OA 12-6-91

IN THE SUPREME COURT OF FLORIDA

CASE NO: 78,466

BILLY B. BURDICK, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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REPLY BRIEF

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JURISDICTION

The Petitioner contends that this Court should accept jurisdiction of this case pursuant to Article V, Sections 3(b)(3) and 3(b)(4) of the Florida Constitution because (1) the issues raised by the Petitioner are of great public importance, and (2) the lower court decision is in express and direct conflict with decisions of other District Courts of Appeal and this Court.

A. MANDATORY NATURE OF PETITIONER'S SENTENCE

1. Conflict Jurisdiction

The lower court's decision is in direct and express conflict with Smith v. State, 574 So.2d 1195, 1197 (Fla. 3rd DCA 1991), where the Third District Court of Appeal ruled that a life sentence under Section 775.084(4)(b)1 of the habitual offender statute is discretionary and not mandatory. The decision of the lower court is also in express and direct conflict with this Court's decision in State v. Brown, 530 So.2d 51 (Fla. 1988), in which this court held that the word "shall" as contained in Section 775.084(4)(a)1 did not require a mandatory sentence for a habitual felony offender convicted of a first degree felony. See Hall v. Florida Board of Pharmacy, 177 So.2d 833 (Fla. 1965). It is also noteworthy that this Court has other cases pending before it on the two identical issues raised by the Petitioner in issues one and two of his initial brief. State v. Washington, 574 So.2d 1195 (Fla. 3rd DCA 1991), Supreme Court Case No: 77,626. In Washington, the State urged this Court to accept jurisdiction of this case because the decision of the Third District Court of Appeal was in express and direct conflict with the decision of other appellate courts in this State.

The Petitioner is not asking this Court to render an advisory opinion, but to the contrary, contends that this Court's decision on this issue will have an affect on the outcome of this case. If this Court decides that a life sentence under Section 775.084(4)(a) is discretionary, the case should be remanded to the trial court for resentencing with the instruction that a life sentence is discretionary. At the Defendant's sentencing hearing, the State suggested to the trial court that a life sentence was mandatory for the Defendant. If the trial court had disagreed with the State's contention that a life sentence was mandatory, it would have expressly stated that it rejected the State's interpretation of the Statute, and further indicated that it felt that a life sentence was appropriate whether or not it was mandatory. The First District did note in its opinion that the State argued to the trial judge that a life sentence was mandatory. Burdick v. State, 16 FLW D 1963 (Fla. 1st DCA 1990) at 1963.

In Washington v. State, 574 So.2d 1195 (Fla. 3rd DCA 1991) the Third District Court of Appeal ruled that Section 775.084(4)(b)1 did not require a mandatory sentence for a defendant convicted of first degree felony. In Washington, the defendant was sentenced as a habitual violent felony offender after his conviction for armed robbery. The Third District concluded that the trial judge's comments at the sentencing proceeding made it difficult for it to determine whether the trial judge believed that a life sentence was mandatory or discretionary. Id. at 1197. The Third District concluded that because of such uncertainty, the interest of justice required that the sentence be vacated and remanded so that the trial judge may consider the matter as one within his discretion. Id. at 1197.

If this Court concludes that the trial judge in the instant case might have been uncertain as to whether a life sentence under Section 775.084(4)(a)1 was mandatory or discretionary, it should remand the case for resentencing. Since the Petitioner in the instant case is serving a life sentence with no possibility of parole, the uncertainty of the trial court in interpreting Section 775.084, which is ambiguously worded, should be resolved in favor of the Petitioner. There would be no justification of remanding the case for resentencing only if the trial judge had expressly stated that a life sentence was appropriate regardless of whether it was mandatory or discretionary.

The State's characterization of the First District holding on this issue is erroneous. The First District does not just "simply conclude" that a life sentence was statutorily authorized for the Petitioner, (Answer Brief, p.7), but instead ruled that a life sentence was mandatory. Since the First District ruled that a life sentence was mandatory, it did not need to address the issue of whether this case should be remanded for sentencing in the event that a life sentence was permissive rather than mandatory.

