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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,193

STATE OF FLORIDA,

Petitioner,

vs.

DONALD WALKER,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE FACTS

After complaining that the State's Initial Brief did not contain a statement of the facts, Respondent proceeded to supply a "statement of the facts" as he sought it necessary to raise issue II before this Court. On direct appeal to the District Court of Appeal, Fourth District, Respondent raised three issues for consideration: I. Whether the trial court erred in not allowing Respondent to present evidence of cocaine addiction by one of the State's witnesses? II. Whether the trial court erred in sentencing Respondent as an habitual offender for a life felony? and III. Whether the trial court erred in sentencing Respondent as an habitual offender where all of his prior convictions were entered the same day?

It is clear that a statement of the facts is only necessary for consideration of the first issue raised on direct appeal before the district court. After considering the record on appeal, the respective briefs, and conducting oral argument on the case, the District Court's opinion **affirmed** the conviction without discussing issue I on direct appeal, and reversed the habitual violent felony offender sentence agreeing with Respondent's arguments on issue II on direct appeal. As to issue III on appeal, the District Court found it to be moot by its resolution of issue II. Walker v. State, 580 So.2d 281 (Fla. 4th DCA 1991).

In 1980, Article V of the Florida Constitution was amended to limit this Court's mandatory review of district court of appeal decisions, and to provide for discretionary review

jurisdiction. This amendment was necessary due to the staggering number of cases reaching this Court. The amendment, thus, turned the district courts of appeal into court with *final appellate* jurisdiction in most cases. Whipple v. State, 431 So.2d 1011 (Fla. 2d DCA 1983). This Court accepted jurisdiction in the case at bar to review the interpretation given to the Habitual Felony Offender Statute by the District Court only. The outcome of that review limited to the interpretation of the statute will have no effect on the validity of affirmance of the conviction by the District Court. Thus, although this Court does have jurisdiction to consider issues ancillary to those directly before the Court, Petitioner urges this Court to decline to entertain the issue raised by Respondent as his issue II before this Court, since that issue has already been resolved by the District Court, it was not discussed in the opinion issued by the District Court, and the resolution of the issue properly before the Court does not affect the affirmance of the conviction by the District Court. See, Lee v. State, 501 So.2d 591, 592 n. 1 (Fla. 1987); State v. Hill, 492 So.2d 1072 (Fla. 1986); Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1983).

Aside from urging this Court not to entertain issue II as raised by Respondent in his Answer Brief to this Court, the State accepts the statement of the facts as it appears at pages three and four of Respondent's Answer Brief to the extent it represents an accurate, non-argumentative recitation of the facts, only as necessary to address issue II now being raised by Respondent before this Court. The State, however, submits the following

additions, modifications and clarifications as necessary to address issue II being added on by Respondent.

Sergeant Arstell Mims testified that on September 22, 1989, at about 11:30 p.m. (R. 45), while off-duty, he was standing in the back yard of the house at 1202 Avenue I (R. 38), when he heard the two gun shots coming from near 13th Street (R. 40). When Sgt. Mims went out to see what happened, there was no other car in sight anywhere except the red and white car (R. 42), carrying the deceased and going through the cemetery, which ended hitting the house on 10th street (R. 40).

Detective James Tedder testified he was called to process the crime scene (R. 82). While looking at the car, Det. Tedder noticed what appeared to be two bullet marks, one in the vicinity of the back window, and one on the left rear trunk area (R. 113). However, Detective James Mosley testified that only one of the two marks on the car appeared to be "a bullet [that] hit [the car] and ricocheted off the trunk." (R. 332). Although both marks were fresh (R. 332), only one, in his opinion, was a bullet that hit the car. Det. Mosley opined that the cylindrical elongation impact indentation, with the copper tracings in the indentation, on the left side of the trunk, was made by a bullet (R. 332, 333). Whereas the other impact he saw on the car, Det. Mosley said could have been made by another bullet, in his opinion it was not, and believed it could have been made by something else, because instead of hitting the car real fast, it dug in (R. 333).[1] Both Sgt. Mims and Diane Walker testified they

[1] During voir dire examination, Detective Mosley stated the

heard only two (2) shots being fired (R. 40, 235). Dr. Frederick Hobin, the medical examiner, testified that Daniel Rosagnello died from a single gunshot wound (R. 169).

