IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 78,378

ERIC PRICE,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

The state seeks review from the decision of the First District Court of Appeal in Price v. State, ___ So.2d ___, 16 FLW D2004 (Fla. 1st DCA July 31, 1991) (copy attached as an appendix). The lead case on this issue is Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991) (en banc), review pending, case no. 77,751, in which the district court held that defendants could not be sentenced as habitual offenders if their two prior threshold convictions were entered on the same day, under the 1988 habitual offender statute.

The record on appeal will be referred to as "R," followed by the appropriate page number in parentheses.

Respondent is also pending review in another case under case number 77,841.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement as reasonably accurate, with the following additional facts. Respondent was convicted of armed robbery, a first degree felony punishable by life (R 2; 44; 52). Respondent argued below that he could not be sentenced as an habitual offender for a first degree felony punishable by life, because that classification of crime is excluded from the habitual offender statute. The lower tribunal did not address that issue, but reversed on respondent's alternative argument that he did not meet the criteria for habitual offender sentencing.

III SUMMARY OF ARGUMENT

Habitual offender statutes in Florida have been construed with a judicial gloss requiring that the prior convictions be sequential.

Even after the 1988 amendment of the habitual offender statute, all the district courts of appeal have have held that the sequentiality requirement remains. The state disagrees with those decisions, arguing that the changed statutory language does not require that prior convictions be in sequence.

The state's position is flawed for two related reasons. First, the legislature is presumed to know of existing laws and their judicial interpretation. Second, when the legislature intends to overturn long-standing precedent and the construction that the courts placed on the statute, it is obliged to use unmistakable language to achieve this objective. Since the 1988 version of the habitual offender statute was essentially silent on the sequentiality rule, the legislature did not abrogate it. Without unmistakable language overturning the rule, and there was none, it stands.

Price had only two prior convictions, both entered on the same day, thus, he did not qualify as an habitual offender. This court should approve the decision of the First District Court of Appeal and answer the certified question in the affirmative.

Price will argue in the alternative that the habitual offender statute does not permit that sanction for one convicted of a first degree felony punishable by life. That

category of crime was specifically excluded from the statute by the Legislature. Penal statutes must be strictly construed in favor of the defendant.

Although the robbery statute cites to the habitual offender statute as a possible penalty, that citation is of no effect where first degree felonies punishable by life were expressly omitted from the habitual offender statute.

This Court should not address the certified question, but rather hold that respondent's crime is not subject to habitual offender treatment at all, and remand for resentencing under the guidelines.

IV ARGUMENT

CERTIFIED QUESTION/FIRST ISSUE PRESENTED

WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (SUPP. 1988), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF TWO OR MORE FELONIES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PREVIOUS OFFENSE?

The debate boils down to this: To prove habitual offender status, the state must establish two prior felony convictions. A line of cases, based on two main decisions discussed infra and referred to as the Joyner-Shead rule requires that the second felony occur after conviction of the first felony, that is, sequentially. Joyner v. State, 30 So.2d 304 (Fla. 1947); Shead v. State, 367 So.2d 264 (Fla. 3d DCA 1979).

The state, on the other hand, argues that the language of the habitual offender statute has changed substantially since Joyner was decided, and that the plain language of the 1988 habitual offender statute - "previously convicted of two or more felonies" - contains no sequentiality requirement. According to this view, two prior convictions on the same day now qualify under the habitual offender statute, although that is not how the earlier statutes were interpreted.

The state argued that the sequentiality requirement was based on an earlier, two-tiered statute, and that the demise of the two-tiered system eliminated the sequentiality requirement. The First District, however, ruled that the Joyner-Shead principle survived long after repeal of the two-tiered provision, and concluded that "[h]ad the legislature intended to overturn

long-standing precedent and the construction that the courts had placed on the statute, then it was obliged to use unmistakable language to achieve its objective." Barnes, 576 So.2d at 761.

