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IN THE SUPREME COURT OF FLORIDA

BILLY B. BURDICK, JR.,

Petitioner,

v. CASE NO. 78,466

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S ANSWER BRIEF

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RESPONDENT'S ANSWER BRIEF

PRELIMINARY STATEMENT

In its order of August 26, this court postponed its decision on jurisdiction. In its order of October 2, this court authorized the State to answer the initial brief by Petitioner and the amicus brief by the Florida Association of Criminal Defense Lawyers (FACDL). Therefore, the State's answer will be divided into four parts. Part I will address jurisdiction; parts II through IV will address Issues I through III by Petitioner and FACDL, respectively.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement, with the following clarifications:

1. Petitioner was convicted for three offenses: armed burglary of a dwelling (count I), theft (count II), and theft of a firearm (count III). (R 284-5).

2. Before this court, Petitioner challenges only his sentence for armed burglary of a dwelling, a first degree felony punishable by a term of years not exceeding life. §810.02(2)(b), Florida Statutes.

SUMMARY OF ARGUMENT

Issue I: Exercise of Discretionary Jurisdiction

This court has discretionary jurisdiction based on certification of two questions of great public importance. A careful reading of the sentencing transcript and the opinion below reveals that the first question effectively invites this court to issue an advisory opinion not grounded on the facts. The second question has been answered consistently and correctly by all five district courts of appeal. Whatever public importance attends the second question is no longer "great."

The State respectfully suggests that this court decline to review the certified questions. If review of both is declined, the court would not have independent jurisdiction to review Petitioner's third issue. Even if review upon the certified questions is granted, Petitioner's third issue is outside the scope of those questions. As to that issue, the First District's function as a court of final jurisdiction should be recognized, and review declined.

Issue II: Mandatory Nature of Petitioner's Sentence

Petitioner cannot attack his life sentence, which is clearly authorized by statute, on the grounds that it is permissive. Whether permissive or mandatory, the sentence is one that is authorized by the Legislature.

Section 775.084(4)(a), Florida Statutes, expressly declares that the trial court "shall sentence the habitual felony offender as follows...." [e.s.]. The word "shall" is mandatory; the plain meaning of the statute controls. Immediately following the life sentence for first degree habitual felons, the Legislature provided a range of prison terms for second and third degree felons. In marked contrast, there is no "term of years" language as to first degree offenders. This difference is telling. The Legislature did not intend the punishment for first degree felons to include a range of possible imprisonment. To find the sentences for habitual felons permissive would not only contradict the plain meaning of the phrase "shall sentence," it would negate or render surplus a later paragraph [§775.084(4)(c)] of the same statute.

Whether the sentences for violent habitual felons are mandatory or permissive is irrelevant to Petitioner, who was sentenced as a felon who is merely habitual. Also, sentences for violent felons must be interpreted as mandatory to avoid the absurd result of punishing them more leniently. Therefore, the literal difference in statutory provisions as to habitual felons ("shall sentence") and corresponding provisions as to violent habitual felons ("may sentence") is not a difference in substance. Both sets of penalties are mandatory. Even if the violent felon sentences are permissive, Petitioner cannot attack his proper, mandatory sentence of life.

Issue III: Applicability of Habitual Felon Statute to First Degree Felonies Punishable by Life

First degree felonies punishable by life are still first degree felonies. As such, they are expressly subject to the habitual felon statute. That statute does not reclassify crimes, but merely enhances sentences. Simply because the maximum punishment for first degree felonies punishable by life is the same as the maximum punishment for a life felonies does not equate those two classifications of offenses, thereby removing the former from operation of the habitual felon statute.

Issue IV: Equal Protection/Substantive Due Process

Petitioner's argument unavoidably challenges the punishments for violent habitual felons. As a nonviolent habitual felon, he is not affected by the former, and does not have standing. If he has standing, Petitioner's attack inherently challenges the statute as applied. Having never raised such a claim before, Petitioner cannot do so now.

Assuming standing and preservation of this issue, Petitioner's tactic is errant. He asks this court to compare the mandatory nature of habitual felon sentences to the allegedly-permissive nature of violent felon sentences, and find that difference violative of equal protection or substantive due process. The narrower question is proper and dispositive: whether enhanced punishment for habitual felons is a reasonable means to achieve the unassailable goal of protecting society from repeat felons. The question answers itself in the affirmative.

Even Petitioner and amicus have conceded that the State may punish habitual felons more severely.

