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IN THE SUPREME COURT OF FLORIDA

TIMOTHY TUCKER,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO.: 77,854

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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PETITIONER'S BRIEF ON JURISDICTION

STATEMENT OF THE CASE AND FACTS

The state filed informations charging Petitioner with one count of grand theft of a motor vehicle in violation of Section 812.014(2)(c)4, Florida Statutes (1989) and one count of robbery with a firearm in violation of Section 812.13(2)(a), Florida Statutes (1989). (R 33, 48) The state filed its notice of intention to seek enhanced punishment with regard to the armed robbery charge. (R 57) Appellant entered pleas of guilty to the grand theft charge and a plea of nolo contendere to the armed robbery charge. (R 59-64) At sentencing, the state presented evidence with regard to Appellant's prior convictions and the trial court found that he qualified under the habitual offender statute and adjudicated him to be one. (R 28-29, 67-68) The state attorney argued that if the trial court found Appellant to be an habitual offender, he had to impose a mandatory life sentence. (R 8) The trial court adjudicated Appellant guilty and sentenced him to life imprisonment on the robbery charge and

a concurrent ten year term on the grand theft charge. (R 29-30, 71-78)

Appellant timely filed a notice of appeal to the Fifth District Court of Appeal and raised one issue regarding the legality of the sentence imposed for the armed robbery conviction. As part of this argument, Petitioner contended that the habitual offender statute is inapplicable with regard to a felony of the first degree punishable by life. In making this argument, Petitioner relied upon several decisions from the First District Court of Appeal. See, Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990); Gholston v. State, 16 FLW 46 (Fla. 1st DCA December 17, 1990); and Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990). The Fifth District Court of Appeal rejected Petitioner's arguments and affirmed on the authority of Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990). In doing so, the Fifth District Court of Appeal recognized conflict with the First District Court of Appeal. Petitioner timely filed its notice to invoke discretionary jurisdiction on April 26, 1991.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal in the case sub judice is in direct conflict with decisions of the First District Court of Appeal in Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990); Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990) and Gholston v. State, 16 FLW 46 (Fla. 1st DCA December 17, 1990) on the identical issue. In those cases, the First District Court of Appeal held that the habitual offender statute was inapplicable to first degree felonies punishable by life. The Fifth District Court of Appeal rejected this holding and has held that the habitual offender statute is applicable to first degree felonies punishable by life. Thus, this court has discretionary jurisdiction to accept the instant case to resolve the conflict.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE INSTANT DECISION OF THE FIFTH DISTRICT COURT OF APPEAL WHERE SUCH DECISION IS IN DIRECT CONFLICT WITH DECISIONS FROM THE FIRST DISTRICT COURT OF APPEAL ON THIS SAME ISSUE.

This court has discretionary jurisdiction to review a case which is in direct conflict with the decision of another District Court of Appeal on the same rule of law. See, Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. On the face of the decision in the instant case, the Fifth District Court of Appeal specifically disagreed with the decisions of the First District Court of Appeal in Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990) and Gholston v. State, 16 FLW 46 (Fla. 1st DCA December 17, 1990). In those decisions, the First District court of Appeal specifically held that the habitual offender statute is inapplicable to a person convicted of a felony of the first degree punishable by life. However, in the instant case, the Fifth District Court of Appeal relying on its previous decision in Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990) reached a contrary conclusion and ruled that the habitual offender statute is applicable to a person convicted of a felony of the first degree punishable by life. In so ruling, the court specifically recognized conflict on this issue with the First District Court of Appeal. This court should accept the instant case for review

in order to resolve the conflict currently existing between the Fifth District Court of Appeal and the First District Court of Appeal.

CONCLUSION

Based on the foregoing reasons and authorities, Petitioner respectfully requests this Honorable Court to exercise its discretionary jurisdiction, accept the instant case for review on the basis of express conflict between the decisions of the Fifth District Court of Appeal sub judice and the decisions of the First District Court of Appeal in Barber, Gholston and Johnston.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave, Suite 447, Daytona Beach, FL 32114 in his basket at the Fifth District Court of Appeal and mailed to: Timothy E. Tucker, P.O. Box 333, Raiford, FL 32083, this 6th day of May, 1991.

Michael S. Becker
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

TIMOTHY E. TUCKER, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO.: 77,854

A P P E N D I C E S

Tucker v. State, 16 FLW D822 (Fla. 5th DCA March 28, 1991)

Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990)

Gholston v. State, 16 FLW D46 (Fla. 1st DCA December 17, 1990)

Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990)

ship, as indicated in *Bentzoni*. Accordingly, we strike the provision relating to automatic termination of rehabilitative alimony upon remarriage. The judgment below is otherwise affirmed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. (DAUKSCH and PETERSON, JJ., concur.)

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[1]For a contrary determination, *see* Blackmon v. Blackmon, 307 So.2d 887 (Fla. 3d DCA 1974).

* * *

Criminal law—Error to impose costs without providing defendant notice or opportunity to be heard

MATTIE JEAN REID, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 90-1283. Opinion filed March 28, 1991. Appeal from the Circuit Court for Putnam County, E. L. Eastmoore, Judge. James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Nancy Ryan, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) We affirm on all points appealed except we reverse that portion of the order imposing costs without notice or opportunity to be heard. *See, Clark v. State,* 560 So.2d 264 (Fla. 5th DCA 1990); *Rowe v. State,* 558 So.2d 174 (Fla. 5th DCA 1990).

AFFIRMED in part; REVERSED in part. (DAUKSCH, COBB and COWART, JJ., concur.)

