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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v.

CASE NO.: 78,378

ERIC PRICE,

Respondent.

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PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4

ISSUE I

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

ISSUE II

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.

CONCLUSION	12
CERTIFICATE OF SERVICE	13

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Barnes v. State,</u> 576 So.2d 761 (Fla. 1st DCA 1991)	4
<u>Burdick v. State,</u> 16 FLW D 1963 (Fla. 1st DCA, July 25, 1991)	10
<u>Clark v. State,</u> 16 FLW S43 (Fla. January 3, 1991)	7
<u>State v. Egan,</u> 287 So.2d 1 (Fla. 1973)	5
<u>West v. State,</u> 16 FLW D2044 (Fla. 1st DCA, August 7, 1991)	10
 <u>OTHER AUTHORITIES:</u>	
Rule 3.701(d)(1), Fla.R.Crim.P.	7
Rule 3.701(b)(2), Fla.R.Crim.P.	7
§775.084(1)(a)(1)(a), Florida Statutes (1987)	5
§775.084(4)(c), Florida Statutes (1989)	8
§775.09, Florida Statutes (1947)	6
§775.10, Florida Statutes (1947)	6
§775.10, Florida Statutes (1969)	7
Laws 1984, c. 84-328, §1	7
Laws 1986, c. 86-273, §2	7
Laws 1987, c. 87-110, §1	7
Laws 1988, c. 88-131, §1.	7

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PETITIONER'S REPLY BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner adopts the preliminary statement set forth in its Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Petitioner adopts the statement of the case and facts set forth in its Brief on the Merits.

## SUMMARY OF ARGUMENT

### ISSUE I:

As the reasons for the requirement that prior convictions must be sequential for habitual felony offender sentencing are no longer valid, the rule of law set forth in Joyner v. State, 30 So.2d 304 (Fla. 1947), no longer applies to the 1988 version of the habitual felony offender statute. The plain language of the statute thus controls its interpretation.

### ISSUE II:

Until such time as this Court may reverse Burdick v. State and hold that a defendant convicted of a first degree felony punishable by life cannot be sentenced pursuant to the habitual offender statute, Respondent's habitual offender sentence is proper.

ARGUMENT

ISSUE I

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.

Petitioner again urges this Honorable Court to answer the certified question in the negative.

The Respondent's merits brief places much reliance on the perception voiced in the majority opinion in Barnes v. State, 576 So.2d 761 (Fla. 1st DCA 1991), review pending, case no. 77,751, that the Legislature failed to use "unmistakable language" to achieve its objective, that objective being to allow trial courts to sentence a defendant as a habitual offender if, inter alia, the defendant has two or more prior felony convictions within five years, regardless of whether the convictions happened to have been entered on the same date. It should be noted that the five dissenting judges below are of the opinion that the Legislature did use unmistakable and plain language.

Respondent complains that the State's presentation looks only at the stark words of the law, but it is clear that the plain language of a statute and the meaning imparted thereby are absolutely basic to the statute's construction. Where

legislative intent as evidenced by a statute is plain and unambiguous, there is no necessity for any construction or interpretation of the statute and effect need only be given to the plain meaning of its terms. State v. Egan, 287 So.2d 1 (Fla. 1973).

Respondent would have this Court blindly adhere to an outdated precedent which was explicitly based on a statutory scheme which existed forty four years ago but which has been radically transformed. The basis for the "Joyner-Shead" rationale has been removed and that rationale now floats freely, unencumbered by logic and substance.

In 1988 the Legislature amended §775.084. Previously, pursuant to §775.084(1)(a)(1)(a), Florida Statutes (1987), a defendant could be sentenced as a habitual felony offender if the trial court found that the defendant had "(p)reviously been convicted of a felony in this state." The statute was amended in 1988 to require in subsection (1)(a)(1) that "(t)he defendant has previously been convicted of two or more felonies in this state." (emphasis supplied).

Clearly the 1987 version requiring one prior felony contained no unspoken sequentiality requirement. It is thus incorrect to assume that the 1988 requirement of two prior felonies somehow added on an unspoken sequentiality requirement. Respondent's argument in this regard must fail.



Petitioner would point out that Respondent incorrectly states that §775.09, Florida Statutes (1947),<sup>1</sup> required sequential convictions but that §775.10, Florida Statutes (1947)<sup>2</sup> did not and that this Court extended the sequentiality requirement to §775.10 by interpretation. (Respondent's brief, p. 10,11). This is plainly incorrect as under §775.09, the second conviction must have followed the first conviction, and as §775.10 required a fourth conviction after a third conviction, the sequentiality requirement was plainly stated in the statute and was not a creature of judicial interpretation. This Court should likewise follow the plain meaning of the 1988 statute.

