D.A. 1-7-92 047 w/app

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 78,466

BILLY B. BURDICK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA

AMICUS CURIAE BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL), ON BEHALF OF PETITIONER

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Florida Association of Criminal Defense Lawyers (FACDL) appears on behalf of Petitioner pursuant to this Court's order of October 2, 1991, permitting FACDL to file an Amicus Brief.

The FACDL is a not for profit Florida corporation formed to assist in the reasoned development of the criminal justice system. Its statewide membership of approximately 1,000 includes lawyers who are daily engaged in the defense of individuals accused of criminal activity. The founding purposes of FACDL include the promotion of study and research in criminal law and related disciplines, the promotion of the administration of criminal justice, fostering and maintaining the independence and expertise of the criminal defense lawyer, and furthering the education of the criminal defense community through meetings, forums, and seminars. FACDL members serve in positions which bring them into daily contact with the criminal justice system.

References to the Record on Appeal and trial transcript will be by the same designations used in Petitioner's Brief and Respondent's Brief.

The First District certified the following questions to this Court: 1) Is a life sentence permissive or mandatory under the 1988 Amendment to Section 775.084(4)(a)1, Florida Statutes?; and 2) Is a first degree felony punishable by a term of years not exceeding life imprisonment subject to enhanced sentence of life imprisonment pursuant to the provisions of the Habitual Felony

Offender Statute? FACDL will address only these issues as Amicus Curiae. The decision of the First District is attached as Appendix I.

STATEMENT OF THE CASE AND FACTS

The FACDL accepts the Statement of the Case and Fact in the Initial Brief of Petitioner on the Merits.

SUMMARY OF ARGUMENT

A life sentence under Section 775.084(4)(a)1, Florida Statutes (Habitual Felony Offender), should be permissive, not mandatory. The First District reasoned that a Habitual Felony Offender (H.F.O.) sentence should be mandatory because the statute in question used the phrase "shall" sentence and it had construed the Habitual Violent Felony Offender Statute (H.V.F.O.) to also be mandatory even though the phrase "may" sentence was used in that statute. See Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990). The First District wrongly decided Donald v. State, supra. The First District ignored the legislative history of the Habitual Offender Statute and it did not use the appropriate standard of review: strict scrutiny. See State v. Wershow, 343 So.2d 605 (Fla. 1977). This Court should adopt Judge Ervin's concurring/dissenting opinion on this issue.

The H.F.O. statute does not apply to an offense punishable by up to life imprisonment. The Court should adopt Judge Ervin's cogent reasoning on this issue. By the clear language of the statutes and the legislative history of the Habitual Offender Statutes, the legislature did not intend for the habitual offender classification to apply to offenses which could already be punished by up to life imprisonment.

The H.F.O. statute denies equal protection because it permits a life sentence while the H.V.F.O. statute permits a life sentence with the chance for release after 15 years. There is no rational reason to treat the two types of habitual offenders dif-

ferently. It is illogical to treat a H.F.O. more harshly than a H.V.F.O. Therefore, even if the Court upholds the application of the H.F.O. statute to this cause, it should construe it to provide for a 15 year minimum term like the H.V.F.O. statute.

ARGUMENT

ISSUE I

WHETHER A LIFE SENTENCE IS PERMISSIVE OR MANDATORY UNDER THE 1988 AMENDMENT TO SECTION 775.084(4)(a)1, FLORIDA STATUTES?

A. The en banc decision below.

FACDL will review the sometimes complex decision below to help the Court focus on the issues it must decide to answer the certified questions. After a review of the decision below, FACDL will then step-by-step discuss the issues in relation to the certified questions.

The en banc decision below construed the following pertinent language from Section 775.084(4)(a), Florida Statutes:

> "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." (Emphasis supplied).

One of the issues presented below was whether a trial court must sentence a person, classified as a habitual offender, convicted of a first degree felony, to life. The opinion by the First District below did address this Court's decision in State v. Brown, 530 So.2d 51 (Fla. 1988), which directly construed the above language, including the use of "shall." In Brown, supra, this Court decided that the word "shall" in the 1985 version of the habitual offender

statute was either an editorial error or a misapprehension of the actual legislative intent by the editors. 530 So.2d at 53.

