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CLERK, SUPREME COURT

By [Signature]  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,788

EDWARD WESTBROOK,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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ON DISCRETIONARY REVIEW FROM  
THE THIRD DISTRICT COURT OF APPEAL

\*\*\*\*\*

BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH  
Attorney General  
Tallahassee, Florida

ANITA J. GAY  
Florida Bar # 0745227  
Assistant Attorney General  
Department of Legal Affairs  
P.O. Box 013241  
401 N.W. 2nd Avenue, Suite N921  
Miami, Florida 33101  
(305) 377-5441

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## INTRODUCTION

The Respondent, The State of Florida, was the prosecution and the Petitioner, Edward Westbrook, was the defendant in the trial court. All parties will be referred to as they stood in the trial court. The symbols "R" and "T" will be used respectively to refer to the record on appeal and the transcript of proceedings.

## STATEMENT OF THE CASE AND FACTS

A single-count information, charging Defendant with robbery with a deadly weapon, was filed on August 21, 1989. (R. 4-4A). Defendant was tried by a jury on August 23-25, 1989 and found guilty as charged. (R. 25). Pursuant to notice filed on July, 11, 1989, the prosecution sought an enhanced penalty under the habitual offender statute, Fla. Stat. §775.084 (1989). (R. 35-48). Defendant was adjudicated guilty and sentenced, as a habitual offender, to a life term. (R. 26-30A).

Notice of appeal was filed on December 6, 1989. (R. 34). On February 12, 1991, the District Court of Appeal of Florida, Third District, affirmed Defendant's judgment and sentence. (R. 50-52). See Westbrook v. State, 574 So.2d 1187 (Fla. 3d DCA 1991). Defendant sought discretionary review and this Court accepted jurisdiction.

POINT ON APPEAL

I.

WHETHER THE HABITUAL OFFENDER  
STATUTE, SECTION 775.084, FLORIDA  
STATUTES (1989), APPLIES TO FIRST  
DEGREE FELONIES PUNISHABLE BY  
LIFE IMPRISONMENT?

SUMMARY OF ARGUMENT

Robbery with a deadly weapon is specifically made punishable under the habitual offender statute, thus the trial court properly sentenced Defendant to a term of life imprisonment as a habitual offender. Furthermore, first degree felonies punishable by life are not in a different category from first degree felonies generally.

## ARGUMENT

THE HABITUAL OFFENDER STATUTE,  
SECTION 775.084, FLORIDA STATUTES  
(1989), APPLIES TO FIRST DEGREE  
FELONIES PUNISHABLE BY LIFE  
IMPRISONMENT.

Defendant's argument that the habitual offender statute does not apply to first degree felonies punishable by life imprisonment is without merit. Defendant was convicted of robbery with a deadly weapon under Section 812.13, Florida Statutes (1989). Subsection (2)(a) of the robbery statute reads as follows:

If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084.

The robbery statute expressly states that Defendant's conviction is punishable under the habitual offender statute found in section 775.084. Thus, contrary to Defendant's position, the plain language of the robbery statute specifically provides for punishment under the habitual offender statute.

In the decision below, the Third District held that first degree felonies punishable by life imprisonment were subject to enhanced sentences under the habitual offender statute.

Furthermore, the court rejected the argument that Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), supported the claim of error in sentencing, with the following:

Secondly, the statement in Barber, 564 So.2d at 1173, concerning the possible nonapplicability of the habitual offender statute to those convicted of a first degree life felony is purely dicta. Moreover, Barber is not controlling here since the habitual offender statute addressed in that case was the 1987 version which was substantially rewritten by the Florida Legislature in 1989 to take penalties prescribed under the habitual offender statute outside the province of the sentencing guidelines and to allow the trial court to impose the penalty of life imprisonment on a defendant by simply making a determination that the defendant fit the statutory definition of a habitual felony offender. See Owens v. State, 560 So.2d 1260 (Fla. 1st DCA 1990).

Westbrook v. State, 574 So.2d 1187, 1188 (Fla. 3d DCA 1991).

The District Courts have also rejected defendant's position that a separate classification of felonious crime, to-wit: first degree felony punishable by life, is excluded from Section 775.084. See Jones v. State, 546 So.2d 1134, 1135 (Fla. 1st DCA 1989)("It is clear that there is no distinct felony classification of 'first degree punishable by life', but only a first degree felony which may be punished in one of two ways."); Burdick v. State, 16 FLW D1963, D1964 (Fla. 1st DCA July 25, 1991)("In essence, appellant here asks us to judicially amend Section 775.081, Florida Statutes to add another classification of felonious crime, that of 'first degree felony punishable by



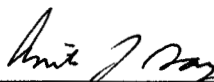
life'. We decline appellant's invitation and, in doing so, observe that a first degree felony, no matter what the punishment imposed by the substantive law that condemns the particular criminal conduct involved, is still a first degree felony and subject to enhancement by Section 775.084(4)(a)(1), Florida Statutes.").

CONCLUSION

Based upon the foregoing reasons and citations of authority the decision of the Third District, affirming Defendant's conviction and sentence, should be affirmed.

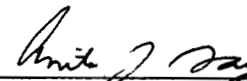
Respectfully submitted,

ROBERT A. BUTTERWORTH  
Attorney General

  
\_\_\_\_\_  
ANITA J. GAY  
Florida Bar No. 0745227  
Assistant Attorney General  
Department of Legal Affairs  
P.O. Box 013241  
401 N. W. 2nd Avenue, Suite N921  
Miami, Florida 33101  
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was furnished by mail to ELLIOT H. SCHERKER, Assistant Public Defender, 1351 Northwest 12th Street, Miami, Florida 33125 on this 14th day of November, 1991.

  
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ANITA J. GAY  
Assistant Attorney General