Section 775.084(4)(c) provides that a Defendant sentenced as a habitual felony offender is not subject to the provisions of Chapter 947, which means that a defendant sentenced as a habitual felony offender is not eligible for parole. If this Court determines that a life sentence under Subsection (4)(a)1 of the Habitual Offender Statute is not mandatory, it should remand the case for resentencing because the sentencing transcript reveals that the State suggested to the trial court that the Defendant's life sentence would not be a life sentence without parole. (R, 317). [1]

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[1] This was inadvertently omitted from the Statement of Case in Facts in the Petitioner's Initial Brief.

Assuming the State is correct in its contention that this Court's opinion would not affect the outcome of this case, this Court should still exercise its discretionary jurisdiction and resolve the conflict that exists among the District Courts of Appeal regarding this issue. It is well settled that the purpose of this Court exercising its conflict jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution is to promote uniformity and harmony in the law of this State. N & L Auto Parts Company v. Doman, 117 So.2d 410 (Fla. 1960); Board of Commissioners of State Institutions v. Tallahassee Bank and Trust Company, 116 So.2d 762 (Fla. 1959). This Court has historically stated that its primary concern in exercising its conflict jurisdiction is to focus on the precedential value of the District Court of Appeal opinions as opposed to adjudications of the rights of particular litigants, or to decide whether or not this Court agrees with a District Court of Appeal about the disposition of a given case. Lake v. Lake, 103 So.2d 639 (Fla. 1958) at 642; Mystan Marine v. Harrington, 339 So.2d 200 (Fla. 1976) at 201. Even if this Court's decision does not affect the outcome of the instant case, it is still important for this Court to resolve the conflict between the District Courts of Appeal on this issue.

2. Question of Great Public Importance.

This issue was certified by the First District Court of Appeal as being one of great public importance. The State contends that this Court's decision on the issue would not affect the outcome of this case. This issue was addressed above by the Petitioner, but even assuming that the State's argument is correct and that this Court would be issuing an advisory opinion, the Petitioner contends that this Court still has a sufficient reason to

exercise its discretionary jurisdiction and consider this case. The underlying rationale for this Court deciding an issue of great public importance is because such an issue deals with a matter of great concern beyond the interest of the immediate litigants and affects others not a party to the litigation. See Lake. Even if this Court's decision does not affect the outcome of this case, there are at least two other cases pending before this Court on this identical issue, and there are probably numerous defendants who have been sentenced and will be sentenced under Sections 775.084(4)(a)1 and 775.084(4)(b)1 who have an intense concern as to how this Court decides this issue.

B. APPLICABILITY OF SECTION 775.084 TO FIRST DEGREE FELONIES PUNISHABLE BY LIFE.

The First District certified the above issue to this Court as a question of great public importance. The identical issue is pending before this Court in Tucker v. State, 576 So.2d 931 (Fla. 5th DCA 1991), Supreme Court Case No. 77,854, and State v. Washington, 574 So.2d 1195 (Fla. 3rd DCA 1991), Supreme Court Case No: 77,626.

The State asserts that all five District Courts of Appeal have ruled in its favor on this issue, and therefore, the issue is no longer one of great public importance. This assertion, if correct, would be persuasive for defeating jurisdiction based upon a conflict between the District Courts of Appeal, but really does not explain why the issue is not one of great public importance. The Petitioner contends that the issue is one of great public importance because of the severity of the sanction for one sentenced as a habitual felony offender convicted of a first degree felony - life without parole. Because there are probably

numerous defendants who have been and who will be sentenced under Subsections (4)(a)1 and (4)(b)1 of the Habitual Offender Statute, this issue is one of great public importance.

C. EQUAL PROTECTION.

Rule 9.040 of the Florida Rules of Appellate Procedure vests this Court with such jurisdiction as may be necessary for a complete determination of this cause. Since the jurisdiction of this Court has been properly invoked with respect to issues one and two, this Court has jurisdiction to review issue three. This Court has held that once it assumes jurisdiction of a case, it may consider the entire case, merits and all, as well as all contested issues. Rupp v. Jackson, 238 So.2d 86 (Fla. 1970); Kennedy v. Kennedy, 303 So.2d 629 (Fla. 1974); See Massachusetts Bonding and Insurance Company v. Bryant, 189 So.2d 614 (Fla. 1966).