This Court expressly found that the legislature actually intended that the life sentence be permissive rather than mandatory. (Id). The majority opinion below decided that Brown did not apply to this case because it involved the relationship between the then new sentencing guidelines and the habitual offender statute. This Court in Brown concluded that a trial judge could not exceed the guidelines simply of the basis of the habitual offender status, therefore, the life sentence could not be construed as mandatory. Judge Miner then found that Brown did not apply to this case because the legislature has provided that habitual offender sentencing is exempt from the sentencing guidelines.

Judge Ervin, in his concurring and dissenting opinion, stated that this Court's opinion in State v. Brown, supra, held that the word "shall" in the habitual offender was not mandatory and, therefore, he would have followed this decision, except that the First District had decided otherwise in Donald v.State, 562 So.2d 792 (Fla. 1st DCA 1990), rev. denied, 576 So.2d 291 (Fla. 1991). Judge Ervin also concluded that the legislative history of the habitual offender statute supported the view that the word "shall" was permissive, not mandatory. Judge Ervin also decided that were it not for Donald, supra, he would decide that the trial court had the option of sentencing Petitioner to a life sentence or a lesser term of years.

The en banc decision below also decided that the Habitual Felony Offender Statute is not unconstitutional because it provides for a greater punishment for a habitual felony offender (H.F.O.) convicted of a first degree felony (life imprisonment) than for a habitual violent felony offender (H.V.F.O.) convicted of a first degree felony (life imprisonment with no chance for release for 15 years). The en banc decision below essentially found that the 15 year release provision was superfluous because a H.V.F.O. could accumulate "incentive gain-time on paper" so that if the sentence was commuted to a term of years, the accumulated incentive gain-time could be applied to the sentence." See Fla. Admin. Code Rule 11.0065(5)(g). The First District decided that both H.F.O. and H.V.F.O. prisoners were not eligible for parole or gain-time, but if the life sentence is commuted to a term of years, both types of offenders are eligible for incentive gain-time. However, the Court acknowledged that a H.F.O. originally sentenced to life must first serve 15 years before being eligible for release.

Judge Ervin rejected the above reasoning of the en banc majority opinion. Judge Ervin noted that the "future possibility of a life sentence being commuted to a term of years based on the discretionary exercise of executive clemency is too tenuous to support the statute against a constitutional challenge." However, Judge Ervin decided that the habitual offender statute was not unconstitutional because he would construe the 15 year mandatory minimum provision as mere surplusage.

The en banc opinion below also decided that the habitual offender statute applied to first degree felonies which were already subject to a punishment of up to life imprisonment. Judge Ervin disagreed with the en banc majority decision and decided that it was "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." Judge Ervin then reviewed the legislative history which supported this position.

Based upon the en banc decision below and the certified questions below, this Court must decide the following questions:

> 1. WAS Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990), CORRECTLY DECIDED? MUST A TRIAL COURT SENTENCE A PERSON CLASSIFIED AS A H.V.F.O. OR H.F.O. TO A LIFE SENTENCE?;
>
> 2. ASSUMING THE TRIAL COURT MUST SENTENCE A PERSON CLASSIFIED AS A H.F.O. OR H.V.F.O. TO LIFE, DOES THE STATUTE APPLY TO FIRST DEGREE FELONIES WHICH ARE PUNISHABLE BY LIFE?; AND
>
> 3. DOES THE H.F.O. STATUTE (WHICH ALLOWS/PERMITS A LIFE SENTENCE) DENY EQUAL PROTECTION BECAUSE THE H.V.F.O. PERMITS/REQUIRES A LIFE SENTENCE WITH A CHANCE FOR RELEASE AFTER 15 YEARS?

B. The statutory language of Section 775.084(4)(a) and (4)(b), Florida Statutes.

The crucial question raised by this issue is whether the following language in Section 775.084(4)(a), Florida Statutes, requires a trial court to sentence a defendant to life in prison:

> 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. (Emphasis supplied).

On its face, this section appears to mandate a life sentence for a defendant convicted of a first degree felony and classified as a Habitual Felony Offender (H.F.O.). However, this Court must consider complete wording of Section 775.084 to determine legislative intent, resolve any conflicts and give each section of the statute a field of operation.

Section 775.084(4)(b), which delineates punishments for a Habitual Violent Felony Offender (H.V.F.O.), provides:

> 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. (Emphasis supplied).