* * *

Criminal law—Sentencing—Guidelines—Scoresheet—Legal constraint—Question certified whether guidelines require that legal constraint points be assessed for each offense committed while under legal constraint

MONTGOMERY SCOTT SHIEL, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 90-1239. Opinion filed March 28, 1991. Appeal from the Circuit Court for Brevard County, Edward J. Richardson, Judge. James B. Gibson, Public Defender, and Paolo G. Annino, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Belle B. Turner, Assistant Attorney General, Daytona Beach, for Appellee.

(DAUKSCH, J.) We affirm the conviction and sentence of appellant and certify the following question of great public importance, as we did in *Love v. State,* 569 So.2d 1374 (Fla. 5th DCA 1990); *Flowers v. State,* 567 So.2d 1055 (Fla. 5th DCA 1990):

> DO FLORIDA'S UNIFORM SENTENCING GUIDELINES REQUIRE THAT LEGAL CONSTRAINT POINTS BE ASSESSED FOR EACH OFFENSE COMMITTED WHILE UNDER LEGAL CONSTRAINT?

(HARRIS and GRIFFIN, JJ., concur.)

* * *

Juveniles—Trial court's oral pronouncement finding that juvenile was guilty of petit theft controls over subsequent clerical error in written order stating that juvenile pled guilty to burglary

B. L., a Child, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 90-1163. Opinion filed March 28, 1991. Appeal from the Circuit Court for Brevard County, Frances A. Jamieson, Judge. James B. Gibson, Public Defender, and Glen P. Gifford, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and David G. Mersch, Assistant Attorney General, Daytona Beach, for Appellee.

(COBB, J.) B. L. was charged with burglary of a dwelling and grand theft. At trial, the court granted a judgment of acquittal on the grand theft charge and found (via oral pronouncement) that B. L. was guilty of petit theft. Subsequent court orders state that B. L. pled guilty to burglary.

It is axiomatic that oral pronouncements control over clerical errors. *Drumwright v. State,* 572 So.2d 1029 (Fla. 5th DCA 1991); *Wilkins v. State,* 543 So.2d 800 (Fla. 5th DCA), *review denied,* 554 So.2d 1170 (Fla. 1989). B.L. was adjudicated guilty of petit theft. Subsequent orders contained a clerical error, that B. L. pled guilty to burglary. The adjudication of petit theft obviously controls over the clerical error and B. L. must be sentenced accordingly.

REVERSED AND REMANDED. (DAUKSCH and HARRIS, JJ., concur.)

* * *

Criminal law—Sentencing—Habitual offender statute provides for enhancement of felonies of first degree punishable by term of imprisonment not exceeding life—Conflict

TIMOTHY E. TUCKER, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case Nos. 90-1478; 90-1479. Opinion filed March 28, 1991. Appeal from the Circuit Court for Orange County, George A. Sprinkel, IV, Judge. James B. Gibson, Public Defender and Michael S. Becker, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee and Nancy Ryan, Assistant Attorney General, Daytona Beach, for Appellee.

(DIAMANTIS, J.) Defendant pled guilty to grand theft of a motor vehicle, section 812.014, Florida Statutes (1989), and nolo contendere to robbery with a firearm, section 812.13(2)(a), Florida Statutes (1989). Defendant was convicted and sentenced as an habitual felony offender[1] to 10 years for the grand theft and life with a minimum mandatory of 3 years for the robbery with a firearm. The sentences are to be served concurrently. Defendant claims error in his sentence on the robbery offense. We affirm.

Defendant argues that the court erred in sentencing him for robbery under the habitual offender statute because that statute does not provide for the enhancement of felonies of the first degree punishable by a term of imprisonment not exceeding life. Defendant cites *Barber v. State,* 564 So.2d 1169 (Fla. 1st DCA 1990) and its progeny to support this theory. *See Gholston v. State,* 16 F.L.W. 46 (Fla. 1st DCA Dec. 17, 1990); *Johnson v. State,* 568 So.2d 519 (Fla. 1st DCA 1990). However, in *Paige v. State,* 570 So.2d 1108 (Fla. 5th DCA 1990), we reached a contrary conclusion. The Third District also recently rejected the rationale of *Barber* in *Westbrook v. State,* 16 F.L.W. 454 (Fla. 3d DCA Feb. 12, 1991). We adhere to our decision in *Paige* but recognize conflict with the First District.

Because we find the other issues raised by defendant without merit, we do not address them.

AFFIRMED. (DAUKSCH and COBB, J.J., concur.)

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[1]§ 775.084(4)(a), Fla.Stat. (1989).

* * *

Criminal law—Sentencing—Guidelines—Scoresheet—Legal constraint—Question certified whether guidelines require that legal constraint points be assessed for each offense committed while under legal constraint

LESTER DAVIS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 90-1157. Opinion filed March 28, 1991. Appeal from the Circuit Court for Brevard County, Lawrence V. Johnston, III, Judge. James B. Gibson, Public Defender, and M. A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and James N. Charles, Assistant Attorney General, Daytona Beach, for Appellee.

ON MOTION FOR REHEARING AND REQUEST FOR CERTIFICATION
[Original Opinion at 16 F.L.W. D329]

(PER CURIAM). We grant appellant's motion to certify to the Florida Supreme Court the same question of great public importance we previously certified in *Flowers v. State,* 567 So.2d 1055 (Fla. 5th DCA 1990), *rev. pending,* Case No. 76,854 (Fla. 1991), since we have resolved the same legal issue adversely to appellant in this case.