Sheila Anderson testified that on September 22, 1989, she had known Respondent and his brother, Roosevelt Walker, for a couple of years (R. 201-202). That evening she saw the two Walker brothers standing at the corner next past Bob Casey's store (R. 117). While she was drinking beer and talking at Baker's Bar, she heard the shots and went out to see what had happened (R. 177-178). When she came out, Roosevelt and Respondent were still at the corner of Edgewood Terrace (R. 178). She also testified that she saw Respondent riding in a light-colored, small car later that same night (R. 179).

Diane Walker testified that on September 22, 1989, she was sitting in a car in front of her house smoking crack cocaine with her boyfriend (R. 218, 223), when she saw a red and white car drive up to Respondent's brother, Roosevelt, to buy rock cocaine (R. 209). Roosevelt went up to the car, poured some cocaine rocks into his hand from a canister he was holding (R. 227), placed his hand inside the car on the driver's side (R. 209, 228) to see how much the driver of the car wanted to buy (R. 209). At that point she heard someone yell, "that's not real money" (R. 229). The car started to drive away, Diane then saw Respondent pull up his shirt and pull a gun from his waist (R. 234); then

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second indentention on the car could have been caused by a piece of wood hitting the car when the car hit the house. The piece of wood could have fallen and hit the car (R. 327).

Respondent shot the driver of the car (R. 209-210). The car went across the cemetery and ended hitting the house. (R. 210).

Corrine Fillmore testified that on the night of September 22, 1989, she was in her front yard raking (R. 256), when she saw the red and white car pull up between two street poles (R. 257). She saw one of the four men that approached the car put some drugs over in the car and talk to the driver (R. 257). Ms. Fillmore heard one of the men say, "give me the drugs, or give me the money," when neither one was given, and the car started pulling off (R. 257). Ms. Fillmore then saw Respondent pull a gun out of his side, across from his waist (R. 262), and shoot the driver of the car once (R. 258). As the car pulled off, Respondent shot two more times (R. 258).

Respondent presented an alibi defense. Respondent's brother (R. 386), Ron Reid, testified that on September 22, 1989, he saw Respondent at home (1219 Avenue M) sometime around 11:00 p.m. when he stopped by to say hello (R. 387). Respondent had some tools with him, and he was greasy as he was working on the car (R. 389). Mr. Reid also stated that when he left around 11:30 (R. 389), Respondent was getting ready to go out and take Teesa (Respondent's girlfriend) home (R. 390).

Shawanda Brown, Roosevelt Walker's girlfriend on September 22, 1989 (R. 431), testified that the three of them (Shawanda, Roosevelt and Respondent) lived together at 1219 Avenue M, Apt. A on September 22, 1989 (R. 432). That day (which Ms. Brown recalled being a Saturday night, even after defense counsel tried to correct her by pointing out that September 22, 1989, was in

fact a Friday night, R. 432-434) Ms. Brown arrived home from work about 8:00 p.m. (R. 432), and found Respondent and his girlfriend at the house (R. 434). Ms. Brown testified that Respondent left the house to take Teesa home about 10:30 or 10:45 (R. 436). Then Teesa called around 11:15 to see if Respondent made it back home (R. 436).

Valtasia Durden (herein Teesa), Respondent's pregnant girlfriend (R. 471, 478), then took the witness stand and stated that on September 22, 1989, Respondent went to pick her up at her house to take her to his house about 8:00 p.m. (R. 472-473). At Respondent's house, they watched TV for a while, then at 10:00 she went into the bedroom to sleep until 11:00 p.m. (R. 473). When Respondent came into the room, at which time Teesa told Respondent she was ready to go home, so Respondent took her home at around 11:15 (R. 473). At 11:30 she called Respondent's apartment and talked to Shawanda who said Respondent came back, but was outside at the moment (R. 474-475). Teesa did not talk to Respondent then (R. 474).

Respondent took the witness stand and stated he was home on September 22, 1989 (R. 484-487), and did not hear about the shooting until he read it in the following Sunday paper (R. 487).

SUMMARY OF ARGUMENT

Point I - Section 782.04(2), Fla. Stat. (1989), classifies second degree murder as a "felony of the first degree." Section 775.084(4)(b)(1) requires that an habitual violent felony offender receive a sentence of life after being found guilty of a

felony of the first degree. Since Respondent was convicted of second degree murder, and second degree murder is a felony of the first degree, the trial court did not err in imposing an enhanced sentence upon Respondent pursuant to §775.084.