Consequently, on its face, Section 775.084(4)(a) (Habitual Felony Offender) appears to mandate a life sentence, while Section 775.084(4)(b) (Habitual Violent Felony Offender) does not mandate a life sentence for a defendant convicted of a first degree felony. Section 775.084(4)(c) states:

> If the Court decides that imposition of sentence under this section is not necessary for the protection of the public, sentence shall be imposed without regard to this section. At any time when it appears to the court that the defendant is a habitual felony offender or a habitual violent felony offender, the court shall make that

determination as provided in subsection (3).

Section 775.084(4)(c) obviously gives a trial court discretion to not classify a defendant as a H.F.O. or H.V.F.O. The First District in Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990), expressly decided that a trial court had the discretion to not classify a defendant as a H.F.O. or H.V.F.O., even though the defendant technically qualified for such classification. Therefore, the Legislature intended to give the trial judge some discretion in this area. To determine if Section 775.084(4)(a) is mandatory because of the use of "shall," this Court must determine the legislative intent and employ rules of statutory construction designed to determine intent and avoid conflicts within the statute. The first conflict to resolve is whether Section 775.084(4)(b) (H.V.F.O.) is permissive or mandatory. The resolution of this conflict will also help determine legislative intent. If it is permissive, then Section 775.084(4)(a) may also be permissive.

C. The First District's decision in Donald v. State, supra, was wrongly decided because it overlooked the rule of lenity and strict scrutiny in criminal cases.

1. Courts have applied the "may means shall" doctrine only in civil cases.

The key to resolving the question of whether the language in Section 775.084(4)(a) is directive or permissive is

the opinion in Donald v. State, supra. See also Pittman v. State, 570 So.2d 1045 (Fla. 1st DCA 1990). The Court in Donald decided that the term "may" in Section 775.084(4)(b) was mandatory and meant "shall."

The Donald court decided that although "may" is generally given a permissive meaning, it can be obligatory where a statute directs the doing of a thing for the sake of justice. 562 So.2d at 794. The Donald court cited Allied Fidelity Insurance Co. v. State, 415 So.2d 109 (Fla. 3d DCA 1982), as authority for this principle. In Allied Fidelity Insurance Co. v. State, supra, the Third District Court of Appeal considered whether "shall" was mandatory or permissive. Allied Fidelity is a civil case involving the issue of whether a court may enter a judgment against a bail bond surety upon undischarged forfeitures where written notices were not given within 72 hours of the forfeitures pursuant to Section 903.26(2), Florida Statutes (1976). Consequently, the Third District Court did not rule upon the question relied upon by this Court in Donald v. State, supra.

The Third District cited, in dicta, Mitchell v. Duncan, 7 Fla. 13 (1857), as authority for the argument that "may" can mean "shall." The court in Allied Fidelity, supra, used this citation to support the argument that "shall" can mean "may" and conversely "may" can mean "shall." Mitchell v. Duncan, supra, was a civil case involving a law of sureties for the execution of a judgment. One part of the statute was directory and another part was permissive. The Supreme Court construed "may" to mean "shall" for the sake of the justice of giving the whole statute its

intended effect. In Jones v. State, 17 Fla. 411 (Fla. 1880), the Supreme Court again decided that "may" meant "shall" in a statute covering the assessment of ad valorem taxes for a school district.

The FACDL has been unable to find a prior criminal case which has decided that "may" means "shall." The above-cited cases were all civil cases which involved property or monetary interests which were protected in one part of a statute by mandatory directions (by use of the word "shall"), but were ostensibly unprotected by another section which used permissive language (by use of the word "may"). These civil cases held that "may" could mean "shall" if a statute directs the doing of a thing for the sake of justice. See Mitchell v. Duncan, supra. In other words, the general statute directed that a thing be done but a certain part of the statute made the thing to be done permissive, instead of mandatory. To achieve the sake of justice which the statute required, the above-described courts construed "may" to mean "shall."

The First District in Donald v. State, supra, did not properly analyze Section 775.084(4)(b) in light of these precedents. A general reading of Section 775.084 does not direct that all habitual offenders "shall" be sentenced in a certain way. The general provisions of the act give discretion to the trial judge on whether to find a defendant to be a habitual offender and this discretion could be further expressed in the discretion inherent in Section 775.084(4)(b). The court in Donald v. State also did not consider the appropriate sake of justice because, in this context, this term implies two sets of justice -

justice for the state and justice and fairness for the defendant. As the intent of the legislature was not clearly expressed in Section 775.084, the First District should not have assumed that the sake of justice meant the State's definition of justice. The Legislature could have also intended that "may" should mean "may;" this reading would permit the trial court discretion to not mete out the draconian sentences in Section 775.084(4)(b).