Assuming the punishment of violent habitual felons is more lenient by virtue of greater trial court discretion in sentencing, violent felons are still treated more harshly under the entire habitual offender statute. Violent felons need only commit one of eleven specified felonies to be so classified; their present offense need not be "violent." Violent felons receive minimum mandatory sentences. Looking at the entire statute, Petitioner's claim of more lenient treatment of the more dangerous criminals evaporates. His equal protection/substantive due process claims are without merit.

In his first issue, Petitioner asks the court to interpret the word "shall" as "may," when interpreting §775.084(4)(a). If this court does so, then habitual and habitual violent felons are treated the same. Petitioner's argument is negated. Similarly, treating both sets of penalties as mandatory refutes the equal protection claim. As said above, there is also a reasonable basis for interpreting the statute exactly as written: sentences for habitual felons are mandatory; sentences for violent habitual felons are discretionary. All three alternatives uphold the statute.

ARGUMENT

ISSUE I

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION.

A. Mandatory Nature of Petitioner's Sentence

The first question certified below asks whether Petitioner's life sentence under count I is mandatory or permissive. A careful reading of the sentencing transcript and the opinion below reveals that this question is not grounded on the facts of this case. It invites this court to issue an advisory opinion.

At sentencing, the trial court declared why it was choosing to impose a life sentence. (R 319-20). Absolutely nothing in the court's remarks indicates it thought a life sentence was mandatory. All parties agree that Petitioner, as a first degree habitual felon, could receive a sentence of life. §775.084(4)(a)1, Florida Statutes (Supp. 1988).[1]

The First District declared: "We hold that because the trial court concluded that the habitual felony offender statute was applicable, it properly sentenced appellant to life in prison." (slip op. at p.4).[2] This language is telling. It does not hold that the trial court erroneously thought a life sentence was mandatory. It simply concludes that a life sentence is

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[1] Petitioner was convicted for offenses committed on July 23, 1989 (R 85, 274-6); and is therefore subject to the habitual felon statute as amended through 1988. See §6, ch. 88-131, Laws of Fla. (effective Oct. 1, 1988).

[2] The opinion below is to be reported at 584 So.2d 1035.

statutorily authorized for Petitioner, assuming the habitual felon statute is otherwise applicable.

Therefore, the first certified question is not grounded on the facts. The trial court chose to impose the most severe sentence available, however, it did not state it was required to do so.

If rephrased to reflect the facts, the first certified question would ask whether a life sentence can be imposed upon a first degree habitual felon. All parties agree a life sentence is at least permissive, if not mandatory. As rephrased the question is not one of "great" public importance. As phrased by the First District, it asks this court to answer an irrelevant matter that would not affect the outcome of this case. This court should decline to do so.

B. Applicability of Habitual Felon Statute to First Degree Felonies Punishable by Life

Whether the habitual felon statute applies to first degree felonies punishable by life has been answered affirmatively in recent decisions by all five district courts. This case, by virtue of being decided *en banc*, controls in the First District. As to the other district courts, see - for example - Lock v. State, 582 So.2d 819 (Fla. 2d DCA 1991) (violent habitual felon statute applies to a first degree felony punishable by life); Westbrook v. State, 574 So.2d 1187 (Fla. 3d DCA 1991), appeal pending, (habitual felon statute applies to robbery with a deadly weapon); Newton v. State, 581 So.2d 212 (Fla. 4th DCA 1991)

(habitual felon statute applies to first degree felonies punishable by life); Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990) (habitual felon statute applies to kidnapping).

Acting independently, the district courts have reached consistent results. While important to Petitioner, this question is no longer one of great public importance needing an answer by this court. Basically, the question is a modest exercise in statutory interpretation. This court need not repeat the work of the five districts. See Everard v. State, 559 So.2d 427 (Fla. 4th DCA 1990) (district court declining to review question certified by county court, stating "nothing in the record indicates that the interpretation of the applicable statute involves such complex or difficult issues, or that the case has such widespread ramifications" to render each question certified into one of great public importance).

C. **Equal Protection/Substantive Due Process**

This issue is ancillary to the two certified questions. Should this court decline to exercise its discretionary jurisdiction to review those questions, it does not have independent jurisdiction to review this issue.

Substantively, Petitioner's equal protection/substantive due process claims are beyond the scope of both certified questions. Review should be declined. See Stephens v. State, 572 So.2d 1387 (Fla. 1991) ("We do not reach the other issue raised by the parties, which lies beyond the scope of the certified question.").