The State suggests that this Court should not review the constitutional issue because it is beyond the scope of the certified questions, and cites Stephens v. State, 572 So.2d 1387 (Fla. 1991) as authority to support its contention. In Stephens, the issue that was certified to this Court had already been decided by this Court in Clark v. State, 572 So.2d 1387 (Fla. 1991) Id. at 1387. Because the decision of the lower court in Stephens ruled in harmony with this Court's decision in Clark, this Court found it unnecessary to review the certified question for a second time, and thus, declined to review the collateral issue as well. The certified questions in this case have not been previously reviewed by this Court, and therefore, the State's reliance on Stephens is misplaced. This Court clearly has jurisdiction to consider the Petitioner's constitutional challenge to Section 775.084(4)(a)1.

ISSUE 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.).

It is significant that the State concedes that if a life sentence is permissive under Subsection (4)(b)1, then it must be permissive under Subsection (4)(a)1; and that if a life sentence is mandatory under Subsection (4)(a)1 then it must also be mandatory under Subsection (4)(b)1 (Answer Brief, p. 17-18). The Petitioner agrees with the State that there is no rational basis for sentencing habitual violent felony offenders more leniently than habitual Non-Violent Felony Offenders. The State then concludes that the conflict between Subsection (4)(a)1 and (4)(b)1 ("shall" v. "may") should be resolved in favor of the State and not the Petitioner, and that life sentences under Subsections (4)(a)1 and (4)(b)1 should be mandatory and not discretionary. In asserting its conclusion, the State fails to explain how this Court can interpret "may" to mean "shall" under the Rule of Lenity and Strict Scrutiny as stated in Section 775.021(2), Florida Statutes.

The State contends that Brown is no longer good law. Why? Is the State suggesting that this Court, when deciding Brown, erred in concluding that the Legislature never intended for the word "shall" to mean "shall" or that the word "shall" was simply an editorial misprint? If the State is not alleging that this Court erred in Brown in its analysis of legislative intent, then it must be alleging that the Legislature intended for a life sentence under Subsection (4)(a)1 to be mandatory when it amended the Statute in 1988. To support its contention, the State must demonstrate that the Legislature expressly and clearly

evidenced intent that life sentences should be mandatory for defendants sentenced under Subsections (4)(a)1 and (4)(b)1 when the Legislature amended the Statute in 1988. The State offers nothing in the legislative history of the amended 1988 Statute which shows an intention that life sentences under Subsection (4)(a)1 and (4)(b)1 should be mandatory.

If there is nothing in the legislative history of the Statute which supports the State's contention, the only other vehicle to determine the legislative intent of the amended 1988 Statute is to examine the plain wording of the Statute itself. As previously noted, Subsection (4)(a)1 remained unchanged after the 1988 amendment to the Statute, and the Legislature used the discretionary term "may" when enacting Subsection (4)(b)1 of the Statute. It is illogical to assume that Legislature clearly expressed its displeasure with this Court's ruling in Brown by failing to amend Subsection (4)(a)1 and by employing the use of the discretionary term "may" when enacting Subsection (4)(b)1. When the Statute was amended in 1988 and Subsection (4)(b)1 was enacted, the Legislature, relying on this Court's ruling in Brown, must have intended for the word "may" to mean "may" and not "shall."

The State offers several possible explanations as to how the Legislature might have evidenced an intent for life sentences to be mandatory under Subsection (4)(a)1 of the amended 1988 Statute. The State first suggests that sanctions for second and third degree habitual felons is a "term of years not exceeding " 30 or 10 years respectively, and that the phrase "not exceeding" does not appear in Subsection (4)(a)1 (Answer Brief, p. 12). This language appeared in both the 1985 and 1987 Habitual Offender Statutes, however, and did not deter this Court from concluding in Brown that the word "shall" did not mandate a life sentence for a habitual felony offender convicted of a first degree felony. By reenacting the

Statute with similar language, however, the Legislature did not intend to change the construction given the Statute by this Court in Brown. As noted in the Petitioner's Initial Brief when a Statute is reenacted, the judicial construction placed thereon is presumed to have been adopted in the reenactment.

The State then suggests that Subsection (4)(c) of the Statute would be rendered meaningless if life sentences under Subsections (4)(a)1 and (4)(b)1 are permissive and not mandatory. (Answer Brief, p. 14.) The Petitioner disagrees. Subsection (4)(c) would still apply for defendants sentenced as habitual second degree felons, third degree felons, and first degree felons whose substantive offense is not punishable by life imprisonment. Section 775.084(4)(a) enhances the statutory ceiling for an habitual felony offender convicted of a third degree felony from five years to ten years, and enhances the statutory ceiling for a habitual felony offender convicted of a scond degree felony from fifteen years to thirty years; and enhances the statutory ceilings of certain first degree felonies from thirty years to life imprisonment.