The Court in Donald v. State implicitly conceded that there was some doubt about whether the word "may" in Section 725.084(4)(b) meant "may" or "shall." To resolve this uncertainty, this Court improperly used the "may means shall" doctrine from civil cases. The use of this civil doctrine was incorrect because: 1) the Court improperly found the thing to be for the sake of justice was, by definition, a harsher sentence than that which was prescribed by the plain language of the statute; and 2) the proper standard of review in this case was strict scrutiny, not the civil doctrine of "may means shall" when a statute directs the doing of a thing for the sake of justice.

The Supreme Court in State v. Brown, 530 So.2d 51 (Fla. 1988), construed the term "shall" in Section 775.084(4)(a)1. to mean "may." Although this case was decided before the Habitual Offender Statute was made independent from the sentencing guidelines, it demonstrates the Legislative intent was for "shall" to mean "may." The Brown court explicitly found that the Legislature never intended for the word "shall" to appear in the statute. The term "shall" was apparently inadvertently included in the section

when the applicable Florida Statutes were codified and published. 530 So.2d at 53.

2. The proper standard of review in this case: strict scrutiny.

The First District reached the wrong decision in Donald v. State, supra, because it used the wrong standard of review. If there is doubt about the meaning of a criminal statute, a court must resolve all doubts about the meaning of a criminal statute in favor of the citizen and against the State. State v. Waters, 436 So.2d 66 (Fla. 1983); State v. Wershow, 343 So.2d 605 (Fla. 1977). Section 775.021(1), Florida Statutes (1989), codifies the strict scrutiny standard. It states:

> "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."

There was obvious doubt about whether the word "may" in Section 775.084(4)(b) meant "may" or "shall." If there had been no doubt, then this Court would not have had to construe it to mean "shall." The Court in Donald should have resolved the doubt about the meaning of "may" in favor of Petitioner. The resolution in favor of Petitioner would have construed "may" to simply mean "may." This construction would also be consistent with another tenet of statutory construction: words should be given their plain meaning, absent direct legislative intent. State v. Cormier, 375 So.2d 852 (Fla. 1979); Tatzel v. State, 356 So.2d 787

(Fla. 1978). The obvious reason for the strict scrutiny - resolve all doubts in favor of the defendant standard is to use a rule of lenity in criminal cases where the loss of liberty is present; the rule of lenity will prevent citizens from losing their liberty when there is doubt about the meaning of a law. See Busic v. United States, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980); Ex parte Bailey, 39 Fla. 734, 23 So. 552 (1897); 49 Fla.Jur.2d Section 195.

The First District in Donald, supra, should have used the strict scrutiny standard of State v. Wershow, supra. Judge Ervin noted below that strict scrutiny was the appropriate standard for review. Once this Court determines that the term "may" in Section 775.084(4)(b) means "may" and not "shall," it then must determine whether the Legislature intended the term "shall" in Section 775.084(4)(a) (the term under consideration in this appeal) to mean "shall," in light of the permissive term "may" in Section 775.084(4)(b).

D. If the Legislature intended Section 775.084(4)(b) (Habitual Violent Felony Offenders) to be permissive, then it must have intended Section 775.084(4)(a) to also be permissive.

If the Legislature meant Section 775.084(4)(b) to be permissive, then it rationally must have intended Section 775.084(4)(a) to also be permissive. Section 775.084(4)(b) deals with Habitual Violent Felony Offenders. Despite this fact, Section 775.084(4)(b) gives a trial the discretion to not sentence

a H.V.F.O. convicted of a first degree felony to life in prison. If the trial judge imposes life under this section, there is a 15 year minimum, mandatory term. Section 775.084(4)(b) is obviously intended for more serious offenders and its sentences are harsher than those for Habitual Felony Offenders. The H.V.F.O. sentences in Section 775.084(4)(b) all contain minimum, mandatory sentences which are not present in Section 775.084(4)(a). These harsher sentences obviously evince a legislative intent to treat Habitual Violent Felony Offenders more harshly than Habitual non-Violent Felony Offenders.

If the Legislature intended to treat H.V.F.O. more harshly than H.F.O., then it is irrational to require a trial judge to sentence a H.F.O. to life for a first degree felony, but give a judge discretion not to sentence a H.V.F.O. to life for the same offense. Consequently, this Court must remove this irrationality and resolve the conflict between these Sections by deciding that the term "shall" in Section 775.084(4)(a) means "may." See DeBolt v. Department of Health and Rehabilitative Services, 427 So.2d 221 (Fla. 1st DCA 1983), (court must try to resolve conflicts between conflicting statutes or sections of statutes).