Even if the conviction herein can be considered to be for a life felony, a rational and logical interpretation of the legislative intent in promulgating §775.084 is that the habitual offender statute was meant to apply to life felonies. The opinion of the District Court being contrary to the clear legislative intent, the decision of the District Court should be quashed and the sentence imposed by the trial court affirmed.

Point II - Since Respondent did not present any expert medical or psychological relevant evidence that Ms. Fillmore's ability to observe, remember, and recount has been affected by her prior drug use, under the authority of Edwards v. State, infra, the trial court was correct in excluding Von Evans proffered testimony that after Ms. Fillmore smoked crack cocaine she "usually" would become paranoid and peek out of her window to look for the cops. The evidence was otherwise cumulative, thus, the error, if any, was harmless beyond a reasonable doubt.

Point III - One of Appellant's three prior convictions committed within five years prior to the second degree murder for which he was being sentence was a conviction, entered March 14, 1988, for armed robbery. Under the provisions of Section 775.084(1)(b)1 all that is needed is **one prior conviction for one of the enumerated violent felony offenses.** Thus, even if this conviction was entered on the same day as the other

convictions, this fact was of no moment because the trial court declared Respondent an "habitual violent felony offender" under the specific provisions of §775.084(1)(b)1.

ARGUMENT

POINT I

IS A FIRST DEGREE FELONY PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE IMPRISONMENT, WHICH HAS BEEN ENHANCED TO A LIFE FELONY BY OPERATION OF §775.087(1)(a), SUBJECT TO AN ENHANCED SENTENCE OF LIFE IMPRISONMENT PURSUANT TO THE PROVISIONS OF THE HABITUAL FELONY OFFENDER STATUTE?

Petitioner re-asserts the arguments made in the Initial Brief on the merits, but in response and rebuttal to Respondent's arguments in his Answer Brief states as follows:

In support of his argument, Respondent cites to Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990). However, Respondent's reliance thereon is misplaced since Barber does not stand for the proposition Respondent submits it does.

The entire quote from Barber, at 1173 is as follows:

> 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)(1), 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 statute criminalizing their offenses do *not* take such recidivism into account.

The State submits that the Barber Court rejected Respondent's argument, and instead reasserted that the Statute does "bear a reasonable and just relationship to [other] legitimate state interest." For example, merely because a life felony allegedly cannot be enhanced, the trial court should not be precluded from habitualizing the defendant to punish the recidivism by depriving the defendant of gain-time as authorized under §775.084(4)(e), Fla. Stat. (Supp. 1988).

Respondent also cites to Power v. State, 568 So.2d 511 (Fla. 5th DCA 1990) in support of his argument. However, in Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990) the Fifth District distinguished Power, and rejected Respondent's arguments. The State's position, once again, is that "life felonies" are subject to the habitual offender statute under the arguments expounded in the initial brief, i.e., the trial court may still declare the felon convicted of a life felony an habitual violent felony offender in order that the no gain-time provision of the statute can be applied to that felon's sentence. The State submits this is necessary because the Power

decision focuses on the habitual offender statute to the exclusion of the other relevant statutory provisions.

As stated earlier, 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. To accept Respondent's interpretation of the statute would deprive the trial court of applying the habitual offender statute in the most serious crimes, as in the case at bar, or under the kidnapping statute, §787.01(3)(a), Fla. Stat., sexual battery statute, §797.011(2)(3), or armed robbery, §812.13(2)(a), Fla. Stat. Viewed this way, the argument that the habitual offender statute does not apply to life felonies loses credibility.

If a life felony, one which the legislature has decided is more serious than a first degree felony, cannot be sentenced pursuant to §775.084, Fla. Stat., that degree of offense has no minimum mandatory sentence, is subject to reduction by gain time granted by the Department of Correction, and may be sentenced by reference to the sentencing guidelines. This interpretation reaches the absurd result that an individual sentenced as an habitual violent felony offender for a first degree felony could receive a life sentence, including a 15 year mandatory minimum period of incarceration, whereas a person with the same background, convicted of a more egregious crime, as Respondent herein, could be released well within the 15 year mandatory

incarceration required for the first degree felon. As statutory construction should never reach an absurd result if the provisions can be construed in harmony, §775.084(4)(b) must be construed by this Court to allow Walker to be sentenced as an habitual violent felon for the commission of the murder of Mr. Rosagnello.

For the above stated reasons, the State submits that Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990), relied upon by Respondent, was wrongly decided.

Accordingly, based on the above stated reasons, and the arguments made in the State initial brief, the State submits that this Court should quash the opinion of the District Court, and reinstate the habitual violent felony offender sentence imposed on Respondent by the trial court.