The state's argument bypasses the history of this statute. In 1988, the legislature did not create a new habitual offender statute. Rather, it amended an existing statute. The legislature's actions must be interpreted taking into account how this court and the district courts interpreted prior versions of the habitual offender statute. The cases cited by the state do not address this situation. Instead, the state's tunnel-visioned presentation looks only at the stark words of the law, without acknowledging historical precedent.

The background of the sequential conviction requirement is critical and revealing. Joyner v. State, supra, is the leading case. At the time Joyner was decided, the statute provided in part that "a person who, after having been three times convicted ... of felonies," shall be sentenced upon conviction for a fourth or subsequent felony as an habitual offender. § 775.10, Fla. Stat. (1941). This court held that three prior convictions entered on the same day did not qualify as the three prior felonies required by the statute. The court said:

> To constitute ... a fourth conviction within the purview of ... Sec. 775.10, supra, the information or indictment must allege and the evidence must show that the offense charged in each information subsequent to the first was committed and the conviction therefor was had after the date of the then last preceding conviction. In other words, the second conviction must be

> alleged and proved to have been for a crime committed after the first conviction. The third conviction must be alleged and proved to have been for a crime committed after both the first and second convictions, and the fourth conviction must be alleged and proved to have been for a crime committed after each of the preceding three convictions. (emphasis added)

30 So.2d at 306.

The court's rationale in Joyner was:

> (1) because the purpose of the statute is to protect society from habitual criminals who persist in the commission of crime after having been theretofore convicted and punished for crimes previously committed. It is contemplated that an opportunity for reformation is to be given after each conviction. (2) This construction is implicit in the statutes. (emphasis added)

Id.

The court did not base its holding on the precise language of the statute, but instead canvassed decisions of other jurisdictions and decided "that a majority of the courts and the weight of authority supports this conclusion." Id.

An annotation entitled Habitual Criminal Statutes, 24 ALR 2d 1247 (1952), confirms the court's analysis:

> [R]egardless of the differences in phraseology, the preponderance of authority supports the view that the prior convictions, in order to be available for imposition of increased punishment of one as a habitual offender, must precede the commission of the principal offense, that is, the latest prosecution in point of time. In this connection it has been brought out in numerous cases that, although differing somewhat in language, the same principle is inherent in a habitual offender criminal statute, namely, that the legislature in enacting such a statute intended it to serve as a warning to first offenders and to afford them an

> opportunity to reform, and that the reason for the infliction of a severer punishment for a repetition of offenses is not so much that defendant has sinned more than once as that he is deemed incorrigible when he persists in violations of the law after conviction of previous infractions. (emphasis added)

Id. at 1248-49.

Since Joyner, this court consistently applied this rationale to habitual offender statutes. E.g., Lovett v. Cochran, 137 So.2d 572 (Fla. 1962) (when two of the four convictions were for offenses committed the same day they did not count as separate prior convictions); Scott v. Mayo, 32 So.2d 821 (Fla. 1947) (two convictions entered on same date, therefore "only one of these two convictions could be counted in arriving at the number of convictions ...").

This court later held that an information charging the defendant as a fourth offender was deficient "because we have repeatedly held that when two of the four convictions required to invoke the statute are shown to have been obtained the same day, the invalidity of the information to allege facts justifying [an enhanced] sentence is obvious." Perry v. Mayo, 72 So. 2d 382, 383 (Fla. 1954).

Application of that rule did not depend on whether the simultaneously imposed sentences were for crimes committed on the same day or different days. In Perry, the court was unable to ascertain the date that any of the four offenses were committed. The pivotal fact, however, was that conviction for the last two offenses occurred on the same day. For that reason

the allegation of four prior convictions was facially insufficient. The court said, "To end the confusion, once and for all, we adhere to the rule that in order to form a basis for sentence as a second or fourth offender, it must be established that offenses after the primary one were in each case committed subsequent to conviction for the preceding offense...." 72 So.2d at 384 (emphasis added).