Section 775.0841, Florida Statutes (1989), expresses the Legislative intent concerning the prosecution of career criminals (Habitual Offenders). Section 775.0841 states that priority should be given to certain career criminals given the constraints or the use of available prison space. This expression of intent reflects the understanding that the limited available prison space

requires discretion and priority-setting so that certain career criminals are properly sentenced. This intent is expressed in the discretion given to the trial judge in sentencing a H.V.F.O.

The primary rule of statutory construction is that a reviewing court must give effect to legislative intent, notwithstanding contrary statutory language. See Speights v. State, 414 So.2d 574 (Fla. 1st DCA 1982); Parker v. State, 406 So.2d 1089 (Fla. 1981). The legislative intent will prevail, even if it contradicts the literal language of a statute. See State v. Webb, 398 So.2d 820 (Fla. 1981). The Legislature surely intended to give a trial judge the same discretion for sentencing violent offenders as when sentencing less dangerous Habitual Felony Offenders. This legislative intent is also reflected in Section 775.084(4)(c) which gives the trial court discretion to not classify a defendant as a H.F.O. or H.V.F.O. Otherwise, the sentencing scheme in Section 775.084(4)(a) is irrational and contrary to common sense.

The above discussion demonstrates that there is considerable doubt about whether the term "shall" in Section 775.084(4)(a) means "shall" or "may," in light of the language used in Section 775.084(4)(b) and the legislative intent expressed in Sections 775.084(4)(c) and 775.0841, Florida Statutes. This Court should also apply the strict scrutiny standard to Section 775.084(4)(a). The doubt about the meaning of Section 775.084(4)(a) should be resolved in favor of Petitioner: the term "shall means may," consistent with the term used in Section 775.084(4)(b).

This Court should adopt the cogent and sagacious reasoning of Judge Ervin on the issue of the legislative intent. Judge Ervin noted in his concurring/dissenting opinion that the legislature has never expressly provided for enhanced sentencing for those felonies which are punishable by up to life imprisonment. The reference, in the offense under question in this cause, Section 810.02(2) (armed burglary), in most statutes to the Habitual Offender Statute is <u>not</u> proof of legislative intent. As Judge Ervin pointed out such wholesale and indiscriminate references (many of which are not presently applicable) do not expressly and unequivocally establish legislative intent. Judge Ervin also applied the doctrine of strict scrutiny, due to the considerable doubt about the meaning of the statute.

ISSUE II

> WHETHER THE PETITIONER WAS IMPROPERLY SENTENCED AS A HABITUAL FELONY OFFENDER IN ACCORDANCE WITH SECTION 775.084, FLORIDA STATUTES, WHEN THE SUBSTANTIVE OFFENSE FOR WHICH HE WAS SENTENCED IS PUNISHABLE BY LIFE IMPRISONMENT.

The question in this issue is whether the Habitual Offender Statute, Section 775.084(4)(a)1., applies to Armed Burglary, a first degree felony, punishable by life.

The crime in this case is a first degree felony, punishable up to life in imprisonment by a term of years not exceeding life. Section 810.01(2), Florida Statutes (1989). Section 775.082(3)(a), Florida Statutes, defines the punishment for a life felony as by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years. Section 775.082(3)(b) defines the punishment for a first degree felony: by a term of imprisonment not exceeding 30 years or, <u>when specifically provided by statute</u>, by imprisonment for a term of years not exceeding life imprisonment.

Section 775.084(4)(a)1. states:

> The court, in conformity with the procedure established in subsection (3), shall sentence the habitual offender as follows:
>
> 1. In the case of a felony of the first degree, for life.

Therefore, this Court must decide whether the Legislature intended to include Armed Burglary within the ambit of Section 775.084(4)(a)1. The language of Section 775.084(4)(a)1. does not exactly describe the crime of Armed Burglary. While Armed

Burglary is a first degree felony, it is punishable by a term of years not exceeding life. Although such a crime and its attendant punishment may not be a separate offense, the punishment for armed burglary is tantamount to the punishment for a life felony. See Jones v. State, 546 So.2d 1134 (Fla. 1st DCA 1989), (there is no distinct felony classification of first degree felony punishable by life, but only a first degree felony punishable by two ways).