> DO FLORIDA'S UNIFORM SENTENCING GUIDELINES REQUIRE THAT LEGAL CONSTRAINT POINTS BE AS-

815, 817 (Fla. 2d DCA 1983) (fact that appellant quickly placed his hand in jacket pocket after seeing officers did not give rise to more than bare suspicion); *Currens v. State,* 363 So.2d 1116, 1117 (Fla. 4th DCA 1978) (appellant quickly moving hand between his legs when officers approached did not constitute founded suspicion or threat). *But cf. State v. Sears,* 493 So.2d 99, 100 (Fla. 4th DCA 1986) (furtive movement of passenger, pushing something down in seat behind him, justified search of automobile).

In the case before us, the officers had received no report connecting the van or its passengers with criminal activity. Dees' furtive movement in and of itself was insufficient to give rise to a founded suspicion to justify a stop to investigate whether she was or had been committing a crime. Moreover, because the cocaine and the paraphernalia were seized from Dees' purse during a search incident to the illegal arrest for possession of marijuana, that contraband should also have been suppressed. *Wong Sun v. United States,* 371 U.S. 471, 484–85, 83 S.Ct. 407, 415–16, 9 L.Ed.2d 441, 453–54 (1963) (fruits of agents' unlawful action must be excluded).

REVERSED and REMANDED for further proceedings.

MINER, J., concurs.

WENTWORTH, J., agrees to conclusion.

Earl Jeffrey BARBER, Appellant,

v.

STATE of Florida, Appellee.

No. 89–2385.

District Court of Appeal of Florida, First District.

July 16, 1990.

Defendant was convicted in the Circuit Court, Leon County, Philip Padovano, J., of escaping and sentenced as habitual felony offender. Defendant appealed. The District Court of Appeal, Ervin, J., held that: (1) defendant's challenge to habitual offender statute on equal protection ground failed to raise cognizable claim; (2) habitual offender statute does not violate due process; (3) habitual offender statute is not void for vagueness; and (4) defendant failed to show that habitual offender statute did not bear reasonable and just relationship to legitimate state interest.

Affirmed.

1. Constitutional Law ⇐250.3(1)
Criminal Law ⇐1201.5

Defendant arguing that statute defining habitual felony offender as defendant for whom court "may" impose extended term of imprisonment violated equal protection, on ground that nothing in law prevented only one of two defendants with similar or identical criminal records from being classified as habitual felony offender, failed to raise cognizable claim; only contention that persons within habitual offender class were being selected according to some unjustifiable standard, such as race, religion, or other arbitrary classification, would raise potentially viable challenge. West's F.S.A. § 775.084(1)(a); U.S. C.A. Const.Amend. 14.

2. Constitutional Law ⇐211(3)

Mere selective, discretionary application of statute is permissible under equal protection clause. U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇐76

Executive branch is properly given discretion to choose which available punishment to apply to convicted offenders.

4. Constitutional Law ⇐270(4)
Criminal Law ⇐1201.5

Habitual felony offender statute does not violate due process on ground that it does not contain method for determining

who it should be applied to. West's F.S.A. § 775.084; U.S.C.A. Const.Amend. 14.

5. Criminal Law ⇐1206.1(1)

Legislature is permitted to enact multiple statutes that prohibit same conduct but carry disparate penalties; legislature's enactment of law enhancing sentences should not be found to be arbitrary and capricious on sole ground that another law overlaps in same area. West's F.S.A. § 775.084.

6. Constitutional Law ⇐270(4)
Criminal Law ⇐1201.5

Prosecutor's discretion concerning whether to apply habitual felony offender statute did not render statute in violation of due process. West's F.S.A. § 775.084; U.S.C.A. Const.Amend. 14.

7. Criminal Law ⇐1201.5

Language of habitual offender statute providing that court "may" sentence habitual misdemeanant and "shall" sentence habitual felony offender is sufficiently clear to provide definite warning of prohibited conduct and, thus, statute is not void for vagueness. West's F.S.A. § 775.084(4)(b, c).

8. Criminal Law ⇐1201.5

Failure of habitual offender statute to make provision for enhancing sentences if original sentence is first-degree felony punishable by life, life felony, or capital offense does not provide basis for finding that statute fails to bear reasonable and just relationship to legitimate state interest. West's F.S.A. § 775.084(4)(a).

Cheryl L. Gentry, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Edward C. Hill, Jr., Asst. Atty. Gen., for appellee.

ERVIN, Judge.

Appellant, Earl Jeffrey Barber, was found guilty of escaping from the Tallahassee Community Center on September 25, 1988. The trial court sentenced him within the sentencing guidelines and pursuant to Section 775.084, Florida Statutes (1987), because the court determined he was a habitual felony offender. Barber contends on appeal that section 775.084 is facially unconstitutional because it violates the guarantees of equal protection and due process. We disagree and affirm.

EQUAL PROTECTION

[1] Barber claims that the statute violates the equal protection clause because nothing in the law prevents two defendants with similar or identical criminal records from being treated differently—one may be classified as a habitual felony offender, while the other might instead be sentenced under the sentencing guidelines alone. His argument is based upon section 775.084(1)(a), in which a habitual felony offender is defined as "a defendant for whom the court *may* impose an extended term of imprisonment, as provided in this section." (Emphasis added.)