POINT II

THE TRIAL COURT PROPERLY EXCLUDED INCOMPETENT TESTIMONY ABOUT HOW CORRINE FILLMORE'S ALLEGED PRIOR DRUG USE AFFECTED HER ABILITY TO OBSERVE, REMEMBER AND RECOUNT. (Restated.)

As stated earlier, Respondent in his answer brief added as his second issue to be reviewed by this Court an argument he had raised before the District Court that went to the validity of his conviction. The District Court after considering same, found it to be without merit, and did not even discuss it in its opinion now under review herein. The District Court simply affirmed the conviction. Because the resolution of that issue

by the District Court would not affect the outcome of the petition now before this Court, on the authority of Lee v. State, supra; State v. Hill, supra; and Trushin v. State, supra, the State urges this Court to decline to entertain the second issue raised by Respondent in his Answer Brief as issue II.

Should this Court decide to go ahead and entertain the issue, in response to Respondent's allegations, the State submits as follows:

Respondent claims the trial court did not allow him "to adduce testimony from Von [Evans] and two other witnesses that Ms. Fillmore was in actuality a cocaine addict, who used drugs three or four times daily, and who suffered from paranoia as a result" (AB 14), that this was reversible error, and as a consequence he is entitled to a new trial (AB 15). The State submits that a review of the record clearly shows that Respondent's allegations are totally erroneous, and without merit; that the trial court's ruling is consistent with the rule reaffirmed by this Court in Edwards v. State, 548 So.2d 656 (Fla. 1989), thus no reversible error was shown by Respondent, and therefore the District Court was correct in affirming the conviction.

As pointed out by Respondent, when Diane Walker testified, she informed the jury herself that on September 22, 1989, she had smoked two rocks of cocaine just prior to her witnessing the shooting (R. 218), and was in the process of trying to light up to smoke more crack **when she heard the shots** (R. 223).

Likewise, although Corrine Fillmore admitted that she did smoke cocaine prior to September 22, 1989 (R. 272), and had a habit of smoking crack cocaine during that period of time (R. 290), she denied she saw, or smoked cocaine with Andre [Thurston] either during the day or night of September 22, 1989 (R. 271), and maintained that she did not smoke crack on the 22d day of September, 1989 (R. 272, 290), that week or two weeks after that (R. 272). Defense counsel was allowed to attack Ms. Fillmore by insinuating that she raked her yard at midnight because she had weird habits due to her cocaine addiction (R. 265-266, 272-274).

On his side of the case, Respondent then called Andre Thurston to the stand (R. 367-383). Mr. Thurston testified that he saw Corrine Fillmore in her house about six or seven p.m. on September 22, 1989 (R. 370), and he smoked crack cocaine with Ms. Fillmore then (R. 371). His testimony was that in addition, they also smoked crack cocaine around 10:00, 10:30, and 11:00 p.m. (R. 371). Mr. Thurston told the jury that around September 22, 1989, Ms. Fillmore smoked "a lot" of cocaine (R. 372), and that Ms. Fillmore has a cocaine habit (R. 373).

During cross-examination, Mr. Thurston stated that on September 22, 1989, he saw the red and white car pull up to buy crack cocaine (R. 381). Immediately, Mr. Thurston then went in the alley and smoked a cocaine rock by himself in the alley (R. 381). Mr. Thurston stated he was in the alley for 15 to 20 minutes smoking his crack before he heard the shots being fired (R. 382-383).

Later Respondent called Von Evans (who at the time of trial was in prison serving time on a conviction for selling cocaine, R. 448) to the stand. Mr. Evans testified that Corrine Fillmore is like his aunt (R. 451) because her brother married Evans' mother (R. 448). Evans testified that on September 22, 1989, and around that period of time he was selling crack cocaine (R. 448-449). That on September 22, he "sold her [Ms. Fillmore] about twenty dollars cocaine and she **usually** let me go in her house and cut up my dope to get her some rock to smoke." (R. 449, 450-51). After he sold the crack to Ms. Fillmore on September 22, 1989, "she smoke it" (R. 451). Specifically, on September 22, 1989 he sold crack cocaine to Corrine Fillmore (R. 454-455); and that "**after she smoke the cocaine, she don't [do] nothing but stay around the house, she don't come outside so I didn't see her after she smoke**" (R. 455).