If, for example, a defendant qualified as a habitual felony offender and was being sentenced for a second degree felony, the Court could sentence him for up to thirty years in prison. If the trial court felt that imposition of an enhanced sentence would not be necessary for the protection of the public, the trial court could apply Subsection (4)(c) and sentence the defendant according to the guidelines, or if legally sufficient justification existed, the trial court could exceed the guidelines and sentence the Defendant to a term of years not exceeding fifteen years.

If a defendant was convicted of arson of a dwelling, a first degree felony, and was sentenced as a habitual felony offender, the Defendant would be eligible for a life sentence under Subsection (4)(a)1. Arson of a dwelling is punishable by Section 806.01(1) and Section 775.082 up to thirty years imprisonment. If the trial court concluded that it was not necessary for the protection of the public to sentence the defendant as a habitual felony offender, the trial court could apply Subsection (4)(c) and sentence the defendant according to the sentencing guidelines, or if justification existed to exceed the guidelines, the defendant could receive a sentence of up to thirty years imprisonment.

Subsection (4)(c) of the Statute clearly has meaning whether a life sentence under Subsections (4)(a)1 and (4)(b)1 is discretionary or mandatory. The only classifications of crimes which would render Subsection (4)(c) meaningless are capital felonies, life felonies, and first degree felonies punishable by life. Certainly the State is not contending that Subsection (4)(c) must be applicable to all classifications of crimes. Regardless of whether a life sentence under Subsections (4)(a)1 and (4)(b)1 is mandatory or discretionary, Subsection (4)(c) would not be applicable to a defendant convicted of a capital felony and sentenced to death.

The State then concludes that had the Legislature not intended for a life sentence to be mandatory under Subsection (4)(a)1, it could have amended the Statute after Brown to say "may". (Answer Brief, p. 13). The Legislature probably saw no need to amend Subsection (4)(a)1 after Brown was decided to employ the term "may," since this Court had ruled that a life sentence under Subsection (4)(a)1 was discretionary and not mandatory. The failure of the Legislature to amend Subsection (4)(a)1 after Brown was decided is an

indication that the Legislature agreed with this Court's conclusion that a life sentence should be discretionary and not mandatory. If the Legislature had disagreed with this Court's ruling in Brown, it would have used the word "shall" instead of the discretionary term "may" when adding Subsection (4)(b)1 in 1988, and would have also expressly stated that life sentences are mandatory under both Subsections (4)(a)1 and (4)(b)1.

It is true that after Brown, the Legislature expressly exempted habitual felon sentencing from guideline procedures. (Answer Brief, p. 13). That is a clear indication that the Legislature disagreed with this Court's ruling in Brown that habitual felony offenders were still subject to guideline sentencing. The State then takes a tremendous leap in logic and concludes that the Legislature intended to overrule Brown in its entirety when it amended the Statute to exempt habitual felon sentencing from guideline sentencing. As stated in the Petitioner's Initial Brief, guideline sentencing was only one of two justifications for this Court's ruling in Brown. The State only focuses on the portion of this Court's opinion in Brown that subjects habitual felony offenders to guideline sentencing, and does not address this Court's analysis in Brown of the legislative history of the Habitual Felony Offender Statute. It is clear that the Legislature disagreed with the portion of the Brown opinion that subjected habitual felony offenders to guideline sentencing, but did not disagree with this Court's conclusion that the Legislature never intended for a life sentence under Subsection (4)(a)1 to be mandatory.

The Statutes and cases from other jurisdictions cited by the State have no relevance to the issues before this Court. The Petitioner agrees that in at least 21 States, punishment for habitual criminality is mandatory. The issue before this Court, however, is not whether

it would be a good policy for the Florida Legislature to enact similar legislation that would provide for mandatory sentences for habitual felony offenders. The function of this Court is not to interpret Habitual Felony Offender Statutes of foreign states.

None of the foreign Statutes cited by the State contained the discretionary term "may" as does Section 775.084(4)(b)1, and none of the foreign statutes contain the ambiguities that are inherent in Section 775.084. The Supreme Courts of Alabama and Oregon have not expressly stated that the terms "shall" and "must" are editorial misprints or that the State Legislatures of the foreign States never intended for there to be mandatory sentences for habitual felony offenders.