As detailed in Issue IV herein, this challenge is actually upon that part of the statute establishing sentences for violent habitual felons. Since Petitioner is not affected by that part, this issue does not affect the outcome. Again, this court should decline to exercise its authority to decide ancillary issues. See Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982) ("[w]e recognize the function of the district courts as courts of final jurisdiction and will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified case."). Notably, Petitioner does not allege independent grounds (i.e., conflict) for this court to rule on his third issue. The First District did not consider it sufficiently important to certify a question.

The State respectfully suggests that this court decline to exercise its discretionary jurisdiction. The opinion below should be allowed to stand.

ISSUE II

WHETHER THE LIFE SENTENCE STATUTORILY AUTHORIZED FOR FIRST DEGREE HABITUAL FELONS IS MANDATORY.

The life sentence authorized for first degree felons is mandatory, and not simply a maximum. In arguing such sentence is permissive, the Petitioner and FACDL ignore the larger statute. Section 775.084(4)(a), Florida Statutes (Supp. 1988) provides:

> (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. [e.s.]

The first emphasized language ("shall sentence") is very significant. As conceded by FACDL (amicus brief, p.10), this phrase facially mandates the sentence received by Petitioner.

Better stated, the plain meaning of all of §775.084(4)(a) renders Petitioner's sentence mandatory. The plain meaning, of course, is this court's starting point and lodestar in determining legislative intent. See State v. Davis, 556 So.2d 1104, 1106 (Fla. 1990) ("[Legislative] intent is determined primarily from the language of the statute. The plain meaning of the statutory language is the first consideration."). See also

Drury v. Harding, 461 So.2d 104, 107-8 (Fla. 1984) (in construing statute relating to blood alcohol tests for drunken driving, the word "shall" is given its normal, mandatory connotation).

In addition to the use of the mandatory "shall," the remainder of subsection (4)(a) implies a life sentence is mandatory. Had the Legislature desired that life imprisonment be only the maximum sentence, it could have said so.

Immediately following its life sentence language for first degree habitual felons, the statute establishes lesser sanctions for second and third degree habitual felons. Imprisonment for such offenders is a "term of years not exceeding" thirty or ten years, respectively. This language is significant. In marked contrast to the life sentence for first degree offenders, the Legislature clearly specified a range of imprisonment for second and third degree offenders. Through the absence of similar language as to first degree felonies, life imprisonment becomes the required sentence, and not merely the maximum.

Habitual offender sentencing is expressly removed from guidelines sentencing procedures by §775.084(4)(e) (Supp. 1988). Owens v. State, 560 So.2d 1260 (Fla. 1st DCA 1990). Petitioner, in effect, received a sentence subject to pre-guidelines case law. Once it is determined that a sentence falls within bounds established by statute, the trial court's exercise of sentencing discretion will not be disturbed on appeal. Adams v. State, 347 So.2d 685 (Fla. 4th DCA 1977). See Banks v. State, 342 So.2d 469 (Fla. 1976) (court without jurisdiction to interfere with

sentence that is within statutory limits). Here, all parties agree that a life sentence is within the statutory limits for first degree, habitual felons.

Since he was sentenced under a procedure exempt from guidelines sentencing, Petitioner's heavy reliance on State v. Brown, 530 So.2d 51 (Fla. 1988) is misplaced. Bluntly put, Brown is no longer good law. It addressed the effect of guidelines procedures upon the habitual offender statute, a matter rendered moot by §775.084(4)(e). Equally significant, the Legislature ratified the use of "shall" in §775.084(4)(a), when it adopted the 1975 statutes as the official law of Florida. See ch. 77-266, Laws of Florida (adopting the 1975 statutes and preserving 1976 and 1977 changes). As noted by the Brown court (id. at 53), the word "shall" has remained in §775.084(4)(a) since its original codification. Had the Legislature not intended that the mandatory "shall" continue in effect, it could have amended the statute to say "may." Significantly, the term "shall" was retained, despite extensive changes to the larger habitual offender statute in 1988. See ch. 88-131, Laws of Florida. By expressly exempting habitual felon sentencing from guidelines procedures, the Legislature overruled Brown.

Petitioner (initial brief, p.11-12) urges this court to follow Henry v. State, 581 So.2d 928 (Fla. 3d DCA 1991) and Smith v. State, 574 So.2d 1195 (Fla. 3d DCA 1991). By omitting contrary authority, he makes it appear the other district courts agree with him. Actually, two district courts have adopted the

State's position: the First District in the decision below and other cases;[3] and the Second District, in State v. Allen, 573 So.2d 170 (Fla. 2d DCA 1991). Thus, two of three districts ruling on the issue have concluded life sentences for first degree habitual felons are mandatory.

Petitioner and FACDL, by focusing too narrowly on §775.084(4)(a), remain oblivious to other provisions in that statute. Section 775.084(4)(c) provides:

> (c) 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).

This paragraph mandates that a defendant qualifying as an habitual felon be so determined in every instance, unless the court makes specific findings that the public does not need the protection provided by an enhanced sentence. If the facially mandatory sentences specified by §775.084(4)(a) are deemed permissive, then the above language is negated, and rendered useless or surplus. Courts are not to presume that a given statute employs useless language. Johnson v. Feder, 485 So.2d 409, 411 (Fla. 1986).

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[3] See, for example, Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990); and Pittman v. State, 570 So.2d 1045 (Fla. 1st DCA 1990).

This leads to the last series of points by Petitioner (initial brief, p.11-19). Both parties rely on two faulty premises: first, that strict scrutiny is the proper standard of review; and, second, that the sentences for violent habitual felons are permissive.

The statute defines habitual felony offenders as violent or nonviolent. Within these two categories, enhanced sentences are established for third, second and first degree felonies. Thus, the statute deals entirely with classification of repeatedly convicted felons and the appropriate penalties. Strict scrutiny[4] is not the proper standard of review. It is not a standard of review at all, but a rule of statutory interpretation.

The proper standard of review, when legislative definition and classification of crimes or penalties is at issue, is whether the statutory classification "rests on some difference bearing a reasonable relation to the object of the legislation." Soverino v. State, 356 So.2d 269, 271 (Fla. 1978) (upholding statute reclassifying battery of police officer from misdemeanor to felony), citing McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) (other citations omitted). No one has suggested that repeated commission of serious crimes does not justify treating habitual felons more harshly than first-time felons.

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[4] Strict scrutiny has most often arisen in an equal protection analysis claiming a classification is based on suspect grounds such as race.

Petitioner's purpose is obvious - he combines "strict scrutiny" (i.e., literal construction) with the rule of lenity - both announced in §775.021(2), Florida Statutes - to circumvent the inconsistency of his position. On one hand, he claims this court should follow the plain meaning of the statute (amicus brief at p.15-16, petitioner's initial brief at p.14-17), and conclude that "may" means "may" when applied to violent, habitual felons. Nevertheless, he requests this court to depart from the plain meaning of "shall" and interpret it to mean "may" when applied to nonviolent habitual felons. Perhaps admirable for their audacity, Petitioner and FACDL's arguments must be rejected for their inconsistency. See Russello v. United States, 464 U.S. 16, 29, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("That rule [of lenity] 'comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.'"), quoting Callanan v. United States, 364 U.S. 587, 596, 81 S.Ct. 321, 5 L.Ed.2d 312 (1961).

This leads to the second faulty assumption by both Petitioner and FACDL: that part of the statute addressing habitual, violent felons is not permissive. While §775.084(4)(b) does employ the term "may," that word must be read as "shall." See Donald v. State, 562 So.2d 792, 795 (Fla. 1st DCA 1990) (once a court determines a defendant is an habitual felon - violent or nonviolent - it must impose the specified sentence).

Violent habitual felon sentences must be read as mandatory for several reasons. First, to assume such sentences are permissive allows violent habitual felons to be punished more leniently than nonviolent habitual felons. This is an absurd result not contemplated by the Legislature, and one this court must not adopt. See Williams v. State, 492 So.2d 1051, 1054 (Fla. 1986) (upholding conviction of felon for possessing firearm, and refusing to adopt absurd interpretation of exception for antique firearm that would also allow possession of operable replicas); and Drury, supra. Second, interpreting violent felon sentences as permissive negates §775.084(4)(c) for the reasons discussed earlier.

Third, there is not a rational basis for sentencing violent felons more leniently than nonviolent. To adopt this position would be to adopt an unconstitutional interpretation of §775.084(4) as a whole. This court must not so interpret the statute when a constitutional and consistent reading - that all sentences are mandatory - is available. State v. Aiuppa, 298 So.2d 391, 396 (Fla. 1974) ("[T]his Court has the duty, if reasonably possible, to resolve all doubts concerning the validity of the statute in favor of its constitutionality.").

Decisions from other jurisdictions support the conclusion that Petitioner's life sentence is mandatory. In Castle v. Gladden, 270 P.2d 675 (Or. 1954), the Oregon Supreme Court held

that a defendant, upon his fourth felony conviction, had to receive the life sentence specified by law.[5] See id. at 678:

> The increased penalty ... is mandatory. (citations omitted). ... 'The Legislature has provided a mechanistic rule to take the place of the discretionary powers of the judge in passing sentence on second offenders.'

Quoting Dodd v. Martin, 162 N.E. 293, 295 (N.Y.Ct.App. 1928). See also id. at note 8 ("In at least 21 states punishment for habitual criminality is mandatory.").

The Florida Legislature has done the same thing. It has replaced the court's sentencing discretion with a precise rule, once the requisite number and recency of prior felony convictions are proven. Petitioner does not contest the fact that he meets the statutory definition for classification as an habitual felon.

The court's attention is specifically directed to the "nearby" Alabama statute for repeat felons. That statute (§13A-5-9, Ala. Code [1975 ed.]) sets forth additional penalties for repeated commission of class A, B, and C felonies. At every instance, a repeat felon "must be punished" according to the appropriate penalty. [Note: §13A-5-9 is attached as App. A.]

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[5] The Oregon law (§26-2803) in effect at the time provided:

> A person who ... commits a felony within this state, shall be sentenced, upon conviction of such fourth [felony], or subsequent offense, to imprisonment in a state prison for the term of his natural life. [e.s.]

See State v. Carlson, 560 P.2d 26, 29 at n.10 (Alaska 1977) (quoting above statute and noting that current version is different).

Most comparable to Petitioner would be the Alabama felon who has been previously convicted of two felonies and presently convicted of "burglary in the first degree,"[6] a class A felony.[7] Such felon "must be punished by imprisonment for life or for any term of not less than 99 years." §13A-5-9(b)(3). This sentence is mandatory. Watson v. State, 392 So.2d 1274, 1276 (Ala.Crim.App. 1980), cert. den., 392 So.2d 1280 (Ala. 1981) ("[T]he provisions of the Habitual Offender Statute are mandatory and not discretionary. . . . The word "must," as it is used in §13A-5-9, leaves no discretion with the court."); Chambers v. State, 522 So.2d 313, 315 (Ala. 1987) (the Habitual Felony Offender Act is mandatory as to its punishments).

Florida's habitual felon statute employs the phrase "shall sentence," as to nonviolent repeat offenders. There is no substantive difference between the mandatory nature of the Alabama statute - using the term "must" - and the Florida statute. Petitioner's sentence is mandatory.

Returning to the facts noted in the jurisdictional part of this brief, the State reminds the court that Petitioner received a statutorily authorized sentence. The trial court did not consider that sentence mandatory. It simply exercised its

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[6] Burglary in the first degree is defined as entering, etc. a dwelling with the intent to commit a crime while being armed with a deadly weapon, etc. §13A-7-5(a)(1). Such burglary is a class A felony pursuant to §13A-7-5(b).

[7] Class A felonies are punishable by life, or by imprisonment from 10 to 99 years. When a firearm is used, the minimum terms of years increases to 20. See §13A-5-6.

discretion to impose the maximum sentence. Should the sentences for habitual felons be interpreted as permissive, Petitioner is still not entitled to a guidelines sentence. At most, he would be entitled to resentencing with express directions that a life sentence be considered permissive. The trial court could reimpose the same sentence.

ISSUE III

WHETHER FIRST DEGREE FELONIES PUNISHABLE BY LIFE ARE SUBJECT TO THE HABITUAL FELON STATUTE.

All five district courts have independently concluded that first degree felonies punishable by life are subject to the habitual felon statute. In addition to the *en banc* decision below, see Lock, Westbrook, Newton, and Paige; supra. These decisions ameliorate any "great" public importance once attending this issue, and are very highly persuasive against Petitioner on the merits.

Arguments by Petitioner and FACDL are very similar. The crux of both is this assumption by FACDL: "[T]he punishment for armed burglary is tantamount to the punishment for a life felony." [e.s.] (amicus brief at p.21).

In other words, because the maximum punishment for Petitioner's main offense is life imprisonment, he equates that offense with the statutory classification of life felonies. This is the fatal flaw.

"Classifications" of felonies are established by §775.081(1), Florida Statutes. Obviously including life and first degree felonies, that statute does not set forth a separate classification for first degree felonies punishable by life. See Jones v. State, 546 So.2d 1134, 1135 (Fla. 1st DCA 1989) ("There is no distinct felony classification of 'first degree felony which may be punished by life', but only a first degree felony

which may be punished in one of two ways."). See also Dominguez v. State, 461 So.2d 277, 278 (Fla. 5th DCA 1985) (section 775.084 prescribes longer sentences, but does not reclassify offenses), citing Eutsey v. State, 383 So.2d 219 (Fla. 1980).

The Legislature, in §810.02(2), Florida Statutes, could have declared armed burglary a life felony. It did not do so. The only remaining possibility is that the Legislature simply authorized a more severe penalty for armed burglary, while still classifying the offense as a first degree felony. This logic is consistent with §775.087, Florida Statutes, which reclassifies first degree felonies to life felonies when a firearm is used, and use of a firearm is not an essential element of the offense. Here, use of a firearm is an essential element, therefore Petitioner's offense could not be reclassified. To compensate, the Legislature authorized a life sentence.

Petitioner and FACDL cite to First District decisions holding that the habitual felon statute does not apply to life felonies. Both overlook Watson v. State, 504 So.2d 1267, 1269-70 (Fla. 1st DCA 1986) rev. den., 506 So.2d 1043 (Fla. 1987) (holding that appellant's argument that the habitual felon statute does not apply to sexual battery with great force -- a life felony -- was "without merit"). In any event, cases involving life felonies are irrelevant as to Petitioner, who was convicted for a first degree felony. Thus, Petitioner is expressly subject to the statute. See §775.084(4)(a)1 and (4)(b)1.

Section 810.02(2), Florida Statutes, provides:

> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in ... §775.084, if ....

Even if this court assumes that first-degree felonies, punishable by imprisonment up to life, are not addressed by the habitual felony offender statute generally; it cannot ignore the express provision that robbery with a firearm is "punishable . . . as provided in §775.084." See Paige, supra at 1108 (noting that the kidnapping statute expressly cross-references §775.084); and Lock, supra (adopting the reasoning of Paige).

The remainder of the amicus brief (p.21-2) consists largely of a quote from Judge Ervin's lone dissent in the opinion below. FACDL urges this court to adopt it.

Relying on his view of legislative history, Judge Ervin concluded an enhanced sentence was not intended for first degree felonies punishable by life. His analysis leads to this result: persons convicted of first degree felonies -- presumably less serious offenses than first degree felonies punishable by life -- can be sentenced as habitual felons, while Petitioner could not. Also, the dissent ignores the obvious. Sentencing as an habitual felon is not based on the single, present offense standing alone, but on the present offense as preceded by other felonies. The penalty for the current offense is enhanced to reflect the perpetrator's repetitive criminal nature. Given the short time actually served in jail under the guidelines, persons convicted

of first degree felonies punishable by life (if so sentenced) could commit several such felonies and never be subject to treatment as habitual felons. This court must not interpret the habitual felon statute in such an unreasonable manner. City of St. Petersburg v. Siebold, 48 So.2d 291 (Fla. 1950).

Finally, the Ervin dissent contains the same flawed assumption in FACDL's opening argument. It implicitly and without justification equates classification of an offense as a first degree felony punishable by life with a life felony based on the same maximum punishment for each. It then makes much out of the habitual felon statute's failure to include life felonies expressly. As said before, this is irrelevant to first degree felonies punishable by life.

One or two points by Petitioner merit further attention. He claims that his crime, already punishable by life, cannot be enhanced. Therefore, he also cannot meet the definition of an habitual felony offender found in §775.084(1)(a).

Petitioner fails to consider the habitual felon statute in the context of guidelines sentencing. Had he done so, he would readily learn that a term of imprisonment -- that is, actual jail time -- can be greatly enhanced by sentencing a felon as habitual, without lengthening the sentence beyond the guidelines maximum. This is true because another provision of the statute, §775.084(4)(e), limits gain time of habitual felons to a maximum of 20 days per month. Whatever the prison term, real time in jail is substantially increased.

In short, Petitioner's offense is a first degree felony carrying a more severe penalty due to use of a firearm. No one can reasonably maintain that by authorizing greater punishment for use of a firearm, the Legislature intended such felons to avoid enhanced punishment when their crimes were "habitual." Petitioner's position would give him the benefit of his own wrongdoing; that is, arming himself during a burglary. That position is absurd, and contrary to legislative intent. It must be rejected.

ISSUE IV

WHETHER MANDATORY SENTENCES FOR HABITUAL FELONS REASONABLY RELATE TO PROTECTING SOCIETY FROM SUCH FELONS.

Petitioner asks this court to interpret punishment of violent felons [§775.084(4)(b)] as permissive; assume the punishment of nonviolent felons [§775.084(4)(a)] is mandatory; and conclude the differing treatment violates substantive due process. This broad approach is the source of Petitioner's error.

Preliminarily, Petitioner - sentenced as an habitual felon - is not affected by the law as to sentencing of violent felons. To the extent his argument implicitly questions the validity of that part, Petitioner lacks standing. See Greenway v. State, 413 So.2d 23 (Fla. 1982) (defendant convicted for smuggling contraband into prison could challenge only those portions of the statute under which he was charged, as he was unaffected by the remainder).

If he has standing, Petitioner has not preserved the issue raised. He attacks the statute on equal protection/substantive due process grounds, claiming that habitual violent felons can be sentenced more leniently than felons who are merely habitual. This is unavoidably a challenge to the statute as applied. Petitioner has never disputed the statute's applicability to him. He cannot do so now. Trushin v. State, 425 So.2d 1125 (Fla. 1982). In contrast, a successful equal protection/substantive

due process challenge was brought by a person convicted for mere possession of embossing machines. That person attacked the statute as applied, claiming that he possessed the machines for legitimate purposes. State v. Saiez, 489 So.2d 1125 (Fla. 1986).

Petitioner claims harm because violent felons could be treated more leniently. This is self-defeating, as the remedy would be to declare only the sentences for violent felons to be unconstitutional. Since Petitioner was not sentenced under those provisions, his sentence would not be affected. This court need go no further to deny relief on this issue.

Also, for the reasons set forth in Issue II, that portion of the statute establishing punishment for violent felons is mandatory, despite its use of "may." So interpreted, a court does not have the discretion to punish violent felons more leniently. No constitutional problem arises.

To answer on the merits, the State will first assume Petitioner's suggested interpretation of the statute. The State will then answer the narrower question actually presented.

Petitioner's entire argument is based on the premise that violent habitual felons are treated differently; that is, more leniently, because the trial court has discretion not to punish them in accord with the statute. Couched in terms of equal protection, his challenge is also one of substantive due process. The test for either is whether the statute is one enacted within the "police power" to protect the public's health, safety and

welfare; and, if so, whether there is a "reasonable and substantial relation" between the means selected and the purpose sought. State v. Saiez, supra at 1127-9 (statute totally prohibiting possession of embossing machines clearly within legislature's police power to curtail credit card fraud, but the prohibition's blanket nature not reasonably related to that end); Soverino v. State, supra at 271 (whether a statutory classification satisfies the equal protection clause depends on whether the classification "rests on some difference bearing a reasonable relation to the object of the legislation").

As announced in §775.084(4)(c), the purpose of the habitual felon statute is to better protect the public by imposing lengthier sentences on such offenders. Petitioner does not, and reasonably cannot, maintain that the statute's purpose is not designed to protect the public's health, safety for welfare.

At this point, the difference between classification of an offender as habitual, and sentencing or punishment is crucial. Under §775.084(4)(c), the trial court must classify as habitual all those felons who meet the statutory criteria; absent case-specific, factual findings that society does not need the extra protection afforded by an enhanced sentence. No distinction is made between violent and nonviolent habitual felons.

Even under Petitioner's interpretation, the differing treatment arises only upon punishment. Until that time violent felons are treated more harshly. It takes only one prior felony conviction, if that felony is one of eleven deemed "violent." Moreover, the present offense need not be violent.

Taken as a whole, the statute treats violent felons more severely even if their sentences are deemed discretionary.[8] Consequently, the Legislature could have reasonably decided to allow more latitude in sentencing those felons classified as habitual and violent.

Imagine this scenario: a juvenile is prosecuted as an adult and convicted for aggravated assault arising out of high-school rivalry after a football game. Three years later, that juvenile is convicted for mere possession of crack cocaine. The trial court is unwilling to find society does not need protection from the juvenile, but is hesitant to impose a sentence of up to 10 years with a 5 year minimum. See §775.084(4)(b)3. The Legislature could reasonably have intended to allow the court to decline to do so, by leaving the word "may" in §775.084(4)(b). The result would be a sentence within the guidelines range. The now-adult juvenile would still be classified as an habitual violent felony offender, but not be eligible for most gain time. Thus, even under Petitioner's interpretation, the Legislature has chosen a reasonable means. Society can be given greater

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[8] If punished as speficied in the statute, violent habitual felons also receive minimum mandatory sentences.

protection from violent habitual felons without compelling punishment that could be unduly harsh if required in every case. Simultaneously the Legislature - by requiring more convictions for nonviolent habitual felons and not specifying a minimum sentence - could reasonably choose to make their penalties mandatory.

To be absolutely clear, the State does not concede that the sentences for habitual, violent felons are permissive. The opposite is correct. Donald, Allen; supra. If the sentences for violent, as well as nonviolent, habitual felons are interpreted as mandatory, Petitioner's argument vanishes. The State suggests, only in the alternative, that there is a reasonable basis for interpreting the statute exactly as written.

At the outset, the State noted that Petitioner's argument was too broad. The proper focus is on the statutory provisions affecting him. The question then narrows to whether mandatory, enhanced sentences for habitual felons are a means reasonably related to the unassailable objective of protecting society from such felony offenders. This is the question that answers itself. Imprisoning repeat offenders for longer period, based on their demonstrated criminal proclivity is certainly a reasonable way to protect society.

In his first issue, Petitioner asks the court to interpret the word "shall" as "may," when interpreting §775.084(4). If this court does so, then habitual and habitual violent felons are treated the same. Petitioner's argument is negated. Similarly,

treating both sets of penalties as mandatory refutes the equal protection claim. As said above, there is also a reasonable basis for interpreting the statute exactly as written: sentences for habitual felons are mandatory; sentences for violent habitual felons are discretionary. All three alternatives uphold the statute.

In relevant part, §775.084(4)(a) provides:

> (4)(a) The court, in conformity with the procedure established by subsection (3), shall sentence the habitual felony offender as follows:
>
> 1. In the case of a felony of the first degree, for life. [e.s.]
>
> * * *
>
> (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. [e.s.]

Reading these two statutes together, Petitioner advances (initial brief, p.26-8) a novel theory: that violent felons are punished less severely, because they can be released after 15 years imprisonment, whereas mere habitual felons are not eligible for release at all. He misunderstands the law. First degree violent felons must serve at least 15 years.[9] In contrast, first degree nonviolent felons can be released earlier, if otherwise proper.

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[9] Conceptually, this is no different from requiring capital felons to serve at least 25 years of a life sentence.

This is the only reasonable interpretation of the statute. Note that the 15 year minimum for violent felons is in addition ("and such offender shall not be eligible for release for 15 years") to the extended prison term. Petitioner's theory again leads to the illogical and unreasonable result of treating violent felons less severely than mere habitual felons. This court must not adopt his interpretation. Dorsey v. State, 402 So.2d 1178 (Fla. 1981) (interpreting a statutory definition in a "common sense and reasonable manner" [id. at 1183]); and Speights v. State, 414 So.2d 574 (Fla. 1st DCA 1982) (construing statute proscribing the burning of wild lands). See also State v. Webb, 398 So.2d 820 (Fla. 1981) (upholding application of stop and frisk law and declaring that a statutory construction leading to absurd or unreasonable result, or one rendering a statute purposeless, must be avoided).

At the end of his equal protection argument, Petitioner declares that he "does not dispute the right of the State to classify individuals as Habitual Offenders." (initial brief, p.30). This is an important admission. It tacitly concedes that there is a rational basis for treating such felons differently from those felons who are not habitual offenders. For the reasons noted above, the State agrees.

As to the amicus brief by FACDL, no additional points are raised on this issue. Significantly, FACDL also concedes that the State has the "right" to classify individuals as habitual felons. (amicus brief, p.29). The State also agrees with

FACDL's concession, and notes its significance as to Petitioner's equal protection claim. Whether deemed an equal protection or substantive due process attack, Petitioner's argument - if he has standing and the issue is preserved - is without merit.

CONCLUSION

This Court should decline to exercise its discretion to review the decision below. Otherwise, the habitual felony offender statute applies to first degree felonies punishable by life. Its penalties are mandatory, and bear a reasonable relation to protecting society from the worst of the worst, a goal Petitioner concedes is proper. Petitioner is not affected by the statute's penalties for violent habitual felons, who are treated more severely even under his interpretation.

Therefore, Petitioner's sentence must be affirmed. To an equal extent, so must the opinion below. Additionally, both certified questions must be answered in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to John L. Miller, Esquire, Johnson, Green & Locklin, P.A., Post Office Box 605, Milton, Florida 32572, and James T. Miller, Assistant Public Defender, 407 Duval County Courthouse, Jacksonville, Florida 32202, this 4th day of November, 1991.

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