During direct examination, defense counsel asked for a side bar and told the court he would like to make a proffer of "cumulative type" testimony (R. 451) to show that Ms. Fillmore was a cocaine addict (R. 451-453). The proffer of "cumulative type" testimony (R. 457-460) showed that Mr. Evans would have said that on "the days immediately just surrounding September 22, 1989" he sold cocaine to Corrine Fillmore almost daily three or four times a day (R. 458). The arrangement they had was that Mr. Evans would "buy a certain amount of dope for sale and I don't have nowhere to cut it up in little pieces, like ten cent rocks. I give her some dope to smoke while I'm in the living room cutting it up." (R. 438-59) Mr. Evans would have also

stated that he would describe Ms. Fillmore, within days of September 22, 1989, when she smoked crack cocaine as acting "scared and watching out for the cops, looking out the window," afraid to come out of the house (R. 459).

After listening to arguments of counsel (R. 460-463), the court ruled that it had allowed Respondent to impeach Ms. Fillmore's credibility by allowing in most of the testimony brought out on the proffer (R. 463-464, 465), and that the court would allow testimony regarding how Ms. Fillmore's prior drug use affected her ability to observe, remember and recount only through a competent medical witness (R. 453, 464). Thus since Respondent did not have that type of competent witness (R. 464), the testimony was limited to what Mr. Evans could testify regarding his observations of Ms. Fillmore, and his selling of crack to Ms. Fillmore on or about September 22, 1989.[2]

The record on appeal shows that the trial court's ruling, and the District Court's affirmance of same, is consistent with this Court's holding in Edwards. As stated earlier, Respondent introduced testimony that Andre Thurston smoked cocaine with Ms. Fillmore on September 22, 1989. Von Evans stated he sold crack cocaine to Ms. Fillmore on September 22, 1989. Further these

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[2] Defense counsel obtained a stipulation from the State (R. 467, 469) that the testimony of Rodney Ellis and Corwin McNeil need not be profferred because just like Von Evans, they did not smoke or observed Corinne Fillmore smoking crack cocaine on September 22, 1989 (R. 467). Mssrs. Ellis and McNeil's testimony would only be regarding their knowlege about Ms. Fillmore's cocaine smoking habits and they way she acts (R. 467, 468). The testimony of these two witnesses was not presented to the jury by Appellant's own strategy, and not because of any exclusion order by the trial court.

two witnesses managed to tell the jury that in their opinion Ms. Fillmore has a cocaine habit, and they also managed to tell the jury how Ms. Fillmore acted after she smoked crack cocaine and that she has paranoia tendencies. Thus, to exclude Mr. Evans testimony that after smoking crack, Ms. Fillmore "**usually**" acted scared and watched out for the cops by looking out the window, is harmless error, if any. The testimony from Mr. Thurston and Mr. Evans was that after she smoked crack Ms. Fillmore would lock herself in the house, and not come out. On the 22d day of September, 1989, the evidence showed that Ms. Fillmore was outside in her front yard, raking for the whole world to see. Thus, the evidence supported Ms. Fillmore's allegations that she was not high on crack when the shooting occurred because otherwise she would have been inside her house, acting scared and looking out of the window for the cops.

In Edwards v. State, 530 So.2d 936 (Fla. 4th DCA 1988), affirmed, 548 So.2d 656 (Fla. 1989), the defendant asserted that the trial court erred in denying her the opportunity to cross-examine the victim regarding the victim's drug addiction and treatment. Edwards asked the District Court to extend the rule expressed in Nelson v. State, 99 Fla. 1032, 128 So. 1 (1930) to permit cross-examination of the victim to show that her drug use and treatment, which occurred prior to the time of the offense, adversely or detrimentally affected her recollection of the events in question. In rejecting Edwards arguments, the District Court stated:

> The jury is the ultimate fact finder and in performing that role makes

> determinations as to the credibility of each witness that takes the stand. When testimony about a witness' past use or misuse of drugs is introduced to discredit the memory and perception of that witness without the benefit of expert medical or psychiatric explanation concerning the effect of drug use on memory and perception, the jury is permitted to draw uninformed and uneducated medical conclusions which they as lay persons are clearly unqualified to do. Indeed, there does not even appear to be consensus in the medical community about the long-term effects of drug use. We therefore decline to extend the scope of cross-examination in this area and hold that the trial court did not err in excluding this testimony. (Emphasis added.)