Whether Armed Burglary is a separate offense or not from a first degree felony, the issue in this cause is whether the Legislature intended crimes which are punishable by life or by a term of years not exceeding life to be included with Section 775.084. The inclusion of Section 775.084 within the possible penalties of Section 810.02(2)(b) does not answer this question. Section 810.02(2)(b) simply provides that Armed Burglary may be a predicate offense for a Habitual Violent Felony Offender classification. See Section 775.084(1)(b)1. Section 775.084(1)(b)1. does not delineate the punishment for armed burglary as a H.F.O. or as a H.V.F.O.

This Court should adopt Judge Ervin's detailed and insightful analysis on this issue. Judge Ervin recounted, step-by-step, the legislative history of the Habitual Offender Statute and its attendant penalties for life felonies. The history of the statute led Judge Ervin to conclude that the legislature never directly intended to or provided for an application of the Habitual Offender Statute to offenses which are punishable by up to life in prison. As Judge Ervin noted:

> "Nor can it be seriously contended that an offense punishable by a term of

years not exceeding life may be enhanced because it does not authorize life imprisonment as its maximum punishment. See Pingel v. State, 352 So.2d 88 (Fla. 4th DCA 1977), opinion adopted, 366 So.2d 758 (Fla. 1978), in which the Fourth District rejected Appellant's argument that an offense punishable by a term of years not exceeding life imprisonment did not include life imprisonment, and ruled that a maximum penalty provided for the offense for which Appellant was charged was life imprisonment, not a term of years."

ISSUE III

WHETHER SECTION 775.084(4)(a), FLORIDA STATUTES, IS UNCONSTITUTIONAL AS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

A. The separate classifications created by Section 775.084(4)(a)1. (Habitual Felony Offender convicted of a first degree felony punishable by life) and Section 775.084(4)(b)1. (Habitual Violent Felony Offender convicted of a first degree felony punishable by life).

The equal protection claim made by Petitioner depends upon whether the classifications created by Sections 775.084(4)(a)1. and 775.084(4)(b)1. have rational relationships to a valid state interest and each other and these classifications provide for equal treatment under the law, i.e., individuals similarly situated are treated equally or individuals in different situations are treated differently in a rational manner. State v. Saiez, 489 So.2d 1125 (Fla. 1986).

If this Court construes Section 775.084(4)(b)1. to be permissive, a trial court does not have to sentence a H.V.F.O. convicted of a first degree felony to life imprisonment. If this Court construes Section 775.084(4)(a)1., to be mandatory, a trial court will have to sentence a H.F.O. convicted of a first degree felony to life imprisonment. As so construed, Section 775.084 (4)(a)1. creates a class of people who must be sentenced to life imprisonment - Habitual Felony Offenders convicted of a first

degree felony and Section 775.084(4)(b)1. creates another class of people who may be sentenced to life imprisonment - Habitual Violent Felony Offenders convicted of a first degree felony. Sections 775.084(4)(a)1. and 775.084(4)(b)1. also create another set of different classifications. Section 775.084(4)(b)1. states a H.V.F.O. may be sentenced to life with no chance for release for 15 years. Section 775.084(4)(a)1. requires a life sentence with no chance of release. Under the equal protection clauses of the Florida Constitution, Article I, Section 2, and the United States Constitution, Fourteenth Amendment, the issue for this Court is whether these two distinct classifications are rational and treat those similarly situated in an equal manner. Rollins v. State, 354 So.2d 61 (Fla. 1978).

B. The tests for equal protection under the law.

Under Florida law, the test for determining whether a particular statutory classification denies equal protection under the law is "whether the classification rests on some difference that bears a just and reasonable relationship to the statute in respect to which the classification is proposed." Rollins v. State, supra, at 63; Soverino v. State, 356 So.2d 269 (Fla. 1978), (any classification must bear a just and reasonable relation to the object of the legislation). The United States Supreme Court has adopted similar tests. See In Re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973); Oyler v. Boles, 368 U.S. 448,

82 S.Ct. 501, 7 L.Ed.2d 446 (1962); Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

The issue for this Court is whether the difference in treatment of individuals, convicted of a first degree felony punishable by life and who are classified as a H.F.O. or H.V.F.O., is based upon a just and reasonable relationship to Section 775.084.

C. Section 775.084(4)(a)1. does not have a just and reasonable relationship to its purpose because it punishes more severely Habitual Felony Offenders than Habitual Violent Felony Offenders.