[2] The United States Supreme Court, however, has held on numerous occasions that the guarantee of equal protection is not violated when prosecutors are given the discretion by law to "habitualize" only *some* of those criminals who are eligible, even though their discretion is not bound by statute. *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668–69, 54 L.Ed.2d 604, 611 (1978); *Oyler v. Boles*, 368 U.S. 448, 455–56, 82 S.Ct. 501, 505–06, 7 L.Ed.2d 446, 452–53 (1962). Consequently, Barber has not raised a cognizable claim. Mere selective, discretionary application of a statute is permissible; only a contention that persons within the habitual-offender class are being selected according to some *unjustifiable* standard, such as race, religion, or other arbitrary classification, would raise a potentially viable challenge. *Bordenkircher*, 434 U.S. at 364, 98 S.Ct. at 668–69, 54 L.Ed.2d at 611; *Oyler*, 368 U.S. at 456, 82 S.Ct. at 506, 7 L.Ed.2d at 453. "The mere failure to prosecute all offenders is no ground for a claim of denial of equal protection." *Bell v. State*, 369 So.2d 932, 934 (Fla.1979). *Accord Owen v. State*, 443 So.2d 173, 175 (Fla. 1st DCA 1983) (reverse sting operation that was conducted only when over fifty pounds of mar-

ijuana was involved, was not an arbitrary classification comparable to the unjustifiable selection of criminal defendants based upon race or religion, and therefore did not deny equal protection).

[3] Similarly, the executive branch is properly given the discretion to choose which available punishments to apply to convicted offenders. *See, e.g., United States v. Batchelder,* 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979) (no equal protection violation because prosecutor has discretion to choose which of two statutes with identical elements to prosecute defendant under, and which penalty scheme to apply to defendant); *Sullivan v. Askew,* 348 So.2d 312 (Fla.) (constitutional rights of prisoner who seeks clemency from a death sentence are not offended by the unrestricted discretion vested in the executive), *cert. denied,* 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 159 (1977); *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (both holding that the constitution is not violated by exercise of prosecutor's discretion in deciding to charge one with a capital offense or to accept a plea to a lesser offense, nor by executive's exercise of discretion in commuting a death sentence).

DUE PROCESS

A

[4] Barber claims that section 775.084 violates his right to due process because the process it establishes is unreasonable, arbitrary, and capricious. *State v. Saiez,* 489 So.2d 1125, 1128 (Fla.1986) ("the means selected shall have a reasonable and substantial relation to the object sought to be attained and shall not be unreasonable, arbitrary, or capricious.") He reasons that the law is arbitrary and capricious because (a) the statute does not contain a method for determining who the law should be applied to, as opposed to applying the sentencing guidelines alone; and (b) the law has no method for determining who—either the prosecutor or the trial court—must decide whether to apply the law to a defendant; therefore the prosecutor has unfettered discretion in applying the law arbitrarily and capriciously. These arguments are not persuasive for the following reasons.

The legislative purpose underlying this law is proper, as are the means the legislature has chosen to achieve its goal. The legislature chose to restrict the class of felons encompassed by section 775.084, based upon the number of prior felonies and misdemeanors committed, and based upon the length of time since the defendant committed the last crime. It is apparent that the legislature intended to enact this law in the belief that increased sentences for repeat offenders will deter their criminal conduct, at least during the time that they are incarcerated. There can be no question that enhanced punishment of repeat felons is a legitimate goal within the state's police power. A state "may inflict a deserved penalty merely to vindicate the law or to deter or to reform the offender or for all of these purposes," [1] and the state may increase the severity of the punishment for a repeat offender.[2]

[5] The legislature's conduct in enacting a law enhancing sentences should not be found to be "arbitrary and capricious" simply because another law overlaps in the same area. Although the sentencing guidelines and the habitual felony offender laws are similar in that each addresses the issue of punishment, they are different. Under the guidelines, a repeat offender's sentence cannot be enhanced beyond the recommended sentencing range without written departure reasons. Under section 775.084, however, such offender's sentence may be automatically extended beyond the statutory maximum, so long as the offender meets the criteria of section 775.084(1). The legislature appears to have concluded that felons who commit a certain number

1. *Pennsylvania ex rel. Sullivan v. Ashe,* 302 U.S. 51, 55, 58 S.Ct. 59, 61, 82 L.Ed. 43, 46 (1937).

2. *Moore v. Missouri,* 159 U.S. 673, 676–77, 16 S.Ct. 179, 180–81, 40 L.Ed. 301, 302–03 (1895); and *Cross v. State,* 96 Fla. 768, 119 So. 380 (1928).

of felonies or a certain type of felony within a specified period of time should be treated differently. The legislature is permitted to enact multiple statutes that prohibit the same conduct but carry disparate penalties. *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979) (government may prosecute under either of two overlapping statutes prohibiting felons from unlawfully receiving firearms); *State v. Cogswell*, 521 So.2d 1081 (Fla.1988) (state may prosecute bookmaking as either a felony or misdemeanor under either of two statutes).

[6] Barber's second point, that the prosecutor has "unfettered discretion" under the law, has no merit. The type of discretion afforded the prosecutor under this law is constitutionally permissible, for it is no different from that afforded a prosecutor in other areas of the law. For example, courts have recognized a prosecutor's broad discretion in selecting who to prosecute; [3] who to charge with a capital offense and whether to accept a plea to a lesser offense; [4] and which of two statutes, prohibiting the same conduct but with disparate penalties, a defendant will be charged with violating [5]. In addition, "[u]nder Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." *State v. Bloom*, 497 So.2d 2, 3 (Fla.1986). The United States Supreme Court has described the discretion routinely exercised by prosecutors and courts in the following manner:

> The provisions at issue [two statutes with identical elements but different penalties] plainly demarcate the range of penalties that prosecutors and judges may seek and impose. In light of that specificity, the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws. Having informed the courts, prosecutors, and defendants of the permissible punishment alternatives available under each Title, Congress has fulfilled its duty.