Respondent argues that when enacting a statute, the Legislature is presumed to know the existing law. However, section 775.084, Florida Statutes (1987) contained no sequentiality requirement whatsoever, and there is very little likelihood that the Legislature could have anticipated that a 1947 case would be applied to defeat the clearly-expressed language of its 1988 amendment.

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

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

There had been no multiple-conviction provision for habitual offender sentencing in Florida since 1971 (Section 775.10, Florida Statutes (1969) provided for a mandatory term of life imprisonment for a fourth felony conviction). Thus from 1971, when §775.084 was enacted, to 1988, when the two conviction requirement was imposed, the rule announced in Joyner had ceased to exist. Consequently it is ludicrous to assert that the Legislature is presumed to know of Joyner when the Joyner rule was not existing law.

Respondent further argues that the basis of the Joyner rationale is that an opportunity for reform and rehabilitation must be given between convictions. Petitioner asserts that this rationale is no longer viable in light of the legislative intent set forth in Rule 3.701(b)(2), Fla.R.Crim.P., which states that "(t)he primary purpose of sentencing is to punish the offender. Rehabilitation . . . must assume a subordinate role." Rule 3.701 has been adopted by the Legislature. See Laws 1984, c. 84-328, §1; Laws 1986, c. 86-273, §2; Laws 1987, c. 87-110, §1; Laws 1988, c. 88-131, §1.

The "fundamental principles of recidivism statutes" urged by Respondent no longer apply in Florida in light of the legislative intent expressed above and in light of Rule 3.701(d)(1), Fla.R.Crim.P., which precludes sequential convictions in many instances by requiring the consolidation of all pending offenses. See also Clark v. State, 16 FLW S43 (Fla. January 3, 1991).

It is important to note that trial courts have the discretion in the individual case of whether or not to impose a habitual offender sentence even if all the statutory requirements are satisfied. Section 775.084(4)(c), Florida Statutes (1989), specifically states that a habitual offender sentence need not be imposed "(i)f the court decides that imposition of sentence under this section is not necessary for the protection of the public." There is thus no danger that all defendant with two prior felony convictions will be sentenced wholesale as habitual offenders. Answering the certified question in the negative will, however, ensure that those offenders deserving of a sentence under §775.084 will be treated accordingly, as the Legislature intended and pursuant to trial courts' reasoned discretion.

There are at present approximately 14 cases pending before this Court concerning the instant certified question, both on the 1988 and 1989 versions of §775.084, Florida Statutes. In virtually every case, the respondents' prior convictions arose out of separate criminal episodes which occurred at different times, but which were consolidated for purposes of conviction and sentence.<sup>3</sup> It should not escape this Court's attention that

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<sup>3</sup> For example, in Barnes, the respondent was convicted on one day of burglaries occurring on separate days. In State v. Johnson, Case No. 77,819, the respondent was convicted on one day of possession of cocaine, dealing in stolen property, and sale of cocaine, all of which occurred on different days over a period of two years.

a defendant may have an extensive prior history of repeated felony offenses over a period of years, but if the offenses were consolidated for adjudication, even though charged separately, under Respondent's interpretation the defendant would not qualify as a habitual offender. There can be no doubt that the Legislature did not intend this result.

ISSUE II

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.

Respondent argues that a defendant convicted of a first degree felony punishable by life can be found to be a habitual felony offender, but that defendant cannot be sentenced as a habitual felony offender. The issue at bar was decided by the First District Court of Appeal en banc in Burdick v. State, 16 FLW D 1963 (Fla. 1st DCA, July 25, 1991), in which the court stated that

. . . a first degree felony, no matter what the punishment imposed by the substantive law that condemns the particular criminal conduct involved, is still a first degree felony and subject to enhancement by Section 775.084(4)(a)(1), Florida Statutes.

Id. at D1964. Accord: West v. State, 16 FLW D2044 (Fla. 1st DCA, August 7, 1991).

The court in Burdick, however, certified the following question to this Court:

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

Review is pending in this Court in Burdick v. State, case no. 78,466. As the law currently stands, Respondent was properly sentenced as a habitual felony offender following his conviction for a first degree felony punishable by life.

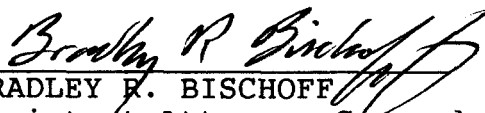
CONCLUSION

Petitioner again urges this Honorable Court to answer the certified question in the negative and hold that §775.084(1)(a)(1), Florida Statutes (Supp. 1988) should be applied according to the plain language expressed by the Legislature therein, thus reversing the majority opinion in the en banc decision in Barnes v. State and reinstating the Respondent's habitual felony offender sentence.

Until such time as this Court may reverse Burdick v. State and hold that a defendant convicted of a first degree felony punishable by life cannot be sentenced pursuant to the habitual offender statute, Respondent's habitual offender sentence is proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida, this 26<sup>th</sup> day of September, 1991.

  
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