The district courts applied the same principle to the revised habitual offender statutes. In Shead v. State, supra, the court ruled that simultaneous convictions of two misdemeanors committed on the same day did not meet the statutory requirement of "twice previously been convicted of a misdemeanor". Following this court's teaching in Joyner, the Third District Court said:

> Under this and similar habitual criminal statutes, it is the established law of this state, as well as the overwhelming weight of authority throughout the country, that, when the statute requires two or more convictions as a prerequisite to an enhanced sentence on a present case, the defendant must have committed the second offense subsequent to his conviction on the first offense. Two or more prior convictions rendered on the same day are, therefore, treated as one offense for purposes of such a provision in a habitual criminal statute.
>
> * * *
>
> It therefore follows that the requirement of two prior misdemeanor or qualified offense convictions under the habitual criminal statute means that the defendant must have committed the second offense subsequent to his conviction on the first offense and thus showed a persistence in a pattern of crime notwithstanding an opportunity to reform. (emphasis added)

367 So.2d at 266-267.

In Snowden v State, 449 So.2d 332, 338 (Fla. 5th DCA 1984), quashed on other grounds 476 So.2d 191 (Fla. 1985), the Fifth District said that, "although the current statute differs somewhat in its operative language from the earlier version, we see nothing in it that expresses a purpose other than was earlier noted by this court in Joyner, viz., to protect society from habitual criminals who persist in the commission of crime after having been theretofore convicted and to permit an opportunity for reform after each conviction" (emphasis added).

In Wilken v. State, 531 So.2d 1011 (Fla. 4th DCA 1988), an habitual misdemeanant sentence was reversed because, as here, both prior offenses occurred before the defendant was convicted of either crime. The court followed the rationale of Joyner and Shead, which had applied "the same gloss" on other versions of the habitual offender laws by finding that "the timing requirement is implicit in the statutes...." Id.

Despite those judicial decisions, the state argues that the present statutory language is clear and requires no interpretation. The Joyner decision is said to be inapplicable because it was based on a "two-tiered" statute. That assertion, however, is not completely accurate, because the original act expressly required sequential convictions for the second

conviction,[1] but not the fourth conviction.[2] This court, however, extended the sequentiality requirement to the upper tier by interpretation. Joyner, 30 So.2d at 306.

Later, the Third District in Shead decided that the sequentiality requirement was also a part of the habitual felony offender statute, which by then was not a two-tiered system. A person qualified merely if he had "twice previously been convicted of a misdemeanor..." § 775.084(1)(a)1.b, Fla. Stat. (1975).

Presently, the statute applies when the defendant "has previously been convicted of two or more felonies." This language is remarkably similar to the fourth conviction requirement in old section 775.10, which read, "after having been three times convicted." This present language is not greatly different from the "twice previously convicted" language of the former section 775.084. Such similarities in the statutory provisions belie the state's assertion that the present law is free of ambiguity, or that interpretations of the former law are irrelevant to interpretation of the present one.

On a larger scale, the state's position is at odds with fundamental principles of recidivism statutes. Joyner's

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[1]Section 775.09, Florida Statutes (1947), applied to a second felony committed by a person, "after having been convicted...of a felony..."

[2]Section 775.10, Florida Statutes (1947), applied to a fourth felony committed by a person "after having been three times convicted...of felonies..."

rationale was not confined to the statute's words, but took account of the overall purpose of habitual offender acts: that "an opportunity for reformation is to be given after each conviction." 30 So.2d at 306. That same principle was carried forward in Shead, nine years before the 1988 amendment was enacted.

Even though Shead is now characterized by the state as wrongly decided, the present statute did not clearly depart from the language construed in Shead, or Joyner, or otherwise convey an intent to depart from an interpretation of law that had prevailed for the preceding 40 years.

