IN THE SUPREME COURT OF FLORIDA

EDDIE MACK LOCK,

Petitioner,

v. CASE NO. 78,472

STATE OF FLORIDA,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT

Issue I

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 felony does not equate those two classifications of offenses, thereby removing the former from operation of the habitual felon statute.

Issue II

Mandatory nature of habitual offender sentences.

A plain reading of the statute and case law togther with sound logic and reasoning indicate irrefutably that habitual offender sentences are mandatory.

Issue III

Equal protection/due process.

This Court and all five districts have examined and rejected Appellant's arguments.

ARGUMENT

ISSUE I

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; Lock v. State, 582 So.2d 819 (Fla.2d DCA 1991); Westbrook v. State, 574 So..2d 1187 (Fla. 3d DCA 1991); Newton v. State, 581 So.2d 212 (Fla. 4 DCA 1991); Paige v. State, 570 So.2d 1108 (Fla. 5 DCA 1990). These decisions ameliorate any "great" public importance once attending this issue, and are very highly persuasive against Petitioner on the merits.

Argument by Petitioner hinges on the assumption that a felony punishable by life is tantamount to a life sentence.

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).

Petitioner cites to the First District decisions holding that the habitual felon statute does not apply to life felonies. But Appellant overlooks 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").

Relying on his view of legislative history, Judge Ervin in Burdick v. State 16 FLW (D) 1963 (Fla.1 DCA July 25, 1991), 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 as in Appellant'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.

Appellant was convicted of robbery with a firearm under Section 812.13 of the Florida Statutes. Subsection (2)(a) of that robbery statute reads:

> If in the course of committing a robbery the offender carried a firearm or other deadly weapon then the robbery is a felony of a first degree punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in Sections 775.082, §775.083, or § 775.084.

The robbery statute clearly indicates that Appellant's conviction can be punishable either by life imprisonment or as provided in section 775.082[1] or as provided section 775.083[2] or as

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[1] Section 775.082(3)(b) gives the following penalty:

provided in section 775.084, to wit the habitual offender statute. Hence, contrary to the Appellant's contention the plain language of the robbery statute in question allows punishment under the habitual offender statute.

Effective October 1, 1988, the habitual offender statute was substantially rewritten by the Florida Legislature. Among the changes made to the earlier version, the Legislature added subsection 4(e) which read as follows:

> A sentence imposed under this section shall not be subject to the provisions of section 921.001.[3] The provisions of chapter 947 shall not be applied to such person. The Defendant sentenced under this section shall not be eligible for gain time granted by the Department of Corrections except that the department may grant up to 20 days gain time

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> "For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by exceeding life imprisonment.

[2] Section 775.083 provides for the imposition of a fine in addition to the penalty proposed under 775.082. Under subsection (1)(b), the fine for a conviction of a felony of the first degree is $10,000.

[3] Section 921.001(4)(a), Florida Statutes, provides, in part:

> The guidelines shall be applied to all felonies, except capital felonies, committed on or after October 1, 1983, and to all felonies, except capital felonies and life felonies, committed prior to October 1, 1983, for which sentencing occurs after such date when the defendant affirmatively selects to be sentenced pursuant to the provisions of this act.

each month as provided for in section 944.275 (4)(b).[4]

This language took the penalties prescribed under the habitual offender statute outside the province of the sentencing guidelines and allowed the trial court to impose the penalty of life imprisonment upon the defendant by simply making the determination that the defendant fit this statutory definition of a habitual violent felony offender.

The Defendant in this case scored "344" on the sentencing guidelines scoresheet, indicating a recommended range of seventeen to twenty two years imprisonment. Taking the sentencing guidelines in conjunction with the robbery statute, the severest penalty that the Appellant in this case could have received without written reasons for departure would have been 22 years imprisonment with a one-cell upward departure. Under the guidelines therefore the Defendant could not have received the maximum penalty of life imprisonment for the robbery offense (without appropriate departure reasons).