United States v. Batchelder, 442 U.S. at 126, 99 S.Ct. at 2205, 60 L.Ed.2d at 766. Here, the Florida Legislature has fulfilled its duty by informing the courts, prosecutors, and defendants of the permissible punishment alternatives available under the habitual offender statute and under the sentencing guidelines.

B

[7] Barber next claims that the habitual offender statute is void for vagueness [6] because the same paragraph contains language that makes application of habitual felony sentencing *optional*, as well as language that suggests such sentencing is *mandatory*. Barber then cites sections 775.084(4)(v) and (4)(c), when there *is* no subsection (v). Barber appears to be referring to subsection (b), although subsection (b) applies to habitual misdemeanants.

"The question presented by a vagueness challenge ... is whether the language of the statute is sufficiently clear to provide a definite warning of what conduct will be deemed a violation; that is, whether ordinary people will understand what the statute requires or forbids, measured by common understanding and practice." *State v. Bussey*, 463 So.2d 1141, 1144 (Fla.1985). We find nothing vague about subsection (4).

The provisions in question provide:

> (4)(a) The court, in conformity with the procedure established in subsection (3) and upon a finding that the imposition of

3. *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530, 84 L.Ed.2d 547, 555–56 (1985).

4. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

5. *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979), and *State v. Cogswell*, 521 So.2d 1081 (Fla.1988).

6. Appellee briefly raises the question whether a void-for-vagueness challenge may be raised against a sentencing statute at all, because the doctrine is traditionally applied to statutes that prohibit certain conduct. The Supreme Court has, however, at least once applied a void-for-vagueness analysis to a statute that established a penalty for criminal conduct. *United States v. Evans*, 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948).

sentence under this section is necessary for the protection of the public from further criminal activity by the defendant, *shall sentence* the habitual felony offender as follows:

1. In the case of a felony of the first degree, for life.

2. In the case of a felony of the second degree, for a term of years not exceeding 30.

3. In the case of a felony of the third degree, for a term of years not exceeding 10.

(b) The court, in conformity with the procedure established in subsection (3) and upon a finding that the imposition of sentence under this section is necessary for the protection of the public from further criminal activity by the defendant, *may sentence* the habitual misdemeanant as follows:

1. In the case of a misdemeanor of the first degree, for a term of years not exceeding 3.

2. In the case of a misdemeanor of the second degree, for a term of imprisonment not in excess of 1 year.

(c) If the court decides that imposition of sentence under this section is not necessary for the protection of the public, sentence shall be imposed without regard to this section. At any time when it appears to the court that the defendant is a habitual felony offender or an habitual misdemeanant, the court *shall make that determination* as provided in subsection (3).

(Emphasis added.)

Subsection (4)(c) states that when it appears that a defendant meets the criteria of the statute, the court is required to determine, in a separate proceeding, whether the defendant is indeed subject to the statute. After complying with subsection (3), which articulates the procedure for making such determination, the court must then determine whether imposition of an enhanced sentence is necessary to protect the public, pursuant to subsections (4)(a) and (4)(b). If the court decides this in the affirmative, it *may* sentence a habitual misdemeanant, and *shall* sentence a habitual felony offender, under the statute. Certainly, such language is sufficiently clear to provide a definite warning of the prohibited conduct; therefore, the statute is not void for vagueness.

C

[8] Finally, 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.

Barber has failed to show that the 1987 habitual felony offender statute is unconstitutional. His sentence under that law is therefore

AFFIRMED.

WENTWORTH and MINER, JJ., concur.

ing and credit card practices." 15 U.S.C.A. §1601. Section 1640(a) establishes creditor's liability at up to $1,000 for failure to comply with any of the disclosure requirements. Further, Section 1640(h) allows a consumer in default on the obligation to assert a violation as a counterclaim to an action to collect amounts owed by the consumer. Section 1602(h) defines consumer with reference to a credit transaction as follows:

> (h) The adjective "consumer" . . . characterizes the transaction as one in which the party to whom the credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.

Additionally, certain transactions are specifically exempt from the Truth-In-Lending Act protections. Among others, credit transactions involving extensions of credit primarily for business, commercial or agricultural purposes are not required to adhere to the disclosure requirements. 15 U.S.C.A. §1603(1).

Thus, violations of the Act for failure to complete the notice provisions can be raised by consumers[3] to whom the credit is extended for personal, family, or household purposes. Violations can also be raised if the credit is extended for other than business, agricultural, or commercial purposes.

In their arguments on appeal, the credit union asserts that the appellant is not entitled to the set-off for two reasons: (1) he was not a consumer pursuant to the definition; and (2) the disclosures are not required because the credit was extended for business purposes. In response, the appellant asserts that the business purpose of the loan cannot be proven because the trial judge did not consider the affidavits tendered by the appellee to which the primary obligor's loan application was attached. It is clear the appellee's contention regarding a comakers ability to sustain an action for set-off is unfounded. In order for Williams' application to be considered on appeal, the credit union would have had to cross-appeal the trial court's ruling regarding the affidavits. However, the issue was not cross-appealed nor raised by the appellee in its brief. Therefore the affidavits and attached loan application cannot be considered by this court.