With this background, there is no justification for a conclusion that the present habitual offender statute was intended to change the historical "gloss" which the courts have uniformly applied to enhancement statutes over the years. The general purpose of habitual offender statutes, rather than their individual wording, has been and should continue to be, the rationale of interpretation.

Further, the state's argument ignores two well-established rules of statutory construction. First, when enacting a statute, the legislature is presumed to know the existing law, and also to "be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute." Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984); Williams v. Jones 326 So.2d 425, 435 (Fla. 1975), appeal dism. 429 U.S. 803, 97 S.Ct. 34, 50 L.Ed.2d 63 (1976); Bermudez v. Florida Power and

Light Co., 433 So.2d 565, 567 (Fla. 3d DCA 1983), review den. 444 So.2d 416 (Fla. 1984).

Second, when the legislature intends to overturn longstanding court interpretation of law, it must do so in unmistakable terms. State ex rel. Housing Authority of Plant City v. Kirk, 231 So.2d 522, 524 (Fla. 1970); American Motors Corp. v. Abrahantes, 474 So.2d 271, 274 (Fla. 3d DCA 1985).

Plant City involved a question whether an amended excise tax statute was intended to tax rental properties owned by public housing authorities. From 1949 to 1968, public housing authorities clearly were not subject to excise taxes. This was due to an interpretation of the Revenue Act by the Department of Revenue that applied from 1949 to 1959, and due to the decision of this court in Green v. Panama City Housing Authority, 115 So.2d 560, 562 (Fla. 1959), for the balance of the period. In 1968, the legislature amended the revenue statutes to expand the definition of businesses which were subject to the excise tax. On appeal, the Department of Revenue argued that public housing authorities came within the expanded definition of businesses and, thus, were subject to excise taxes.

This court said:

> Inherent in the argument of the Department of Revenue is that the exemption granted to the Housing Authority in Chapter 423 was repealed by implication by the 1968 amendment to the Revenue Act, thus rendering the Panama City cases and the exemption granted - now inoperable.

Plant City, 231 So.2d at 523. The court continued, thus:

> We cannot say that the Department's argument is not persuasive, but, in a situation such as this - with such long standing recognition of such exemption by both the Legislature, this Court, the district court and the circuit court - we are not persuaded that such a catyclysmic [sic] result could be brought about by the application of the principle of implied repeal.

Id.

This court further held that "[w]here an act purports to overturn long-standing legal precedent and completely change the construction placed on a statute by the courts, it is not too much to require that it be done in unmistakable language." Id.

American Motors, supra, concerned the retroactivity of a long-arm statute. The Third District noted a long line of cases which held that amendments to long-arm statutes were not to be applied retroactively. It then noted two rules of statutory construction, the second being that, as in Plant City,, when an act purports to overturn long-standing legal precedent and change the courts' construction placed on the statute, the legislature must do so in unmistakable language. The district court said that, while the language of the amended statute may reasonably be viewed to evince a legislative intent that the 1984 amendment be applied retroactively, the act did not do so "clearly" and "unmistakably," and was therefore ineffective in doing so. 474 So.2d at 274.

Applying that rule of construction here, and considering the longstanding precedent of Joyner-Shead, if the legislature

intended to eliminate the sequential conviction requirement, it was obliged to do so in unmistakable language. It did not. Therefore, Joyner-Shead should stand, until and unless the legislature makes a contrary intent unmistakably clear.

It is noteworthy that all the district courts have addressed the issue before the court, and there is no conflict among them. All those courts have agreed, either expressly or implicitly, that the Joyner-Shead rule remains viable under the 1988 habitual offender statute. Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991); Collazo v. State, 573 So.2d 209 (Fla. 3d DCA 1991); Williams v. State, 573 So.2d 451 (Fla. 4th DCA 1991); Walker v. State, 567 So.2d 546 (Fla. 2d DCA 1990); Taylor v. State, 558 So.2d 1092 (Fla. 5th DCA 1990), appeal after remand, 576 So.2d 968 (Fla. 5th DCA 1991).

