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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,790

ANDRE HENRY,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT

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INTRODUCTION

The Respondent, The State of Florida, was the prosecution and the Petitioner, Andre Henry, 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 armed robbery, was filed on February 22, 1989. (R. 1-1A). Defendant was tried by a jury on September 5-7, 1989 and found guilty as charged. (R. 24). Pursuant to notice filed on August 8, 1989, the prosecution sought an enhanced penalty under the habitual offender statute, Fla. Stat. §775.084 (1989). (R. 20). Defendant was adjudicated guilty and sentenced, as a habitual offender, to a life term. (R. 25-29A).

Notice of appeal was filed on November 20, 1989. (R. 30). On March 19, 1991, the District Court of Appeal of Florida, Third District, affirmed Defendant's judgment and sentence. (R. 33-34). See Henry v. State, 576 So.2d 409 (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

Armed robberies are 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 armed robbery 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 companion case consolidated with the instant case for oral argument, Westbrook v. State, Case No. 77,788, 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

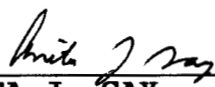
Section 775.081, Florida Statutes to add another classification of felonious crime, that of 'first degree felony punishable by life'. We decline appellant's invitation and, in doing so, observe that a first degree felony, no matter what the punishment imposed by the substantive law that condemns the 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,

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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.



ANITA J. GAY
Assistant Attorney General