A genuine issue exists as to whether the purpose of the loan has been demonstrated in such a way as to provide an exception to the Truth-In-Lending Act. It has been held that the use of the money, property, or services which is the subject of the underlying transaction and not the subjective motivation of the borrower controls when determining whether the transaction is exempt. *Sims v. First Nat. Bank, Harrison*, 590 S.W.2d 270 (Ark. 1979). Further, the use of the proceeds of the loan determines the primary purpose and if the loan was used in part for business and in part for personal use, the use of the greater portion determines whether the loan falls within the purview of the Act. *Bokros v. Associates Financial, Inc.*, 607 F.Supp. 869 (N.D. Ill. 1984).

The only evidence regarding the use of the loan in the case at bar is the "itemization of the amount financed" which is situated at the bottom of the note instrument and indicates that $5,300 was paid on Williams' account and $4,700 was given to him directly.

Determining the use of the loan is critical to establishing whether it is exempt from the disclosure requirements under the Truth-in-Lending Act and ultimately whether the appellant can sustain an action for set-off against the creditor. When every inference is viewed in the light most favorable to the appellant, there appears to be a genuine issue of material fact which must be resolved.

The trial court was correct in finding no genuine issue of material fact as to the appellant's liability after the principal's default and that issue will not be reversed. However, we reverse the trial court's order granting the summary judgment as to the appellant's counterclaim asserting the truth-in-lending offset. The credit union has not sustained its burden of showing there was no genuine issue of material fact as to the purpose of the loan.

We reverse the order denying the appellant's counterclaim and remand for further proceedings consistent with this opinion. (SMITH and ZEHMER, JJ., CONCUR.)

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[1]15 U.S.C.A. §§1601 *et seq.*

[2]In the order appealed, the court specifically stated that it was not considering those affidavits.

[3]According to *Barash v. Gale Emp. Credit Union*, 659 F.2d 765 (7th Cir. 1981), nothing in the Act limits a creditor's liability for its violation to primary obligors, comakers or joint obligors.

* * *

Criminal law—Sentencing—Habitual offender—Statute does not provide for enhancement of penalties for first-degree felonies punishable by life, life felonies, or capital felonies—Habitual offender statute improperly used to reclassify offenses as to their degree—Sentence imposed for aggravated assault conviction in excess of statutory cap

RANDY LEON GHOLSTON, Appellant, vs. STATE OF FLORIDA, Appellee. 1st District. Case No. 89-02826. Opinion filed December 17, 1990. An Appeal from the Circuit Court for Columbia County. John W. Peach, Judge. Barbara M. Linthicum, Public Defender, and Carl S. McGinnes, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Amelia L. Beisner, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) This cause is before us on appeal from a judgment and sentence for six felonies. Appellant raises several issues. However, we need only discuss his contention that the trial court misapprehended the habitual felony offender statute.

Under Counts I and II, appellant was convicted of two counts of sexual battery while armed with a deadly weapon, which are both life felonies. Under Count III, appellant was convicted of burglary while armed with a dangerous weapon, a first-degree felony punishable by life imprisonment. Under Count IV, appellant was convicted of armed robbery, a first-degree felony. Under Count V, appellant was convicted of aggravated assault, a third-degree felony. Under Count VI, appellant was convicted of aggravated battery, a second-degree felony. Before sentencing, the court found appellant to be a habitual felony offender under Section 775.084, Florida Statutes. As to Counts I through IV, the court sentenced appellant to four concurrent life sentences. As to Count V, the court reclassified appellant's aggravated assault conviction from a third-degree felony to a second-degree felony, and sentenced appellant to 15 years' imprisonment. As to Count VI, the court reclassified appellant's aggravated battery conviction from a second-degree felony to a first-degree felony, and sentenced appellant to 30 years' imprisonment. We agree with appellant that the trial court misapprehended the habitual felony offender statute.

Section 775.084, Florida Statutes, makes no provision for enhancing penalties for first-degree felonies punishable by life, life felonies, or capital felonies. *See Johnson v. State*, 15 F.L.W. 2631 (Fla. 1st DCA Oct. 22, 1990) (habitual violent felony offender statute makes no provision for enhancing sentence of defendant convicted of life felony); *Barber v. State*, 564 So.2d 1169, 1173 (Fla. 1st DCA 1990) (habitual felony offender statute is not irrational for failure to make any provision for enhancement of first-degree felonies punishable by life, life felonies, or capital felonies). Accordingly, the habitual felony offender statute can have no application to appellant's sentences under Counts I through III.

As to appellant's first-degree felony conviction under Count IV, the trial court correctly sentenced appellant to life imprisonment. § 775.084(4)(a)1, Fla. Stat. However, the judgment must be corrected as to Counts V and VI. The habitual felony offender

statute does not reclassify offenses as to their degree; rather, it merely extends the penalties above the maximum otherwise authorized by statute. Here, the trial judge erroneously reclassified appellant's third-degree felony conviction of aggravated assault to a second-degree felony, and his second-degree felony conviction of aggravated battery as a first-degree felony. Moreover, while the sentence imposed for the aggravated battery conviction (30 years) is within that authorized by the habitual offender statute,[1] the sentence imposed for appellant's aggravated assault conviction (15 years) exceeds the ten-year statutory cap set forth in Section 775.084(4)(a)3, Florida Statutes.

We therefore vacate appellant's sentences under Counts I, II, III, V, and VI, and remand this cause for resentencing. (ERVIN, BOOTH, AND BARFIELD, JJ., CONCUR.)

