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CLERK SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,193

STATE OF FLORIDA,

Petitioner,

vs.

DONALD WALKER,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONSii
PRELIMINARY STATEMENT1
STATEMENT OF CASE AND FACTS1
SUMMARY OF ARGUMENT2
REASONS FOR GRANTING DISCRETIONARY REVIEW3-4

THIS COURT HAS DISCRETIONARY
JURISDICTION BECAUSE THE DECISION OF
THE DISTRICT COURT EXPRESSLY DECLARES
VALID §775.084 OF THE FLORIDA STATUTES.

CONCLUSION5
CERTIFICATE OF SERVICE5

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<u>Evans v. Carroll,</u> 104 So.2d 375 (Fla. 1958)	3
<u>Florida Star v. B.J.F.,</u> 530 So.2d 286 (Fla. 1988)	3
<u>Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority,</u> 111 So.2d 439 (Fla. 1959)	3
<u>Westbrook v. State,</u> 574 So.2d 1187 (Fla. 3d DCA 1991)	4
 <u>FLORIDA CONSTITUTION:</u>	
Art. V, §3(b)(3) <u>Fla. Const.</u> (1980)	2,3
 <u>OTHER AUTHORITIES:</u>	
<u>Fla.R.App.P.</u> 9.120(d)	2
 <u>FLORIDA STATUTE:</u>	
§775.084	1,2,3
775.084(4)(b)(1), Florida Statutes (1989)	1,2,3
775.087(1)(a)	1

PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the Appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The Respondent was the appellant and the defendant, respectively, in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will be used to refer to Petitioner's Appendix to this brief.

STATEMENT OF THE CASE AND FACTS
(Limited to the issue of Jurisdiction)

Respondent was charged and convicted of second degree murder for the shooting death of Daniel Rusignolo. Respondent's recommended guidelines sentence for the offense was between seventeen and twenty-two years in prison. However, the State filed a notice of intent to seek sentencing of Respondent pursuant to the Habitual Offender Statute, §775.084. After an appropriate hearing, the trial court found Respondent to be an habitual violent felony offender, and sentenced Respondent to serve life in prisons, with the three year mandatory minimum term applicable for the use of a firearm.

Respondent appealed the conviction to the District Court of Appeal, Fourth District. By opinion filed May 15, 1991, (see Appendix A) the District Court reversed the enhancement and sentence as an habitual violent offender under section 775.084(4)(b)(1), Florida Statutes (1989), on the basis that since the second degree murder conviction was already enhanced to a life felony under section 775.087(1)(a) for use of a firearm,

the degree of the felony could not be further enhanced under section 775.084(4)(b)1 because it was no longer a first degree felony. And specifically stated:

Under the plain language of the statute, only first degree felonies -- not those which are already made life felonies -- can be enhanced under section 775.084(4)(b)1.

(Appendix, page 2).

The State filed a Motion for Rehearing and Certification (see Appendix B), which was denied by Order dated June 20, 1991 (see Appendix C). Notice to Invoke the Discretionary Jurisdiction of this Honorable Court was filed June 25, 1991. Thus, pursuant to Fla.R.App.P. 9.120(d) this Brief on Jurisdiction follows.

SUMMARY OF THE ARGUMENT

The basis for this Court's jurisdiction is Article V, Section 3(b)(3) of the Florida Constitution. This Court has jurisdiction, and Petitioner respectfully requests this Court to exercise its discretionary jurisdiction, to review the decision of the District Court of Appeal, Fourth District, construing the applicability of §775.084 to life felonies.

REASONS FOR GRANTING DISCRETIONARY REVIEW

THIS COURT HAS DISCRETIONARY
JURISDICTION BECAUSE THE
DECISION OF THE DISTRICT COURT
EXPRESSLY DECLARES VALID
§775.084 OF THE FLORIDA
STATUTES.

On appeal to the district court, Respondent raised several constitutional attacks upon the Habitual Felony Offender Statute, §775.084, Florida Statutes (1989). In holding that "[u]nder the plain language of the statute," §775.084(4)(b)1 does not apply to life felonies, the district court "inherently" construed the state statute. Accordingly, Petitioner seeks to establish this Court's discretionary jurisdiction under Art. V, §3(b)(3) Fla. Const. (1980). This Court has discretionary review jurisdiction, See, Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988); Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority, 111 So.2d 439 (Fla. 1959); Evans v. Carroll, 104 So.2d 375 (Fla. 1958).