It is irrational, pursuant to the entire sentencing scheme in Section 775.084, to punish a H.F.O. convicted of a first degree felony more severely than a H.V.F.O. convicted of the same crime. The Legislature unquestionably intended, as a general matter, to punish Habitual Violent Felony Offenders more severely than Habitual Felony Offenders. For each degree of crime (except first degree felonies), a H.V.F.O. classification has a minimum, mandatory term not present in the H.F.O. classification. However, the punishment for a H.V.F.O. convicted of a first degree felony is life, with no chance for release for 15 years. The punishment for a H.F.O. convicted of a first degree felony is life, with no chance for release. Given the general intent to punish a H.V.F.O. more severely than a H.F.O., it is irrational to punish a H.F.O.

convicted of life felonies more severely than a H.V.F.O. convicted of the same degree of crime.

Although the legislature has the general sovereign power to classify punishments, the power is not boundless and the sentencing category must have a reasonable relationship to a legitimate State interest. Walker v. State, 501 So.2d 156 (Fla. 1st DCA 1987); State v. Saiez, 489 So.2d 1125 (Fla. 1986). Section 775.084(4)(a)1. lacks a reasonable relationship to the state interests embodied in the rest of the Habitual Offender Statute, especially Section 775.084(4)(b)1.

There is no reasonable and just justification for treating a H.F.O. convicted of a first degree felony more severely than a H.V.F.O. convicted of a first degree felony. By definition, a sentence of life is harsher than a sentence of life with no chance for release for 15 years. A life sentence under Section 775.084, Chapter 947 and Section 944.275(4)(b), Florida Statutes, means that there is no chance of release. Life literally means life. However, a sentence under Section 775.084(4)(b)1. means that after 15 years, the defendant could earn the incentive gain time provided for in Section 944.275(4)(b). Therefore, there is a chance for release under a H.V.F.O. life sentence.

The different treatment of life sentences under a H.F.O. sentence and a H.V.F.O. is unjust. Both classifications involve the punishment of repeat offenders. However, by any reasonable and just measure, a mere Habitual Offender should not be punished more severely than a repeat Habitual Violent Felony Offender. The

minimum qualification for a H.F.O. is at least 3 felony convictions of any degree. The minimum qualification for a H.V.F.O. is at least one prior violent felony conviction and ostensibly a second felony conviction, regardless of type or degree. While these minimum qualifications may make it permissible for the Legislature to punish a H.F.O. as severely as a H.V.F.O., these requirements make it unjust to punish a H.F.O. more severely than a H.V.F.O.

A more severe sentence for non-violent offenses than violent offenses is unjust because all the criminal statutes in this state reflect an intent to punish violent crimes more severely than non-violent crimes. The crime in this cause, burglary, was reclassified as a higher degree of crime because of the use of a firearm. Section 775.012, Florida Statutes, embodies this intent and states, inter alia, that the general purposes of the criminal code is to proscribe conduct that improperly causes or threatens substantial harm to individual or public interest and to differentiate on reasonable grounds between serious and minor offenses and to establish appropriate disposition for each.

The following statutes also reflect the intent to punish offenders more severely for violent offenders: Section 775.0823, Florida Statutes (1989), increasing penalty for attempted murder on a law enforcement officer; Section 775.087, Florida Statutes (1989), increasing penalty for use of a firearm or weapon; Section 784.045, Florida Statutes (1989), increasing the penalty and reclassifying battery based upon violence; Section 810.02, Florida Statutes (1989), increasing penalty and reclassifying offense of

burglary for use of a firearm; Section 812.13, Florida Statutes (1989), increasing penalty and reclassifying offense of robbery for use of firearm.

The above-described offenses clearly demonstrate the legislative intent of more severe punishment for crimes of actual or potential violence. Consequently, it is irrational and a denial of equal protection to punish a H.F.O. convicted of a first degree felony more severely than a H.V.F.O. Although the H.V.F.O. section does generally punish violent offenders more severely than it does Habitual Felony Offenders, the H.F.O. classification for persons convicted of first degree felonies punishes more severely than the punishment of a H.V.F.O. convicted of the same crime. Therefore, Section 775.084(4)(a)1. denies equal protection under the law and is unconstitutional.