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[1]*See* § 775.084(4)(d)2, Florida Statutes.

* * *

Real property—Subdivisions—Protective covenants—Error to dismiss developer's action for mandatory injunction to enforce protective covenants where homeowners had added addition to home without prior approval of developer or architectural review committee—Homeowners not denied due process because they were not afforded an opportunity to appear in person before architectural review committee—Where party seeks an injunction to prevent the violation of a restrictive covenant, a prima facie case is established by evidence showing the alleged violation—Requirement for prior approval of home additions and policy requiring use of consistent materials and roof lines for additions to existing structures not arbitrary or unreasonable—Burden is on party challenging enforcement of restriction to show in what manner developer has illegally exceeded or abused reserved authority and discretion to approve architectural changes—No showing that application of restrictive covenants was arbitrary and unreasonable as to homeowners

EUROPCO MANAGEMENT COMPANY OF AMERICA, Appellant, v. STEPHEN W. SMITH and RUTH R. SMITH, Appellees. 1st District. Case No. 90-1392. Opinion filed December 17, 1990. An appeal from the Circuit Court for Okaloosa County, G. Robert Barron, Judge. D. Michael Chesser, of Chesser, Wingard, Barr, Whitney, Flowers and Fleet, Shalimar, for Appellant. C. LeDon Anchors, of Anchors, Foster and McInnis, Fort Walton Beach, for Appellees.

(ZEHMER, J.) Europco Management Company of America appeals a final order, entered at the end of the plaintiff's case in a nonjury trial, dismissing its action for a mandatory injunction to enforce certain protective covenants of the Southwind II housing development against homeowners Stephen and Ruth Smith. We reverse, holding that the evidence presented by Europco was sufficient to establish a prima facie case.

Europco is the owner and developer of Southwind II, a 200-acre golf course subdivision containing single-family, highpriced homes.[1] Protective covenants, which have been recorded in the official records of Okaloosa County and run with the title to the land in Southwind II, contain various restrictions on the use of the land in the subdivision and the construction and alteration of the structures built thereon. The covenants principally involved in this case recite that:

> (4) MINIMUM SQUARE FOOTAGE FOR ANY PRINCIPAL RESIDENCE. . . . (c) *No* lot clearing or *construction of any kind, including but not limited to construction of main structure, garages, fences or ancillary structures, shall be permitted to commence or allowed to remain on any lot until the plans, design, colors and location of said improvements on the lot have been approved by Developer acting through the Bluewater Bay Architectural Review Committee or such other representative as Developer may designate from time to time.*
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> * * *
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> (5) OTHER STRUCTURES. *Construction of structures other than the main residence and a garage shall not be permitted on any lot of the Subdivision* except for the following ancillary structures which may be permitted subject to approval by Developer of location, architectural design and exterior finishes: pet house (up to 25 square feet and not more than 5 feet high), hothouse or greenhouse (up to 100 square feet and not more than 15 feet high), poolhouse, outdoor fireplace or barbecue pit (up to 9 square feet and not more than 10 feet high), and swimming pools and mechanical installation in connection therewith. *Any such ancillary structures permitted hereunder shall be* attractively landscaped, *constructed in a harmonious design with the main structure* and located only in the lot area to the rear of the main residence and not visible from the street. *No ancillary structure shall be built or placed on a lot until the quality, style, color and design have been approved by the Developer in the manner provided for herein.*
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> * * *
>
> (9) DESIGN AND LOCATION OF IMPROVEMENTS AND TREE REMOVAL TO BE APPROVED BY DEVELOPER. For the purpose of further insuring the development to be a residential area of highest quality and standards, *and in order that all improvements on each lot shall present an attractive and pleasing appearance from all sides of view, the Developer reserves the exclusive power and discretion to control and approve the* landscaping plan and the location on the lot and *design of all building, structures and other improvements to be built on each lot. Included in the power and discretion to approve such design is the right to approve the architectural design, appearance, color, finish and materials of all exterior building surfaces.* A lot owner shall be required to submit such information as Developer may request in order to facilitate Developer's approval process. One set of the plans required to be submitted for approval will be retained by Developer. *If the finished building or other structure does not comply with the approved plans, Developer retains the right to cause the necessary changes to be made at owner's expense, the cost of which shall be a lien upon the property involved.* Any changes in plans must first be reapproved by the Developer in accordance with the procedures specified from time to time by Developer. . . .

(Emphasis added.)

The Smiths purchased a home in Southwind II and required, as a condition of the sale, that the builder add a screen porch to the rear of the house. The builder, however, did not obtain the developer's approval before completing the addition and consummating the sale transaction. Subsequent to the purchase transaction, Europco sought an injunction against the Smiths on the ground that they had caused an addition to their house to be built without first seeking approval as required by the protective covenants. Europco further alleged that when approval was eventually requested, it was denied because the addition violated the developer's established policy prohibiting additions constructed of a design and material different from that of the primary structure. The complaint requested an injunction requiring the Smiths to either remove the addition or make it comply with the protective covenants and the builder's policy. The Smiths' answer denied the essential allegations of the complaint and raised the affirmative defenses of estoppel and laches.[2]

At trial, Jerry Zivan, the chief executive officer of Europco, testified that he had created an advisory committee for the architectural review of projects in Southwind II, and that the committee consisted of 3 representatives of the developer, 5 representatives of the homeowners, and 2 other representatives. Zivan testified that on July 16, 1987, the architectural review committee was making a routine inspection for an application involving property in Southwind II when a member noticed Mr. Barber, a contractor, constructing an addition on the back of a house. Zivan talked to Barber, confirmed that no request for approval of

injury throughout the lawsuit, leaving no adequate remedy by appeal. *Martin–Johnson, Inc. v. Savage*, 509 So.2d 1097 (Fla.1987).