Moreover, in his concurring opinion in Barnes, Judge Zehmer considered whether, in light of the unanimity among the district courts, there even was a question of great public importance. The concurrence said:

> In view of the unanimity of rulings by all district courts of appeal on the question now before us, I am unable to agree that the court should revisit the statute and change these principles; there is simply no question of great public importance presented.

576 So.2d at 765 (Zehmer, J., concurring).

Since the state has asked for these habitual offender cases to be consolidated with some others, including Fuller v. State, 578 So.2d 887 (Fla. 1st DCA 1991), which involved the 1989 version of the habitual offender statute, and in the

interest of fully briefing this issue, respondent will address the 1989 amendment.

The 1989 amendment changed the "previously been convicted of two or more felonies in this state" language to "previously has been convicted of any combination of two more more felonies in this state or other qualified offense." In Fuller, the state argued that the change to the "any combination" language meant the legislature had abolished any sequentiality requirement of prior convictions. Id.

The First District disagreed with this interpretation and said:

> We cannot agree with the state's position. The sequential conviction requirement is one of long standing. Nothing in the 1989 amendment addresses the timing of qualified offenses. If the legislature intended to overrule the sequential conviction requirement, it was obligated to do so in unmistakable language. (cites omitted)

Id. The court continued:

> Moreover, it appears that the sole intent of the 1989 amendment was to expand the definition of "qualified offenses" to include out-of-state offenses... (cites omitted)

Id.

Further, as noted by Judge Zehmer in his concurring opinion in Barnes, the state has taken inconsistent positions as to the 1988 and 1989 amendments. While the state has argued, in Barnes, for example, that the language of the 1988 statute is clear that there is no sequentiality requirement, it has also argued, in Fuller, for example, that the 1989 amendment

abolished the sequentiality requirement. Barnes, 576 So.2d at 762 (Zehmer, J., concurring).

To summarize, the courts have consistently held that the habitual offender statute requires that each subsequent offense be committed after conviction of the prior offense. The legislature did not demonstrate an intent to abolish that rule when enacting the 1988 (or 1989) amendments to the statute. The prior interpretations should, therefore, still control.

Price cannot be sentenced as an habitual offender because the statute requires two non-contemporaneous felony convictions. Price's two prior convictions were imposed on the same date and, thus, do not qualify.

This court should approve the decision of the First District Court of Appeal below and answer the certified question in the affirmative.

SECOND ISSUE PRESENTED

WHETHER A FIRST DEGREE FELONY PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE IMPRISONMENT IS SUBJECT TO AN ENHANCED SENTENCE PURSUANT TO THE PROVISIONS OF THE HABITUAL FELONY OFFENDER STATUTE?

The history of this issue in the First District is interesting, but confusing. In Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990), the court held that the 1988 revised habitual offender statute did not apply to life felonies because life felonies were not included within the statute. In Gholston v. State, 16 FLW D46 (Fla. 1st DCA December 17, 1990), the court held that it did not apply to first degree felonies punishable by life because they too were not included in the statute.[3]

In Burdick v. State, 16 FLW D1963 (Fla. 1st DCA July 25, 1991), the court, in an en banc decision, receded from Gholston, held that the habitual offender statute did apply to first degree felonies punishable by life, even though they were not included in the statute, and certified the question. Judge Ervin dissented, and respondent will rely heavily upon his views in this brief.

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[3]In another context, the court held that a first degree felony punishable by life was properly scored as a life felony on a sentencing guidelines scoresheet. Jones v. State, 546 So.2d 1134 (Fla. 1st DCA 1989).

The court adhered to its Burdick decision in Weems v. State, 16 FLW D2028 (Fla. 1st DCA July 30, 1991) and certified the question.

Finally, in West v. State, 16 FLW D2044 (Fla. 1st DCA August 7, 1991), the court reaffirmed its Johnson position and held that life felonies are not subject to the habitual offender sentencing because they are not included within the statute, and because a life sentence is already available as a penalty.

Respondent makes the following observations about this confusing historical picture: usually referees should stick with the first call they make, because it is most likely the correct one; and the same statute cannot be read two different ways.

The starting point in any statutory construction question is the statute itself. The habitual offender statute provides that once a defendant is found to be an habitual offender or a violent habitual offender, the following penalties apply:

> (4)(a) The court, in conformity with the procedure established in subsection (3), 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), may sentence the habitual violent felony offender as follows:

> 1. In the case of a felony of the first degree, for life, and such offender shall not be eligible for release for 15 years.
> 2. In the case of a felony of the second degree, for a term of years not exceeding 30, and such offender shall not be eligible for release for 10 years.
> 3. In the case of a felony of the third degree, for a term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.

Section 775.084(4),(5), Florida Statutes (emphasis added).

Nowhere in the habitual offender statute itself does the category of crime at issue here, first degree felony punishable by life, appear. Thus, the Legislature's omission of this degree of crime from the statute evinces its clear intent to exclude this category, especially since such crimes are already punishable by life in Section 775.082(3)(b), Florida Statutes.

In addition, it must be remembered that in construing penal statutes, the most favorable construction to the accused must be used. 49 Fla. Jur. 2d Statutes §195; Section 775.021(1), Florida Statutes:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This Court recently applied these principles in Perkins v. State, 576 So.2d 1310 (Fla. 1991) to find that cocaine trafficking is not a "forcible felony" because it was not defined as such by the Legislature.

The lower tribunal's response to this argument in Burdick was both predictable and superficial. The court found that a first degree felony punishable by life is really a first degree

felony, and so subject to the habitual offender penalty. The court did not mention its contradictory holding in Jones, supra, note 3, but merely cited to Section 775.081(1), Florida Statutes, for the proposition that first degree felonies punishable by life do not exist as a separate degree of crime.

Judge Ervin's dissent in Burdick sets forth the legislative history and the proper analysis:

> Turning to the second point, that the lower court erred in imposing an enhanced life sentence upon appellant because the substantive underlying offense for which he was convicted is punishable by a maximum penalty of life imprisonment, I agree and would reverse. In my judgment it is illogical to assume that the legislature intended for a trial judge to have the authority to impose an enhanced sentence of life upon one who was already subject to a maximum sentence of life imprisonment for the offense for which he or she was convicted. My conclusion is supported by the legislative history of both sections 775.082 and 775.084, Florida Statutes.
>
> Section 775.082(3)(b), Florida Statutes (1987), provides two methods of punishing persons convicted of felonies of the first degree: "[B]y a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment of a term of years not exceeding life imprisonment[.]" See also Jones v. State, 546 So.2d 1134, 1135 (Fla. 1st DCA 1989). When the 1971 legislative session enacted in the same legislative act section 775.082, establishing penalties for various categories of crimes, as well as section 775.084, creating the habitual offender classifications, the trial court's discretion to impose a maximum sentence within the range specified for all noncapital felonies was left unimpaired and remained so until October 1, 1983, the effective date of guideline sentencing.

Additionally, during the special session of November 1972, the legislature amended section 775.081 by designating "life felony" as an additional category to the list of felonies, and amended section 775.082 by adding subsection (4)(a), establishing as the penalty for a life felony "a term of imprisonment in the state prison for life, or for a term of years not less than thirty." Ch. 72-724, Sections 1,2, Laws of Fla. In 1983, the penalty for a life felony was amended, providing for life felonies committed before October 1, 1983, a term of imprisonment for life or a term of years not less than thirty, and for life felonies committed on or after October 1, 1983, a term of imprisonment for life or a term of imprisonment not exceeding forty years. Ch. 83-87, Section 1, Laws of Fla. The obvious intent of such amendment was to make Section 775.082((3)(a), Florida Statutes (1983), consistent with the newly created guideline sentencing, providing at Section 921.001(4)(a), Florida Statutes (1983), that the guidelines were to be applied to all felonies committed on or after October 1, 1983, except capital felonies, and to all felonies committed prior to October 1, 1983, except capital felonies and life felonies, when sentencing occurred subsequent to such date and the defendant chose to be sentenced under the guidelines. Ch. 83-87, Section 2, Laws of Fla.

