly, there is no justification for statutorily creating a mechanism for release of the more serious offender. Such an arbitrary classifi-

cation cannot stand and clearly bears no rational or reasonable relationship to the legitimate State interest in incarcerating more serious offenders.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Appellant respectfully asks this Honorable Court to reverse the judgment and sentence of the lower court.