The Petitioner feels that it is necessary to comment on the standard of review in this case. At no time did the Petitioner's Initial Brief suggest to this Court an erroneous standard of review. The Rule of Strict Scrutiny and the Rule of Lenity are both codified in Section 775.021(2), Florida Statutes, and is the appropriate test for resolving the conflicts and inconsistencies contained in Section 775.084. A review of the Petitioner's Initial Brief, in its full context, makes it clear that the Petitioner is suggesting that the strict scrutiny test should be employed when analyzing Subsection 775.084(4)(a) and 775.084(4)(b).

At no time does the Petitioner suggest that this Court should use the strict scrutiny standard in addressing the constitutional issue raised by the Petitioner. The Petitioner expressly states in numerous places throughout his Initial Brief (Initial Brief, p. 17, 25) that the equal protection test in this case is "whether the classification rests on some difference that has a just and reasonable relationship to the Statute to which the classification is proposed."

On page 15 of the State's Answer Brief, the State is defending a constitutional challenge which has not been raised by the Petitioner. The Petitioner has never alleged that there is no rational basis for having stiffer sentences for habitual felony offender than for first time felons. The Petitioner did not raise any constitutional challenge to Section 774.084 in issue one of the Petitioner's Initial Brief, and does not understand why the State is suggesting that strict scrutiny and the rule of lenity are not the proper standards of review for interpreting the language in Section 775.084. The State is attempting to confuse this issue by arguing the standard of review for a constitutional challenge which has not been raised by the Petitioner in issue one.

If this Court finds that a life sentence is permissive according to Section 775.084(4)(a)1, and decides that the Petitioner can be sentenced as a habitual felony offender (Issue Two), then the Petitioner should be resentenced with express directions that a life sentence should be considered permissive.

ISSUE TWO

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.

The State suggests that the Petitioner's argument should be rejected because there is no separate classification of a crime for a first degree felony punishable by life. As stated in the Petitioner's initial brief, it makes no difference whether or not there is a separate classification of crime for armed burglary. Since armed burglary, a first degree felony, is punishable by Section 810.02, Florida Statutes, by life imprisonment, there can be no "enhancement" of the Defendant's sentence under Section 775.084. If the Defendant's sentence cannot be enhanced under Section 775.084(4)(a), then the defendant is not a "habitual felony offender" within the plain meaning of Section (1)(a) of the Statute.

The State argues that the Petitioner's view of the Habitual Offenders Statute is unreasonable and suggests that a Defendant convicted of a first degree felony punishable by life could commit several felonies and never be sentenced as a habitual felony offender. The State's argument has no merit. It was reasonable for the Legislature not to classify the Defendant in the instant case as a habitual felony offender because under Section 810.02, he is already eligible for a life sentence. The Legislature might have concluded that the punishment for armed burglary is already severe. While the Legislature could have also reasonably included life felonies, capital felonies, and first degree felonies punishable by life within the ambit of the Habitual Offender Statute, the fact remains that it chose not to do so.

If this Court accepts the Petitioner's view that the Habitual Offender Statute does not apply to defendants for first degree felonies punishable by life, it is not true that the defendant would have profited by not arming himself while in the structure he burglarized. (Answer Brief, p. 25). Had the defendant not armed himself while in the structure, he could have only been convicted of a second degree felony, which would have made him eligible for a thirty year sentence under Section 775.084(4)(a)2. The defendant could have only received a fifteen year sentence for second degree burglary under Section 810.02, so his sentence would have been enhanced under Section 775.084.

The Petitioner concedes that Section 775.084 is poorly worded and contains many ambiguities. In resolving whether or not Section 775.084 was intended to apply to defendants convicted of life felonies and first degree felonies punishable by life, it is important that criminal statutes are to be strictly construed in favor of the Defendant.

ISSUE THREE

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. STANDING

The Petitioner is not attacking the Constitutionality of Section 775.084(4)(b)1 for habitual violent felony offenders, but is alleging that the provision under which he was sentenced, Section 775.084(4)(a)1, is unconstitutional because there is no rational basis for treating a habitual felony offender, sentenced for a first degree felony under Subsection (4)(a)1 more harshly than a habitual violent felony offender, convicted of a first degree felony, and sentenced under Subsection (4)(b)1. In order for this Court to consider the Petitioner's equal protection challenge, it is necessary to compare the penalties in Section (4)(a)1 for a habitual felony offender when the penalties in Subsection (4)(b)1 for a habitual violent felony offender. Just because the Petitioner requests that this Court analyze the entire Statute in order to determine the meaning and effect of Subsection (4)(a)1 does not mean that the Petitioner is challenging as unconstitutional the other parts of the Statute.

