IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,788

EDWARD WESTBROOK,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

OTHER AUTHORITIES

FLORIDA STATUTES

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INTRODUCTION

Petitioner, Edward Westbrook, seeks discretionary review of a decision of the District Court of Appeal of Florida, Third District, affirming his conviction and sentence. The symbol "A" will be used to designate the appendix to this brief.

STATEMENT OF THE CASE

Petitioner was convicted of armed robbery and sentenced to life imprisonment as an habitual offender (A. 1). On appeal, he claimed that he was not subject to an habitual-offender sentence because the offense of armed robbery, as a first-degree felony punishable by life imprisonment, is not included within the ambit of the habitual-offender statute (A. 1-2).

The District Court of Appeal ruled as follows:

> We find that neither the applicable statutes nor *Barber* [*v. State*, 564 So.2d 1169 (Fla. 1st DCA 1990)] supports his argument. First, the robbery statute on its face permits sentencing under the habitual offender statute. Even though conviction under section 812.13(2)(a) is a first-degree felony punishable by life imprisonment, the trial judge is required to enter a guidelines sentence. In defendant's case, his guidelines scoresheet total provided for a recommended sentence of twelve to seventeen years, not life imprisonment. The defendant's highest permitted sentence under the guidelines, without the necessity of written reasons for departure, would have been twenty-two years imprisonment with a one-cell upward departure. However, because the robbery statute permits sentencing under the habitual offender statute where applicable, the trial judge, upon finding the defendant [a] recidivist, was permitted to impose the enhanced life sentence.
>
> Second, the statute 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 her 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.

(A. 2-3)(citation omitted; original emphasis).

The decision, which issued on February 12, 1991 (A. 1), was rendered upon the denial of a timely-filed motion for rehearing (A. 4-6) on March 19, 1991 (A. 7). A notice invoking this Court's discretionary-review jurisdiction was filed on April 15, 1991.

QUESTION PRESENTED

WHETHER THE DECISION OF THE COURT BELOW IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISIONS IN *BARBER V. STATE*, 564 So.2d 1169 (Fla. 1st DCA 1990), AND *GHOLSTON V. STATE*, 16 F.L.W. D46 (Fla. 1st DCA Dec. 17, 1990).

SUMMARY OF ARGUMENT

There exists an irreconcilable conflict among the district courts of appeal on the question whether the habitual-offender statute applies to first-degree felonies which are specially made punishable by life imprisonment. This conflict should be addressed by this Court to ensure uniform application of the statute through the state.

ARGUMENT

THE DECISION OF THE COURT BELOW IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISIONS IN *BARBER V. STATE*, 564 So.2d 1169 (Fla. 1st DCA 1990), AND *GHOLSTON V. STATE*, 16 F.L.W. D46 (Fla. 1st DCA Dec. 17, 1990).

Petitioner was convicted of robbery with a firearm, which offense is a first-degree felony punishable by life imprisonment. § 812.13(2)(a), Fla. Stat. (1989). The decision in *Barber v. State*, 564 So.2d 1169 (Fla. 1st DCA 1990), in the course of rejecting the argument that the habitual-offender statute, § 775.084, Fla.Stat. (1989), is unconstitutional, construed the statute to exclude from its ambit first-degree felonies punishable by life imprisonment:

> Barber contends that the law does not bear a reasonable and just relationship to a legitimate state interest. He claims that while the statute *appears* to be aimed at the most dan-

> gerous criminals, it excludes by its very terms those who have committed the most serious crimes. Barber states that "[a] person cannot be sentenced as a habitual felony offender if his offense is classified as a first degree felony punishable by life, a life felony, or a capital offense. Section 775.084(4)(a), Florida Statutes (1987)." Although subsection (4) makes no provision for enhancing sentences if the original sentence falls into one of the above categories, this is not a basis for finding that the statute fails to bear a reasonable and just relationship to a legitimate state interest. The legislature may have determined that these punishments are already sufficiently severe to keep the felon in prison for an extended period of time. Section 775.084, on the other hand, enhances sentences of habitual offenders when the statutes criminalizing their offenses do *not* take such recidivism into account.

Id. at 1173 (original emphasis).

The court below rejected petitioner's argument that *Barber* would require that he be sentenced without application of Section 775.084, for two reasons: (1) because the statement is "purely dicta," and (2) because the habitual-offender statute reviewed in *Barber* permitted guideline sentencing (A. 2-3). The court overlooked the decision in *Gholston v. State,* 16 F.L.W. D46 (Fla. 1st DCA Dec. 17, 1990), which decision was brought to the court's attention through a notice of supplemental authority and again in petitioner's motion for rehearing (A. 4-5).

In *Gholston,* the First District followed *Barber* to hold expressly that "Section 775.084, Florida Statutes, makes no provision for enhancing penalties for first-degree felonies punishable by life, life felonies, or capital felonies." 16 F.L.W. at D46 (citing *Johnson v. State,* 568 So.2d 519 (Fla. 1st DCA 1990), and *Barber*). The court then applied that ruling to vacate an habit-

ual-offender sentence imposed for a first-degree felony punishable by life imprisonment (armed burglary) in that case. *Ibid.* Any notion that the *Barber* holding was "purely dicta" is obliterated by the flat ruling in *Gholston*.[1] There accordingly exists a direct conflict of decisions on this issue.[2]

CONCLUSION

Based on the foregoing, petitioner requests this Court to grant discretionary review in the above-styled cause.

Respectfully submitted,

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[1] With regard to the second reason set forth by the court below, it should be noted that the pertinent aspects of the 1989 habitual-offender statute are unchanged from the statute which was considered in *Barber*. *Compare* § 775.084(4)(a), Fla.Stat. (1987), *with* § 775.084(4)(a), Fla.Stat. (1989).

[2] The Fifth District has aligned itself with the Third District in holding the habitual-offender statute applicable to first-degree felonies punishable by life imprisonment, and, in so ruling, recognized conflict with the First District's *Gholston* decision. *Tucker v. State*, No. 90-1478 (Fla. 5th DCA March 28, 1991).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, MONIQUE T. BEFELER, 401 N.W. Second Avenue, Suite N-921, Miami, Florida 33128 this 16TH day of April, 1991.

ELLIOT H. SCHERKER
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