This Court should accept jurisdiction to decide whether the "plain language" of Section 775.084, Florida Statutes (1989) can be construed to apply to further enhance a sentence as an habitual offender to a person convicted of a "life felony." Important policy reasons dictate that this Court should accept jurisdiction and decide the constitutionality of the statute in this case.

As part of the sentencing process, the Legislature determined that the degree of some offenses committed by the habitual offender should be enhanced. Life felonies, of course,

by their own definition could not be enhanced any further, because the next level is a capital offense. However, if the habitual offender statute does not apply to persons convicted of life felonies, then the statute does not apply to the most serious crimes, i.e., second degree murder with a firearm, kidnapping, sexual battery, or armed robbery. Viewed this way, the argument that the habitual offender statute does not apply to life felonies loses credibility. To interpret the Statute as the district court did would mean that person convicted of second or third degree felonies could receive much harsher **enhanced** sentences under the Statute, than would an habitual offender who happened to commit a life felony, but who could receive a less severe sentence under the sentencing guidelines. This interpretation of the statute is illogical and absurd.

This interpretation of the Habitual Offender Statute could create conflict if there were another opinion reaching a contrary result. Cf., Westbrook v. State, 574 So.2d 1187 (Fla. 3d DCA 1991). Therefore, since it is apparent that the opinion in the instant case passed on the validity of a state statute, it is imperative that this Court exercise its discretionary review jurisdiction to review the illogical interpretation of the statute by the district court.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, Petitioner respectfully requests this Honorable Court ACCEPT discretionary jurisdiction in the instant case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

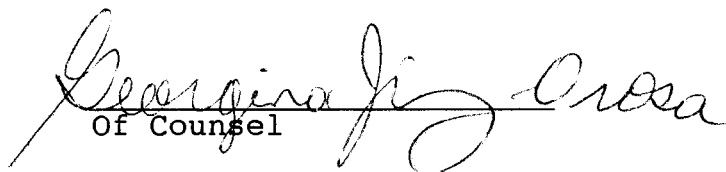


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Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Brief of Petitioner on Jurisdiction" has been furnished by courier to: TAJNA OSTAPOFF, Assistant Public Defender, Counsel for Respondent, 9th Floor/Governmental Center, 301 N. Olive Avenue, West Palm Beach, FL 33401 this 3rd day July, 1991.


Of Counsel

EXHIBIT

A

K

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1991

DONALD WALKER,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)

CASE NO. 90-1919.

NOT FINAL UNTIL THREE DAYS
TO FILE REHEARING MOTION
AND IF FILED DISPOSED OF

Opinion filed May 15, 1991

Appeal from the Circuit Court,
St. Lucie County;
Charles E. Smith, Judge.

Richard L. Jorandby, Public Defender
and Tania Ostapoff, Assistant Public
Defender, West Palm Beach, for
appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and Georgina
Jimenez-Orosa, West Palm Beach,
for appellee.

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MAY 15 1991

OFFICE OF
ATTORNEY GENERAL
WEST PALM BEACH, FLORIDA

PER CURIAM.

We affirm appellant's conviction for second degree murder with a firearm. Walker was sentenced as a habitual violent offender under section 775.084(4)(b)1, Florida Statutes (1989), to life without eligibility for release for 15 years. We reverse that enhancement.

As the First District did in Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990), we conclude that his second degree murder was already enhanced to a life felony under section 775.087(1)(a) for use of a firearm and thus could not be additionally enhanced under section 775.084(4)(b)1 because it was

no longer a first degree felony. Under the plain language of the statute, only first degree felonies -- not those which are already made life felonies -- can be enhanced under section 775.084(4)(b)1. Appellant's third issue on appeal is now moot by this disposition.

AFFIRMED IN PART; REVERSED IN PART.

DOWNEY, GUNTHER and FARMER, JJ., concur.

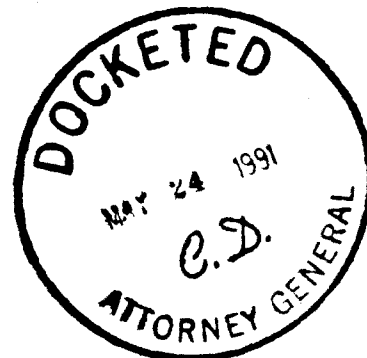
EXHIBIT

B

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

DONALD WALKER,)
Appellant,)
v.) CASE NO. 90-1919
STATE OF FLORIDA,)
Appellee.)