The party who would lack standing to raise the Constitutional challenge would be the defendant sentenced under Subsection (4)(b)1 for habitual violent felony offenders. It would be foolish for a Defendant sentenced under Subsection (4)(b)1 to allege that Subsection (4)(b)1 is unconstitutional because it treats the Defendant more leniently than it does a similar defendant sentenced under Subsection (4)(a)1. A defendant sentenced under Subsection (4)(b)1, therefore, could not raise the issue because the defendant would

really be attacking the constitutionality of Subsection (4)(a)1, and the defendant would not have standing to do so.

B. EQUAL PROTECTION

The State is indirectly contending that the constitutional challenge is dependent upon Subsections (4)(a)1 and (4)(b)1 providing for mandatory sentences. (Answer Brief, p. 26.) This is not so. The argument is the same regardless of whether life sentences under Subsection (4)(a)1 and (4)(b)1 are discretionary or mandatory. If the life sentences are permissive, then the Statute is unconstitutional because it provides for a more severe possible punishment for a habitual felony offender than it does for a habitual violent felony offender. The trial court could sentence a habitual felony offender convicted of a First Degree Felony more harshly than it could sentence a habitual violent felony offender convicted of a First Degree Felony.

The State then contends that a habitual felony offender convicted of a First Degree Felony and sentenced under Subsection (4)(a)1 is not treated more harshly than a similarly situated habitual violent felony offender sentenced under Subsection (4)(b)1. The State suggests that first degree nonviolent felons can be released earlier than fifteen years "if otherwise proper" (Answer Brief, p. 31). The State cannot explain how the first degree nonviolent felon can be released earlier than fifteen years. Since Subsection (4)(e) provides that Chapter 947 (Parole) does not apply to a defendant sentenced as a habitual felony offender, the defendant sentenced under Subsection (4)(a)1 is not eligible for parole. Subsection (4)(e) also limits gain time for a habitual felony offender to twenty days per month.

Suppose a defendant is sentenced as a habitual felony offender to thirty years imprisonment (which is far less than a life sentence). Using simple mathematics, and assuming the defendant received twenty days of gain time per month, the defendant would have to serve close to eighteen years before becoming eligible for release. If a defendant receives a life sentence, there is no way the Defendant would be eligible for release before fifteen years.

A habitual violent felony offender sentenced under Subsection (4)(b)1, however, would be eligible for release after fifteen years. That is because Subsection (4)(b)1 creates a release mechanism not available for a habitual felony offender in Subsection (4)(a)1. The First District Court of Appeal contends that Subsection (4)(b)1 does not create such a release mechanism because the language "cannot be eligible for release for fifteen years" is simply surplus. As the State suggests in its argument in issue one, however, courts should never presume that a given Statute employs useless language. (Answer Brief, p. 14.)

The State argues that the fifteen year release eligibility language contained in Subsection (4)(b)1 should be construed as providing for a mandatory minimum sentence, analogous to capital felons having a twenty-five year mandatory minimum sentence. That would be true except for the fact that Subsection (4)(e) eliminates parole for a habitual felony offender. If the restrictions on parole were not contained in Subsection (4)(e), and a habitual violent felony offender were in fact eligible for parole (as a capital felon is), then it would be necessary for the Legislature to insure that a habitual violent felony offender not be released before serving fifteen years. But since it is mathematically impossible for a habitual violent felony offender to be released before fifteen years with the restrictions

contained in Subsection (4)(e), the Legislature had no need to provide for a mandatory minimum sentence. That is why the only reasonable interpretation of Subsection (4)(b)1 is that the fifteen year release eligibility language creates a release mechanism not available for habitual felony offenders under Subsection (4)(a)1.

There is no rational basis for treating a habitual felony offender more harshly than a Habitual Violent Felony Offender, and Subsection (4)(a)1 of the Habitual Offender Statute should be declared unconstitutional.

Respectfully submitted,

JOHN L. MILLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Waive Court Costs 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 27 day of November, 1991.

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