This court observed in *Baghaffar v. Story*, 515 So.2d 1373 (Fla. 5th DCA 1987), that there is no justification for burdening the alienability of property with a lis pendens where complete relief is available to the plaintiff against a solvent defendant. *Baghaffar* at 1374, n. 2; *see also Beefy King International, Inc. v. Veigle*, 464 F.2d 1102 (5th Cir.1972). In this case there is no contention by the plaintiffs, much less any proof, that the defendant Wayne cannot fully respond to any money judgment.

The trial court correctly dissolved the notice of lis pendens filed below, and certiorari should be denied.

Robin Craig EASTER, Appellant,

v.

STATE of Florida, Appellee.

No. 89–1910.

District Court of Appeal of Florida, First District.

Oct. 22, 1990.

An Appeal from the Circuit Court for Bay County; W. Fred Turner, Judge.

Barbara M. Linthicum, Public Defender and Michael J. Minerva, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen. and Cynthia Shaw, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

AFFIRMED. *See Arnold v. State*, 566 So.2d 37 (Fla. 2d DCA 1990); *Johnson v. State*, 564 So.2d 1174 (Fla. 4th DCA 1990); *King v. State*, 557 So.2d 899 (Fla. 5th DCA), *review denied*, 564 So.2d 1086, (Fla. 1990); *compare Barber v. State*, 564 So.2d 1169 (Fla. 1st DCA 1990) (although this case addresses constitutionality of 1987 version of section 774.084, analysis is equally applicable to challenge of 1988 amended version).

WIGGINTON, MINER and WOLF, JJ., concur.

Rufus JOHNSON, Appellant,

v.

STATE of Florida, Appellee.

No. 89–2128.

District Court of Appeal of Florida, First District.

Oct. 22, 1990.

Rehearing Denied Nov. 28, 1990.

Defendant was convicted in the Circuit Court, Duval County, Hudson Olliff, J., of second-degree murder and possession of a firearm, and he appealed. The District Court of Appeal, Wolf, J., held that the habitual violent felony offender statute did not provide any basis for enhancing the sentence of a defendant who was convicted of a life felony.

Reversed and remanded for resentencing.

Criminal Law ⇐1202.2

No provision under habitual violent felony offender statute gave trial court authority to enhance defendant's sentence for second-degree murder which had been reclassified to life felony. West's F.S.A. §§ 775.084, 775.084(4)(b)1, 775.087, 782.04(2).

R. Baker King, Jacksonville, for appellant.

Robert A. Butterworth, Atty. Gen., William A. Hatch, Asst. Atty. Gen., Tallahassee, for appellee.

WOLF, Judge.

Johnson appeals his judgment and sentence for second degree murder and possession of a firearm on several grounds, only one of which we find to have merit.

The defendant was convicted of second degree murder pursuant to section 782.-04(2), Florida Statutes (1989), which constitutes a first degree felony. This offense was reclassified to a life felony under section 775.087, Florida Statutes (1989), because the defendant used a firearm during commission of the felony. Before sentencing, the court found the defendant to be a habitual violent felony offender pursuant to section 775.084, Florida Statutes. The trial judge mistakenly believed that section 775.084(4)(b)(1), Florida Statutes (1989), allowed him to sentence the defendant to life in prison without eligibility for release for 15 years. However, there is no provision under the habitual violent felony offender statute for enhancing the sentence of a defendant convicted of a life felony. Therefore, it was error for the trial judge to sentence the defendant pursuant to this statute.

Accordingly we must reverse and remand to the trial court for resentencing.

WIGGINTON and MINER, JJ., concur.

BARKETT COMPUTER SERVICE and Liberty Mutual Insurance, Appellants,

v.

Isabel SANTANA, Appellee.

No. 89–2843.

District Court of Appeal of Florida, First District.

Oct. 22, 1990.

Employer and carrier appealed order of Judge of Compensation Claims, Alan Kuker, awarding attendant care benefits to pay maid and husband for performing household chores. The District Court of Appeal, Barfield, J., held that claimant was not entitled to attendant care benefits either for maid or for family member where only "care" being provided was ordinary household chores.

Reversed.

Workers' Compensation ⇐966

Workers' compensation claimant was not entitled to attendant care benefits to pay maid and claimant's husband for performing normal household chores; cleaning, cooking, washing clothes, and making beds were wholly ordinary chores for which employer and carrier could not be held responsible.

Sheryl S. Natelson and Wendy Ellen Marfino, Miller, Kagan & Chait, P.A., Deerfield Beach, for appellants.

Jerold Feuer, Miami, for appellee.

BARFIELD, Judge.

The employer and carrier (EC) appeal a workers' compensation order which awards attendant care benefits in the nature of $200 per week for a maid employed by the injured claimant and $210 per week for claimant's husband. We reverse.

The claimant is a 53–year–old woman who injured her back in a 1986 accident accepted as compensable. Claimant underwent surgery in 1987, and the EC voluntarily accepted her as permanently, totally disabled. Claimant then sought, inter alia, attendant care benefits for the household chores performed by a maid for five months, and now performed by her husband. Claimant testified that prior to her accident she was responsible for all the household chores. After she underwent surgery for her injury a nurse was provided by the EC for four months. Thereafter