MOTION FOR REHEARING AND CERTIFICATION

COMES NOW Appellee, the State of Florida, by and through undersigned counsel and pursuant to Fla. R. App. P. 9.330(a), respectfully moves this Honorable Court to rehear its decision issued May 15, 1991, in the captioned cause. The grounds for this motion are as follows:

1. In its opinion, agreeing with Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990), this Court reversed the enhancement and sentence as an habitual violent offender under section 775.084(4)(b)(1), Florida Statutes (1989) on the basis that since the second degree murder conviction was already enhanced to a life felony under section 775.087(1)(a) for use of a firearm, the degree of the felony could not be further enhanced under section 775.084(4)(b)1 because it was no longer a first degree felony.

2. The State respectfully submits that in reversing the enhancement under the habitual offender statute, this Court overlooked and misapprehended the plain meaning of the statutory language, that once the trial court determines that the defendant has met the criteria as set forth in section 775.084(1)(a), and

declares the defendant to be an habitual offender, the trial court is entitled to sentence the defendant under the provisions designated by the legislature in section 775.084(4)a), 1, 2, or 3. See, Walsingham v. State, 16 FLW D653 (Fla. 2d DCA March 6, 1991); State v. Allen, 573 So.2d 170, (Fla. 2d DCA 1991); Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990). The result of being declared an habitual offender is that rather than be sentenced under the guidelines, the defendant is to be sentenced under section 775.084. Id.

3. In reversing the enhancement on the basis that it did, the Court overlooked the fact that the sentencing provisions of the habitual offender statute (§775.084) apply even though the offense may have been otherwise enhanced, such as by operation of the terms of section 775.087. See, Williams v. State, 517 So.2d 681 (Fla. 1988); Holley v. State, 16 FLW D369 (Fla. 1st DCA 1991). Thus, this Court's decision that enhancement under section 775.084 must be reversed because the second degree murder conviction was already enhanced to a life felony under section 775.087(1)(a) for use of a firearm is in conflict with the decision of the Florida Supreme Court in Williams, and the First District in Holley.

4. The State respectfully requests the Court to reconsider its decision in light of the ruling in Westbrook v. State, 574 So.2d 1187 (Fla. 3d DCA 1991):

Defendant's basic premise is that the robbery with a deadly weapon statute, ... which he violated is a first-degree felony punishable by life imprisonment. Thus, he claims, the court erred in sentencing him under the

habitual offender statute, ... because that statute does not provide for the enhancement of life felonies.

We find that neither the applicable statute nor *Barber* 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. ... 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 recidivist, was permitted to impose the enhanced life sentence.

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

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. ... 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.


And join the Fifth and Third District Courts of Appeal in recognizing conflict with the First District's decision in Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990), as the Fifth District did Id.

WHEREFORE based on the above and foregoing the State respectfully requests this Honorable Court GRANT the instant "Motion for Rehearing and Certification" as prayed for above. Or in the alternative to certify conflict with Tucker and Westbrook; or certify the following question as one of great public importance:

DO THE PROVISIONS OF THE HABITUAL OFFENDER STATUTE, §775.084(4)(B)1, FLA. STAT. (1989), APPLY TO A DEFENDANT WHO ALTHOUGH CONVICTED OF A FIRST DEGREE FELONY, AT SENTENCING THE DEGREE OF THE FELONY IS ALREADY ENHANCED TO A LIFE FELONY BY OPERATION OF SECTION 775.087(2), FLA. STATS. (1989)?

Respectfully submitted,

ROBERT A. BUTTERWORTH
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Tallahassee, Florida


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Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Motion for Rehearing" has been furnished by courier to: TANJA OSTAPOFF, Assistant Public Defender, Counsel for Appellant, The Governmental Center/9th Floor, 301 North Olive Avenue, West Palm Beach, FL 33401, this 24th day of May, 1991.


Of Counsel

EXHIBIT

C

K

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX A, WEST PALM BEACH, FL 33402

DONALD WALKER

CASE NO. 90-01919

Appellant(s),

vs.

STATE OF FLORIDA

L.T. CASE NO 89-2685 CF
ST. LUCIE

Appellee(s).

June 20, 1991

BY ORDER OF THE COURT:

ORDERED that appellee's motion filed May 24, 1991 for
rehearing and certification is hereby denied.

I hereby certify the foregoing is a
true copy of the original court order.

Clyde L. Heath
CLYDE L. HEATH
CLERK.

cc: Public Defender 15
Attorney General-W. Palm Beach

/CH

RECEIVED
JUN 21 1991
OFFICE OF
ATTORNEY GENERAL
WEST PALM BEACH, FLORIDA