Even though the legislature as early as 1972 created the classification of life felonies, it never amended the habitual felony offender statute to include enhanced sentencing for life felonies. As previously stated in this dissent, the legislature was no doubt aware that the trial courts' discretion to impose sentence for the substantive offense within the maximum range remained unaffected until the creation of guideline sentencing. Consequently, the result reached by the majority is that persons who commit severe felony offenses categorized as life felonies after October 1, 1983 are eligible for guideline sentencing, whereas persons such as appellant who commit first degree felonies punishable for a term of years not

> exceeding life imprisonment are denied such consideration upon being classified as habitual felons, because section 775.084(4)(e) excludes habitual felony sentences from guideline sentencing and other benefits. My thesis is, of course, not that the legislature could not validly make this kind of distinction -- only that it did not intend to make it.

Burdick, 16 FLW at D1965 (Ervin, J., dissenting) (footnotes omitted).

The state also argued below that because the statutes defining crimes as first degree felonies punishable by life refer to the habitual offender statute as a possible penalty,[4] the Legislature intended for that enhanced punishment to apply. Again, Judge Ervin's dissent in Burdick sets forth the legislative history and the proper analysis:

> The reference in section 810.02(2) to section 775.084 appears in all noncapital felony and misdemeanor statutes listed under Title XLVI of the Florida Statutes. Thus, even though offenses which are designated life felonies were never made subject to enhanced sentencing under the habitual felony statute, reference to such statute is nonetheless made within each statute prescribing the penalty for life felonies. See, e.g., Section 787.01(3)(a)5., Fla.Stat. (1980) (kidnapping); Section 794.011(3), Fla. Stat. (1989) (sexual battery). Additionally, although section 775.084 had formerly provided enhanced sentencing for habitual misdemeanants, the legislature, effective October 1, 1988, deleted the provisions relating to habitual misdemeanants. See Ch. 88-131, Sections 6,9, Laws of Fla. In

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[4] e.g., the statute defining armed robbery, Section 812.13(2)(a), Florida Statutes, and the one defining armed burglary, Section 810.02(2), Florida Statutes.

> the 1989 Florida Statutes, however the legislature failed to delete references to section 775.084 in providing punishments for specified misdemeanors. See, e.g., Section 784.011(2), Fla.Stat. (1989) (assault), Section 784.03(2), Fla.Stat. (1989)(battery). Considering the legislature's wholesale indiscriminate reference to the habitual offender statute throughout the Florida Statutes, many of which are inapplicable, I do not consider that the state can take any comfort in the reference made in section 810.02(2) to section 775.084.

Burdick, 16 FLW at D1965 (Ervin, J., dissenting).

Thus, respondent's crime has been excluded from habitual offender consideration by the Legislature. This Court must so hold and remand for resentencing under the sentencing guidelines.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court answer the certified question in the affirmative and approve the decision of the First District Court of Appeal below, that Price cannot be sentenced as an habitual offender because he did not have the requisite two non-contemporaneous felony convictions.

In the alternative, respondent requests that this Court hold that a first degree felony punishable by life is not subject to the habitual offender statute.

Under either theory, Price is entitled to be resentenced pursuant to the sentencing guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Bradley R. Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. Eric Price, #629504, P.O. Box 1072, Arcadia, Florida 33821, this 6th day of September, 1991.

P. DOUGLAS BRINKMEYER