The equal protection challenge in this case is significantly different from the challenges rejected by the First District and other District Courts of Appeal. See e.g., Wallace v. State, 15 FLW D2742 (Fla. 1st DCA, November 9, 1990); Bell v. State, 573 So.2d 10 (Fla. 5th DCA 1990); Arnold v. State, 567 So.2d 547 (Fla. 2d DCA 1990); Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990); Roberts v. State, 559 So.2d 289 (Fla. 2d DCA 1990), dismissed, 564 So.2d 488 (Fla. 1980); King v. State, 557 So.2d 899 (Fla. 5th DCA 1990); rev. den., 564 So.2d 1086 (Fla. 1990). None of these cases considered the issue raised by this appeal. For example, in Barber v. State, supra, the First District considered whether Section 775.084 denied equal protection by permitting the prosecutor to decide to "habitualize"

some defendants, but not others similarly situated. This Court rejected the equal protection claim and decided that as long as an unjustifiable standard (for example race) was not used by the State, Section 775.084 did not deny equal protection. The issue in this cause is once the State decides to habitualize defendants, must it treat all Habitual Offenders similarly situated equally? This claim is the essence of the equal protection constitutional guarantee: all persons similarly situated must be treated equally. See Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), (law which prohibited males of certain age to drink beer, but which allowed females to drink beer, denied equal protection); Frost v. Corporation Com. of Oklahoma, 278 U.S. 515, 49 S.Ct. 235 (1929); Field v. Barber Asphalt Paving Co., 194 U.S. 618, 24 S.Ct. 784 (1904), (purpose of equal protection clause is to ensure all persons similarly situated are treated alike).

The other equal protection challenges considered whether persons classified as Habitual Offenders were treated differently than those persons not classified as Habitual Offenders. Florida courts have upheld the different treatment because the statute has a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary, capricious or oppressive. See e.g. King v. State, supra. In this appeal, the FACDL does not dispute the right of the State to classify individuals as Habitual Offenders. However, once the State creates such a class, all individuals within that class must be treated equally.

The different treatment created by Sections 775.084 (4)(a)1. and 775.084(4)(b)1. is arbitrary and capricious. There

is simply no logical reason to treat differently these two subsets within the larger class of Habitual Offenders. Consequently, Section 775.084(4)(a)1. denies Petitioner equal protection under Article I, Section 2, of the Florida Constitution and the Fourteenth Amendment to the United States Constitution. King v. State, supra, at 902; Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974).

D. The decision below did not adequately address the equal protection claim in this cause:

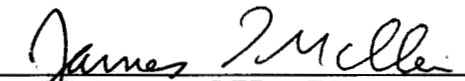
The en banc decision below addressed the equal protection claim in two ways: 1) The majority decided that the H.V.O. and H.V.F.O. statutes treated both types of offenders equally - each are denied parole, but each can earn gain time "on paper" in case a sentence is commuted by the executive branch. However, even the majority noted that under this position, a H.V.F.O. must still serve 15 years before being eligible for release. Consequently, even under the majority's view, a H.V.F.O. would be treated differently than a H.F.O. assuming that the sentences are commuted and the "paper gain time" is awarded.

Judge Ervin avoided the equal protection claim by construing the 15 year release provision was mere surplusage. Although this construction may have avoided the equal protection claim, it was judicial legislation which ignored the clear expression of legislative intent. Therefore, this Court should reject this solution to the equal protection issue in this cause.

CONCLUSION

This Court should find that Section 775.084(4)(a)1. is permissive, not mandatory. Therefore, the case should be remanded for resentencing. As Section 775.084(4)(a)1. does not apply to first degree felonies punishable by life, the trial judge should be directed to not sentence Petitioner as a Habitual Offender. If the Court finds that Section 775.084(4)(a)1. does apply to Petitioner, it should find that the life sentence is impermissible and Petitioner should be sentenced to no more than life with no chance for release for 15 years.

Respectfully submitted,



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ROBERT HARPER, JR., CHAIRMAN
AMICUS COMMITTEE, FACDL

GEORGE TRAGOS, PRESIDENT
FACDL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished, by mail, to Assistant Attorney General Charlie McCoy, at the Office of the Attorney General, Department of Legal Affairs, The Capitol Building, Tallahassee, FL 32399-1050, Mr. John L. Miller, Esquire, P. O. Box 605, Milton, FL 32572, and Public Defender Nancy Daniels, 301 S. Monroe St., 4th Floor North, Tallahassee, FL 32302 and this 17th day of October, A.D., 1991.

James T. Miller

JAMES T. MILLER, ESQUIRE, ON BEHALF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS