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IN THE SUPREME COURT OF FLORIDA

CASE NO: 78,466

BILLY B. BURDICK, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

INITIAL BRIEF OF PETITIONER

****

Original

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INTRODUCTION

The Petitioner, **BILLY B. BURDICK, JR.**, was the Appellant in the District Court of Appeal, First District Court of Appeals. The Respondent, **THE STATE OF FLORIDA**, was the Appellee below. The parties will be referred to as they stand before this Court. The symbol "R" will designate the record on appeal.

STATEMENT OF THE CASE AND FACTS

The Petitioner, **BILLY B. BURDICK, JR.,** and a co-defendant, Jessie Holley, were tried and convicted of burglary of a dwelling while armed, a first degree felony punishable by life imprisonment, grand theft, and two counts of grand theft of a firearm. (R. 184). The Petitioner was also convicted of violation of probation, since at the time he allegedly committed the offenses, he was on probation for the sale of marijuana, and possession of marijuana less than 20 grams. (R. 289). On December 13, 1989, the State of Florida filed a Notice to have the Petitioner declared a Habitual Felony Offender in accordance with Section 775.084, Florida Statutes (1988 Supp.). (R. 287). Under the State sentencing guidelines, the Defendant qualified for a permitted range of 4½ - 9 years. (R. 296).

On December 13, 1989, the State served notice that it intended to have the Defendant sentenced as a Habitual Felony Offender in accordance with Section 775.084, Florida Statutes. (R. 287). At the sentencing hearing, the State argued that the Defendant was a Habitual Felony Offender according to the criteria in Section 775.084(1)(a), Florida Statutes, and since he was convicted of a first degree felony, a life sentence was mandatory in accordance with Section 775.084(4)(a), Florida Statutes. The Petitioner was adjudged by the Court to be a Habitual Felony Offender, and was sentenced to a term of life imprisonment for burglary of a dwelling while armed, five years imprisonment for grand theft, and five years imprisonment for both counts of grand theft of a firearm, with the latter three sentences to run concurrent with the life sentence. (R. 291 - 294). The trial judge did expressly state whether or not he felt a life sentence was mandatory for a defendant sentenced in accordance with Section 775.084(4)(a), Florida Statutes.

The Petitioner appealed his sentence and conviction to the First District Court of Appeals, alleging that (1) the trial court improperly interpreted Section 775.084(4)(a) as requiring that the Petitioner be sentenced to life imprisonment; (2) that the Petitioner was improperly sentenced as a habitual offender in accordance with Section 775.084 since the substantive offense for which he was convicted was already punishable by statute by life imprisonment; (3) that 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. The Petitioner also raised other issues before the First District Court of Appeal which are not relevant for purposes of this Appeal.

The First District Court of Appeal affirmed Defendant's conviction and sentence on all issues. The First District held that Section 775.084(4)(a) imposes a mandatory sentence for a Habitual Felony Offender who is convicted of a First Degree Felony, and that the trial judge has no discretion but to impose a mandatory sentence upon a Habitual Felony Offender convicted of a First Degree Felony. The First District Court of Appeal also held that Section 775.084(4)(a) provides for an enhanced sentence for a defendant convicted of a First Degree Felony. The First District further held that Section 775.084(4)(a) is not unconstitutional as violative of the Equal Protection clause of the United States Constitution and the Florida Constitution. Petitioner filed a Petition for Discretionary Review before the Supreme Court of Florida.

ISSUES PRESENTED

ISSUE ONE

WHETHER A LIFE SENTENCE IS PERMISSIVE OR MANDATORY PURSUANT TO THE HABITUAL OFFENDER STATUTE, SECTION 775.084(4)(a), FLORIDA STATUTES (1988 SUPP.).

ISSUE TWO

WHETHER THE PETITIONER WAS IMPROPERLY SENTENCED AS A HABITUAL OFFENDER UNDER SECTION 775.084(4)(a), FLORIDA STATUTES, WHEN THE SUBSTANTIVE OFFENSE FOR WHICH HE WAS CONVICTED IS PUNISHABLE BY STATUTE BY LIFE IMPRISONMENT.

ISSUE THREE

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.

SUMMARY OF ARGUMENTS

ARGUMENT I:

The First District Court of Appeal was incorrect in deciding that a life sentence was mandatory rather than permissive for a Habitual Felony Offender sentenced in accordance with Section 775.084(4)(a)1., Florida Statutes. This Court had previously ruled in State v. Brown, 530 So.2d 51 (Fla. 1988), that a life sentence under subsection (4)(a) was permissive and not mandatory. After Brown was decided, the legislature amended the Habitual Offender Statute in 1988 and 1989, and did not expressly provide that a sentence under subsection (4)(a) of the statute was mandatory rather than permissive. The legislature accepted this Court's interpretation of subsection (4)(a). In the instant case, the First District Court relied on its prior holding in Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990) which held that a life sentence under subsection (4)(b) of the statute, for Habitual Violent Felony Offenders, was permissive rather than mandatory. In deciding Donald, the First District Court of Appeal did not consider this Court's opinion in Brown, and in reaching its conclusion, the First District Court of Appeal ignored commonly accepted principles of statutory construction.

ARGUMENT II:

The First District Court of Appeals erred in ruling that the Defendant was properly sentenced as a Habitual Felony Offender by the trial court, when the substantive offense for which he was convicted is punishable under Section 810.02(1), Florida Statutes, by life imprisonment. By statutory definition, a Habitual Felony Offender is one who is eligible

for an enhanced or extended term of imprisonment. The purpose of the Habitual Felony Offender Statute is to enhance the statutory ceiling for certain classifications of crimes. There is no enhancement provision under the statute for first degree felonies punishable by life, life felonies, or capital felonies. The First District Court of Appeals in part based its ruling on its reasoning that a life sentence under subsection (4)(a) is mandatory and not permissive, and that a mandatory sentence is an enhanced sentence.

ARGUMENT III:

Section 775.084(4)(a)1. is unconstitutional as violative of the Equal Protection clause of the United States Constitution and the Florida Constitution. Subsection (4)(a)1. provides that a Habitual Felony Offender convicted of a first degree felony can receive a life sentence. Subsection (4)(e) of the statute provides that defendants sentenced under the Habitual Offender Statute are not eligible for parole, and are only eligible for twenty days of gain time per month. Subsection (4)(b)1., the applicable sentencing provision for Habitual Violent Felony Offenders, which presumably is a more serious classification than Habitual Felony Offenders, provides that a Habitual Violent Felony Offender can receive a life sentence, and not be eligible for release until after fifteen years. The statute expressly mandates that a Habitual Violent Felony Offender convicted of a first degree felony can be released after fifteen years, while a Habitual Felony Offender is not eligible for release for fifteen years. There is no rational basis or justification for treating a Habitual Felony Offender more harshly than a Habitual Violent Felony Offender, and therefore, subsection (4)(a)1. of the statute is unconstitutional.

ARGUMENT ONE

A LIFE SENTENCE IS PERMISSIVE, AND NOT MANDATORY, PURSUANT TO THE HABITUAL FELONY OFFENDER STATUTE, SECTION 775.084(4)(a), FLORIDA STATUTES (1988 SUPP.).[1]

The Petitioner was convicted of Armed Burglary and sentenced to a term of life imprisonment under the Habitual Felony Offender Statute, Section 775.084(4)(a), Florida Statutes (1988 Supp). At the Petitioner's sentencing hearing, the State argued that a life sentence for a defendant sentenced under Section 775.084(4)(a) was mandatory and not permissive. The trial court did not expressly state whether it felt a life sentence was permissive or mandatory, but, following the State's recommendation, sentenced the Defendant to a term of life imprisonment.

The crucial question raised by this issue is whether the word "shall" as contained in Section 775.084(4)(a), Florida Statutes, requires a trial court to sentence a defendant to life in prison. Once a Court has determined that a defendant should be sentenced as a Habitual Felony Offender or a Habitual Violent Felony Offender, the Court is directed to apply the penalty guidelines set forth in Section 775.084(4)(a) or 775.084(4)(b), which states:

> (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. (Emphasis added).
>
> (4)(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. (Emphasis added).

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[1] The above issue is identical to one of the issues presented in State v. Washington, 574 So.2d 1195 (Fla. 3rd DCA 1991), Supreme Court Case No. 77,626, which is pending before this Court.

The First District Court of Appeals held that a life sentence in accordance with Section 775.084(4)(a) is mandatory and not permissive. Burdick v. State, 16 FLW D1963 (Fla. 1st DCA, July 25, 1991). The Petitioner has sought the discretionary review of this Court and contends that the sentences under both Section 775.084(4)(a) and 775.084(4)(b) are discretionary and not mandatory.

A) This Court has previously held that a life sentence under Section 775.084(4)(a) is discretionary and not mandatory, and the legislature has accepted this Court's interpretation because it has not subsequently amended the Statute to provide for mandatory sentences under Section 775.084(4).

The Respondent suggests that the word "shall" as contained in subsection (4)(a) provides for a mandatory sentence of a Habitual Felony Offender convicted of a first degree felony. In State v. Brown, 530 So.2d 51 (Fla. 1988), however, this Court held that a life sentence under subsection (4)(a) is permissive and not mandatory, and gave two independent justifications for its holding. First, this Court reasoned that defendants sentenced as Habitual Felony Offenders were subject to sentencing guidelines, and to construe subsection (4)(a) as requiring a mandatory life sentence would not be in harmony with the sentencing guidelines. Id. at 52. Second, this Court reasoned that the legislature never intended for a life sentence in accordance with subsection (4)(a) to be mandatory. This Court concluded:

> "We are further persuaded that the legislature never intended Section 775.084(4)(a)1 to be mandatory. The word "shall" as used in Section 775.084(4)(a)1, first appeared in the 1975 addition of Florida Statutes and has remained in all subsequent editions. After researching relevant session laws from the Laws of Florida (1975), we conclude that the legislature itself never inserted the word in the Statute. "Shall" either was an editorial error or a misapprehension of actual legislative intent by the editors. Both Chapter 75-

> 116 and 75-298, Laws of Florida, the only two laws amending Section 775.084 during the 1975 Session, clearly used the word "may". This expresses an unequivocal legislative intent that the life sentence should be permissive, not mandatory. Moreover, no prior or subsequent legislation contained in the laws of Florida has purported to change the word "may" to "shall." Id. at 53.

This Court in Brown was construing the 1985 Habitual Offender Statute, and after Brown was decided, the legislature amended the statute to exempt Habitual Felony Offenders from guideline sentencing. When amending the statute in 1988 and 1989, however, the legislature did not change the language of subsection (4)(a) to expressly state that a life sentence was mandatory and not permissive; therefore, the legislature accepted this Court's interpretation of subsection (4)(a). The legislature was obviously cognizant of the Brown decision when it amended the statute in 1988 to exempt Habitual Felony Offenders from guideline sentencing, and if it had intended for a life sentence under subsection (4)(a) to be mandatory and not permissive, it would have further amended the statute to expressly and clearly provide for a mandatory sentence.

It is well settled under ordinary principles of statutory construction, that the legislature's failure after Brown to amend subsection (4)(a) to provide for a mandatory sentence is a clear intention on the part of the legislature to adopt this Court's interpretation that subsection (4)(a) does not provide for a mandatory life sentence. Henry v. State, 16 FLW D1545 (Fla. 3rd DCA, June 11, 1991). *See* Davies v. Bossert, 449 So.2d 418 (Fla. 3rd DCA 1984). When the Habitual Offender Statute was reenacted in 1988 and 1989, the judicial construction placed thereon is presumed to have been adopted in the reenactment, and court's are barred from changing the earlier construction. *See* Deltona Corp v. Kipnis, 194 So.2d 295 (Fla. 2nd DCA 1966). In Barnes v. State, 16 FLW D562 (Fla.

1st DCA, Feb.22, 1991), the First District Court of Appeals followed the above-articulated rules of statutory construction in reviewing the "subsequential conviction requirement" of the Habitual Offender Statute. The court concluded:

> "Had the legislature intended to overturn longstanding precedent and the construction that the courts had placed on the statute, then it was obliged to use unmistakable language to achieve its objective." Barnes at D563.

The court continued:

> "Absent clear and unambiguous language evidencing legislative intent to change or abrogate those long standing legal principles governing the application of the Habitual Offender Statute, the court should refrain from reinterpreting and repudiating those long standing principles." Barnes at D565.

Not only did the legislature fail to amend subsection (4)(a) to expressly provide for a mandatory sentence, but when it adopted subsection (4)(b) in 1988, which provided for enhanced sentencing for a habitual violent felony offenders, the legislature used the discretionary term "may" instead of "shall". It is illogical for the State to assume that when the legislature enacted subsection (4)(b) in 1988, that it intended for Habitual Violent Felony Offenders convicted of first degree felonies to receive mandatory life sentences.

The First District Court of Appeal ignored this Court's prior interpretation of Section 775.08(4)(a) when ruling that a life sentence under subsection (4)(a) is mandatory and not discretionary. The First District relied primarily upon the State's contention that the rationale for this Court's holding in Brown was because Habitual Felony Offenders were subject to guideline sentencing under the 1985 Habitual Offender statute, and since the statute has been amended to exempt Habitual Felony Offenders from guideline sentencing, this Court's interpretation of subsection (4)(a) is no longer valid. The relationship between

the Habitual Offender Statute and the sentencing guidelines, however, was not the only rationale for this Court's holding in Brown. No explanation was given by the First District Court of Appeals as to why it did not adopt this Court's reasoning in Brown that the legislature intended a sentence under Section 775.084(4)(a) to be discretionary and not mandatory, nor did the First District Court of Appeals seem to examine the legislative history of the statute. The First District also did not follow the rules of statutory construction that it articulated in Barnes.

In Henry v. State, 16 FLW D1545 (Fla. 3rd DCA, June 11, 1991), the Third District Court of Appeals ruled that the sentencing provisions under Section 775.084(4)(a) are discretionary and are not mandatory. The Third District Court of Appeals in Henry followed this Court's analysis of the legislature's intent as articulated in Brown. The court in Henry, unlike the First District Court of Appeal in the instant case, applied the above-cited rules of statutory construction and found it significant that the legislature did not see fit to amend the Statute to provide for a mandatory sentence under Section 775.084(4)(a) after Brown was decided. Henry at D1545.

In Smith v. State, 574 So.2d 1195, 1197 (Fla. 3rd DCA 1991), the Third District Court of Appeals ruled that a life sentence under Section 775.084(4)(b)1, the Habitual Violent Felony Offender provision, was discretionary and not mandatory. The court in Smith expressly noted that the State had conceded, both in its brief and at oral argument, that a life sentence was permissive and not mandatory. Smith at 1197. The State is now asserting a position inconsistent with what it argued before the Third District Court of Appeals in Smith, and urges this Court not to follow the reasoning of the Third District Court of

Appeals that a life sentence under subsection (4)(a) or (4)(b) is permissive and not mandatory.

B) The First District Court of Appeals decision of Donald v. State, supra, was incorrectly decided because it overlooked the Rule of Lenity and Strict Scrutiny in criminal cases.

In the instant case, after distinguishing Brown, the First District relied on its previous holding in Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990), in which the First District held tht a life sentence for a Habitual Violent Felony Offender sentenced in accordance with Section 775.084(4)(b) is mandatory and not permissive, despite the statutory language that the Court "may" sentence a Habitual Violent Felony Offender convicted of a first degree felony to a term of life imprisonment. *See also* Pittman v. State, 570 So.2d 1045 (Fla. 1st DCA 1990). It is noteworthy that when deciding Donald, the First District did not make reference to this Court's decision in Brown. Burdick at 1966. The Donald opinion was never addressed by this Court because the case was remanded to the trial court for resentencing since the First District ruled that the defendant did not meet the criteria for a Habitual Violent Felony Offender, Donald at 795.

Even though the Defendant in the instant case was sentenced under subsection (4)(a) and not (4)(b), it is still important to resolve whether subsection (4)(b), for Habitual Violent Felony Offenders, is permissive or mandatory. The resolution of this conflict will also help determine legislative intent. If it is permissive, then subsection (4)(a), for Habitual Felony Offenders, must also be permissive.

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

The First District in Donald decided that the term "may" in Section 775.084(4)(b) was mandatory and meant "shall." This 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. Donald at 794. The Donald court cited Allied Fidelity Insurance Co. v. State, 415 So.2d 109 (Fla. 3rd 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.

However, 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 Petitioner 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."

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

This Court 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." This 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.

This Court in Donald, supra, should have used the strict scrutiny standard of State v. Wershow, supra. Consequently, this Court should rule that Donald was incorrectly decided. 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 "may" in light of the permissive term "may" in Section 775.084(4)(b).

C) 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 Habitual Violent Felony Offender 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 Habitual Violent Felony Offender 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 Habitual Violent Felony Offender more harshly than Habitual Felony Offender, then it is irrational to require a trial judge to sentence a Habitual Felony Offender to life for a First Degree Felony, but give a judge discretion not to sentence a Habitual Violent Felony Offender 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).

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 Habitual Felony Offender or Habitual Violent Felony Offender Otherwise, the sentencing scheme in Section 775.084(4)(a) is irrational and contrary to common sense.

D) It would be unconstitutional for a life sentence under Section 775.084(4)(a) to be mandatory if a life sentence under Section 775.084(4)(b) is permissive.

It would also be unconstitutional to treat a Habitual Felony Offender more harshly than a Habitual Violent Felony Offender, which is presumably a more serious classification of felony offender. The Equal Protection clause of the United States Constitution and the Florida Constitution requires that a statutory 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, 354 So.2d 61 (Fla. 1978); Soverino v. State, 356 So.2d 269 (Fla. 1978); Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). There is no rational basis for treating a Habitual Felony Offender more harshly than a Habitual Violent Felony Offender, which would be the case if a life sentence under subsection (4)(b) is permissive and a life sentence under subsection (4)(a) were mandatory. This issue was addressed by the First District in Pittman, supra, and the First District concluded that both Habitual Felony Offenders and Habitual Violent Felony Offenders were treated equally, however, the First District was assuming that both subsection (4)(a) and (4)(b) required mandatory sentences. If a life sentence under subsection (4)(b) is discretionary and not

mandatory, then it must follow that a life sentence under subsection (4)(a) is also discretionary.

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 Appellant: the term "shall means may," consistent with the term used in Section 775.084(4)(b).

ARGUMENT II

THE DEFENDANT WAS IMPROPERLY SENTENCED AS A HABITUAL FELONY OFFENDER UNDER SECTION 775.084, FLORIDA STATUTES, WHEN THE SUBSTANTIVE OFFENSE FOR WHICH HE WAS SENTENCED IS PUNISHABLE BY STATUTE BY LIFE IMPRISONMENT.[2]

The Petitioner was convicted of Burglary of a Dwelling While Armed in violation of Section 810.02, Florida Statutes (1988 Supp.), which is a First Degree Felony and is punishable under Section 810.02, Florida Statutes (1988 Supp.) by a term of years not exceeding life imprisonment. The Petitioner contends that a person convicted of a First Degree Felony punishable by statute by life imprisonment cannot be sentenced as a "Habitual Felony Offender" in accordance with Section 775.084, Florida Statutes. The Habitual Felony Offender statute only applies to those defendants sentenced for crimes that are not life felonies, capital felonies, or first degree felonies punishable by life.

There is no enhanced penalty under the Habitual Felony Offender statute for a person convicted of a first degree felony punishable by life. A "Habitual Felony Offender" is defined in Sections 775.084(1)(a) as:

> ". . . a defendant for whom the Court may impose an extended term of imprisonment, as provided in this Section, if the Court finds that "(1) if the defendant has previously been convicted of two or more felonies in this State; (2) felony for which the defendant is to be sentenced was committed within five years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within five years of the defendant's release, on parole or otherwise, from a prison or other commitment imposed as a result of a prior felony conviction for a felony or other qualified offense, whichever is later."

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[2] The above issue is identical to the issue presented in Tucker v. State, 576 So.2d 931 (Fla. 5th DCA 1991), Supreme Court Case No. 77,854, and to one of the issues in Washington.

Since the legislature chose to define a Habitual Felony Offender as a defendant "**for whom the court may impose an extended term of imprisonment**. . . ", in order to qualify as a "Habitual Felony Offender", a defendant must receive or be eligible to receive an enhanced term of imprisonment which exceeds the normal statutory ceiling for such offense. In Dominguez v. State, 461 So.2d 277 (Fla. 5th DCA 1985), the Fifth District concluded:

> "This Statute (Section 775.084) has long been construed as a penalty enhancement statute. Washington v. Mayo, 91 So.2d 621 (Fla. 1957). It merely prescribes longer sentences, but does not reclassify the offenses enhanced as being new substantive offenses." Id. at 278.

Since the Defendant can already receive a life sentence under Section 810.02, Florida Statutes, he cannot be a "Habitual Felony Offender" as defined in subsection (1)(a) because a life sentence under subsection (4)(a) would not be an "extended term of imprisonment." The legislature could have provided for an enhanced penalty for life felonies, capital felonies, or first degree felonies punishable by life, but the plain language of the Statute makes it clear that the legislature did not provide for enhanced penalties for such offenses.

In Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), the First District ruled that Section 775.084 did not violate the Equal Protection clause since it did not enhance penalties for life felonies, capital felonies, or first degree felonies punishable by life, and that the legislature might have deemed the statutory punishment for those offenses sufficient without the use of the Habitual Felony Offender statute. The First District in Gholston v. State, 16 FLW D46 (Fla. 1st DCA December 17, 1990), relying on Barber, ruled that a defendant convicted of burglary of a dwelling while armed was not subject to sentencing under the Habitual Felony Offender statute. The court noted that Section 775.084 "makes

no provision for enhancing penalties for first degree felonies punishable by life, life felonies, or capital felonies." In the instant case, the First District Court of Appeals apparently withdrew its prior opinion in Gholston. Part of the court's reasoning was based on its reasoning that subsection (4)(a) requires a mandatory sentence, and that a mandatory sentence is an "enhanced" sentence. This argument was addressed in Argument I of this Brief.

Section 775.084(4)(e) places restrictions on allowable gain time for a defendant sentenced as a habitual offender, and also provides that a habitual offender is not eligible for parole under Chapter 947. The restrictions on parole and gain time were not included in the statute, however, until 1988. The State cannot contend that the legislature intended to "enhance" sentences for life felonies, capital felonies, and first degree felonies punishable by life, by restricting their gain time and eligibility for parole. When the legislature amended the statute in 1988, it did not provide for a new classification of Habitual Felony Offenders (except for Habitual Violent Felony Offenders), so the provisions concerning gain time and parole contained in subsection (4)(e) could have only been intended to apply to the pre-existing classifications of Habitual Felony Offenders, which do not include life felonies, capital felonies, or first degree felonies punishable by life.

In Walker v. State, 16 FLW D1318 (Fla. 4th DCA May 15, 1991), the Fourth District Court of Appeals reversed a sentence for a defendant convicted of second degree murder with a firearm, who was sentenced as a Habitual Violent Felony Offender under Section 775.084(4)(b)1. The Court concluded that since the defendant's second degree murder

charge was already enhanced to a life felony under Section 775.087(1)(a) for use of a firearm, it reasoned:

> "Under the plain language of the Statute, only first degree felonies - not those which are already made life felonies - can be enhanced under Section 775.084(4)(b)1." Walker at 1318.

The Fifth District Court of Appeals reached the same conclusion as the Fourth District Court of Appeals in Power v. State, 568 So.2d 511 (Fla. 5th DCA 1990). The defendant in Power was convicted of six life felonies, two first degree felonies punishable by life, and one second degree felony. Id. at 511. The court reversed the defendant's classification as a Habitual Felony Offender because the trial court failed to make the necessary findings of fact as required by Section 775.084, but stated in dicta, that life sentences are not subject to habitual offender enhancement. Id. at 512.

In a subsequent case, Paige v. State, 570 So.2d 1108, the Fifth District then ruled that a defendant convicted of a first degree felony punishable by life is subject to habitual offender treatment under Section 775.084. The Court distinguished the Power opinion in that the predicate offense in Power was a life felony, and the predicate offense in Paige was a first degree felony punishable by life. The court in Power reemphasized that there is no enhancement provision under the habitual offender statute for a life felony. Id. at 1109. There was no reason given for the Court's distinction between life felonies and first degree felonies punishable by life. The Petitioner contends that under the Habitual Offender Statute neither life felonies or first degree felonies punishable by life are enhanced because a defendant in each case can receive a life sentence as punishment for the substantive offense. A life sentence is the maximum sentence under the armed burglary statute, and

therefore, there is no enhanced sentence under the Habitual Offender Statute for the petitioner in the instant case.

In Westbrook v. State, 16 FLW D454 (Fla. 3rd DCA Feb.12, 1991), the court upheld habitual offender treatment for a defendant convicted of armed robbery, concluding that "The Robbery Statute on its face permits sentencing under the Habitual Offender Statute." Westbrook at 1187. The fact that the Armed Robbery Statute, Section 812.13(2)(a), Florida Statutes cross references Sections 775.084, is not a clear indication that the legislature intended to make defendants convicted of armed robbery eligible for habitual offender treatment. As noted by Judge Ervin in the dissent in Burdick, the legislature has made wholesale indiscriminate reference to the Habitual Offender Statute throughout the Florida Statutes. Judge Ervin concludes:

> "Considering the legislature's wholesale indiscriminate reference to the Habitual Offender Statute throughout the Florida Statutes, many of which are inapplicable, I do not consider that the State can take any comfort in the reference made in Section 810.02(2) to Section 775.084." Id. at D1965.

The plain language of Section 775.084, Florida Statutes, does not provide for enhancement for a life felonies, capital felonies, or first degree felonies punishable by life. The courts are obligated to construe Section 775.084, Florida Statutes in favor of the accused. While the State can possibly offer several reasons for why the legislature could have included life felonies and first degree felonies punishable by life within in the ambit of the Habitual Offender Statute, the fact remains that the legislature has chosen not to do so.

ARGUMENT III

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 Appellant 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 Habitual Violent Felony Offender 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 Habitual Felony Offender 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 Offender 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

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 Habitual Violent Felony Offender may be sentenced to life with no chance for release for fifteen years. Section 775.084(4)(a)1. requires a life sentence with no chance of release. The legislature has, therefore, treated the Habitual Felony Offender more harshly than the Habitual Violent Felony Offender by making the Habitual Violent Felony Offender eligible for release after 15 years, while not providing for the same release provision for a Habitual Felony Offender sentenced under subsection (4)(a). 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 Habitual Felony Offender or Habitual Violent Felony Offender, 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 Habitual Felony Offender convicted of a first degree felony more severely than a Habitual Violent Felony Offender 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 Habitual Violent Felony Offender classification has a minimum mandatory term not present in the Habitual Felony Offender classification. However, the punishment of a Habitual Violent Felony Offender convicted of a first degree felony is life, with no chance for release for 15 years. The punishment for a Habitual Felony Offender convicted of a first degree felony is life, with no chance for release. Given the general intent to punish a Habitual Violent Felony Offender more severely than a Habitual Felony Offender, it is irrational to punish a Habitual Felony Offender convicted of life felonies more severely than a Habitual Violent Felony Offender 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 Habitual Felony Offender convicted of a first degree felony more severely than a Habitual Violent Felony Offender 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 Habitual Violent Felony Offender life sentence.

The different treatment of life sentences under a Habitual Felony Offender sentence and a Habitual Violent Felony Offender is unjust. Both classifications involve the punishment of repeat offenders. However, a sentence under Section 775.084(4)(b)1. means that after 15 years, the defendant could be eligible for release. Therefore, there is a chance for release after 15 years for a defendant sentenced to life as a Habitual Violent Felony Offender. The minimum qualification for a Habitual Felony Offender is at least 3 felony convictions of any degree. The minimum qualification for a Habitual Violent Felony Offender 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 Habitual Felony Offender as severely as a

Habitual Violent Felony Offender, these requirements make it unjust to punish a Habitual Felony Offender as severely as a Habitual Violent Felony Offender.

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 a 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 Habitual Felony Offender convicted of a first degree felony more severely than a Habitual Violent Felony Offender. Although the

Habitual Violent Felony Offender section does generally punish violent offenders more severely than it does Habitual Felony Offenders, the Habitual Felony Offender classification for persons convicted of first degree felonies punishes more severely than the punishment of a Habitual Violent Felony Offender 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 District Courts of Appeal. See e.g., Wallace v. State, 15 FLW D2742 (Fla. 1st DCA, November 9, 1990); Bell v. State, 15 FLW D2553 (Fla. 5th DCA, October 11, 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. 2nd 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 Court considered whether Section 775.084 denied equal protection by permitting the prosecutor to decide to "habitualize" some defendants, but not others similarly situated. The First District 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 Petitioner, 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 Appellant equal protection under Article 1, 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).

CONCLUSION

Based upon the foregoing argument and citations of authority, Petitioner prays this Honorable Court remand this case for resentencing, and rule that the Petitioner not be sentenced as a Habitual Felony Offender. If this Court determines that it is proper to sentence a defendant convicted of a first degree felony punishable by life or a life felony as a Habitual Offender, then the Petitioner prays this Court to declare Section 775.084(4)(a)1. unconstitutional as violative of the Equal Protection Clause of the United States Constitution and Florida Constitution, and require that the Petitioner be sentenced either as a non-Habitual Offender, or as a Habitual Offender convicted of a second degree felony, eligible for a term of imprisonment of 30 years. In the alternative, Petitioner prays this Honorable Court determine that a life sentence under subsection (4)(a)1. of the Habitual Felony Offender Statute does not require a mandatory sentence, and remand this case for resentencing with instructions to the trial court that a life sentence is permissive and not mandatory.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing INITIAL BRIEF OF PETITIONER has been furnished to CHARLES L. McCOY, ESQUIRE, Assistant Attorney General, Dept. of Legal Affairs, The Capitol, Tallahassee, Florida 32399; NANCY A. DANIELS, ESQUIRE, Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, FL 32301; ARTHUR I. JACOBS, ESQUIRE, General Counsel, P.O. Drawer I, Fernandina Beach, Florida 32034; JAMES T. MILLER, ESQUIRE, Public Defenders Office, 520 East Bay Street, 407 Duval County Courthouse, Jacksonville, FL 32202 by regular U.S. mail this 20 day of September, 1991.

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