530 So.2d at 937 (citations omitted). On certiorari review, this Court expressly approved the above cited paragraph, see, Edwards, 548 So.2d at 657, and reaffirming the views earlier expressed by it in Eldridge v. State, 27 Fla. 162, 9 So. 448 (1981), and Nelson v. State, 99 Fla. 1032, 128 So. 1 (1930) stated that:

> [The *Eldridge* and *Nelson*] view **excludes** the introduction of evidence of drug use for the purpose of impeachment unless: (a) it can be shown that the witness had been using drugs at or about the time of the incident which is the subject of the witness's testimony; (b) it can be shown that the witness is using drugs at or about the time of the testimony itself; or (c) it is expressly shown by other relevant evidence that the prior drug use affects the witness's ability to observe, remember, and recount.

548 So.2d at 658. This Court then affirmed the decision of the Fourth District Court of Appeal, Id., at 658.

At bar, the trial court allowed testimony in from Mr. Thurston that Ms. Fillmore had been using drugs at or about the

time of the shooting; as well as allowed testimony from Mr. Thurston and Mr. Evans as to how Ms. Fillmore "usually" acted after she ingested crack cocaine. The only thing the trial court excluded, but which Respondent truly did not proffer he could present, was competent, "relevant" evidence to demonstrate that the prior drug use by Ms. Fillmore affected her ability to observe, remember, and recount the events she witnessed on September 22, 1989. Respondent did not have "expert medical or psychiatric" evidence concerning the effect of drug use on Ms. Fillmore's memory and perception. Thus since the trial court's ruling at bar was in accord with this Court's rulings on the issue, no reversible error has been shown. Accord, Johnson v. State, 565 So.2d 879 (Fla. 5th DCA 1990); Richardson v. State, 561 So.2d 18 (Fla. 5th DCA 1990); Tullis v. State, 556 So.2d 1165 (Fla. 3d DCA 1990).

POINT III

THE TRIAL COURT PROPERLY SENTENCED APPELLANT AS A HABITUAL **VIOLENT** FELONY OFFENDER SINCE **ONE** OF APPELLANT'S PRIOR CONVICTIONS WAS A ROBBERY AS REQUIRED BY §775.084(1)(b) F.S. (SUPP. 1988).

Respondent claims that because all of his prior convictions were entered on the same day, he does not meet the criteria for sentencing as an **habitual offender** (AB 20). What Respondent over looks is the fact that he was declared a **habitual violent felony offender** under §775.084(1)(b), Florida Statutes (Supp. 1988) which provides:

> (b) "Habitual violent felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if it finds that:
>
> 1. The defendant has previously been convicted of **a felony** or an attempt or conspiracy to commit a felony and one or more of such convictions was for:
>
> a. Arson,
> b. Sexual battery,
> c. **Robbery**, ...
>
> 2. **The felony** for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior enumerated felony or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for an enumerated felony, whichever is later.

A reading of the Statute makes it abundantly clear that all that is needed, under the provisions of §775.084(1)(b), is **one (1)** prior conviction for one of the enumerated felonies before the trial court can impose an extended term of imprisonment. This subsection is distinct from §775.084(1)(a), "Habitual Felony Offender" which requires "two or more felonies in this state or other qualified offenses." Johnson v. State, 569 So.2d 872 (Fla. 2d DCA 1990); Henderson v. State, 569 So.2d 925 (Fla. 1st DCA 1990).

As in Johnson, in the case at bar, at sentencing the State established, without any objection from Appellant (R. 537), that the most recent -- within five (5) years prior to committing the second degree murder for which he was being sentenced -- of Respondent's prior convictions was the "armed robbery" for which he was adjudicated and convicted March 14, 1988 in St. Lucie

County, Circuit Court Case No. 87-3304-CF (R. 536, see also R. 573-576). Thus Respondent has failed to show any reversible error under the allegations made at pages 20 through 22 of his answer brief, since the trial court declared Appellant an "Habitual **Violent** Felony Offender" under §775.084(1)(b), (4)(b), F.S. (1989) (R. 543-545, 587, 589), not a "Habitual Felony Offender" under §775.084(1)(a) as contended by Respondent.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court **QUASH** the opinion of the District Court of Appeal, Fourth District, and **AFFIRM** the conviction and sentence as imposed by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Petitioner's Reply Brief" has been furnished by Courier to: TANJA OSTAPOFF, Assistant Public Defender, Counsel for Respondent, The Governmental Center/9th Floor, 301 North Olive Avenue, West Palm Beach, FL 33401, this 21st day of January, 1992.

Georgina Jiménez-Rosa
Of Counsel