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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,790

ANDRE HENRY,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, Andre Henry, 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. 1-2). 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. 2).

The District Court of Appeal ruled as follows:

Section 812.13(2)(a) provides:

If in the course of committing the rob-

bery 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.

Appellant was convicted of robbery while carrying a firearm and sentenced under section 775.084, Florida Statutes (1989).

Section 775.084(4)(a) provides in pertinent part:

The court . . . shall sentence the habitual felony offender as follows: 1. In the case of a felony of the first degree, for life.

Appellant was sentenced to life. We find no error.

(A. 2)(citation omitted; original emphasis). 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 dangerous 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).

In *Gholston v. State*, 16 F.L.W. D46 (Fla. 1st DCA Dec. 17, 1990), 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 habitual-offender sentence imposed for a first-degree felony punishable by life imprisonment (armed burglary) in that case. *Ibid*.

The court below held directly to the contrary (A. 2), as it previously had in *Westbrook v. State*, 16 F.L.W. 454 (Fla. 3d DCA Feb. 12, 1991), which decision is also pending before this Court on an application for discretionary review. 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). There accordingly exists a direct conflict of decisions on this issue.

CONCLUSION

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

Respectfully submitted,

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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, KATHERINE B. JOHNSON, 401 N.W. Second Avenue, Suite N-921, Miami, Florida 33128 this 18th day of April, 1991.

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