The only way the trial court was able to sentence the Defendant to life imprisonment was under the habitual offender statute. Thus, in light of the amendment to the statute, which in effect, exempts sentences under the habitual offender statute in the operation of sentencing guidelines, the Appellant's reliance on Gholston, and by reference Barber v. State, 564 So.2d 1169 (1st

[4] The statute was further amended in 1989, but the aforementioned language in subsection (4)(e) was retained.

DCA 1990), is inapplicable. See Owens v. State, 560 So.2d 1260 (1st DCA 1990).

ISSUE II

THE SENTENCES ENUMERATED UNDER SECTION 775.084(4)(a) FOR HABITUAL FELONY OFFENDERS AND THE SENTENCES ENUMERATED UNDER SECTION 775.084(4)(b) FOR HABITUAL VIOLENT FELONY OFFENDERS ARE MANDATORY WHEN THE TRIAL COURT HAS FOUND THE DEFENDANT TO BE EITHER A HABITUAL FELONY OFFENDER OR A HABITUAL VIOLENT FELONY OFFENDER AND WHEN THE TRIAL COURT HAS DETERMINED THAT IMPOSITION OF SENTENCE UNDER THE HABITUAL OFFENDER STATUTES, AND NOT PURSUANT TO THE SENTENCING GUIDELINES, IS NECESSARY FOR THE PROTECTION OF THE PUBLIC.

This Court in Whitehead v. State, 498 So.2d 863 (Fla. 1986) and Winters v. State, 522 So.2d 816 (Fla. 1988), held that the enactment of section 921.001, Florida Statutes (1985) implicitly repealed section 775.084, Florida Statutes (1985). Accordingly, a habitual offender sentence could only be imposed if there were valid reasons to depart from the sentencing guidelines and the fact that the defendant was a habitual offender was not a valid reason for departure. In State v. Brown, 530 So.2d 51 (Fla. 1988) this Court applied the foregoing holdings to section 775.084(4)(a)(1), Florida Statutes (1985). This Court held the said section, which states that the court shall sentence a habitual offender in the case of a felony of the first degree to life, was "implicitly repealed by the enactment of section 921.001, Florida Statutes (1985), to the extent that the former may be construed as requiring a mandatory life penalty." Id. at 53. (Emphasis in original.) This Court held that section 775.084(4)(a)(1) still was viable within the gambit of the guidelines. Said section could be used by the trial court as the

maximum sentence authorized by law and a departure sentence could be entered anywhere about the recommended range to the maximum, as long as valid reasons were given. Once again it was declared that habitual offender status itself was not a valid reason.

In response to and to overrule the foregoing decisions, the legislature amended the habitual offender statute, section 775.084, Florida Statute (Supp 1988). The relevant portion of the amended statute section 775.084(4) 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.
>
> 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.
>
> (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.
>
> 2. In the case of a felony of the second degree, for a term of years not exceeding 30, and such offender shall not be eligible for release for 10 years.
>
> 3. In the case of a felony of the third degree, for a term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.
>
> (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).
>
> (d) A sentence imposed under this section shall not be increased after such imposition.
>
> (e) A sentence imposed under this section shall not be subject to the provisions of §921.001. The provisions of chapter 947 shall not be applied to such person. A defendant sentenced under this section shall not be eligible for gain-time granted by the Department of Corrections except that the department may grant up to 20 days of incentive gain-time each month as provided for in §944.275(4)(b).

The statute continues the practice, pursuant to (4)(1) that upon proper notice and sufficient proof, the trial court must determine that the defendant is a habitual offender. This is a non-discretionary determination and only after it is made does the actual sentencing aspects of the statute become operable. Upon finding a defendant to be a habitual offender, section(4)(1) requires the trial court to exercise its discretion by determining if a habitual sentence will be imposed. The trial court after finding that the protection of the public would not be served by a habitual offender sentence, can sentence without regard to this section. This finding then allows the trial court, in the exercise of its discretion, to sentence the defendant under the sentencing guidelines and to depart from the guidelines, either upward or downward, as long as a valid reasons are given. Upon exercising its discretion and finding that the

protection of the public would be served by a habitual offender sentence, the trial court, pursuant to (4)(e) is not longer bound by the sentencing guidelines. The trial court is then bound by the mandatory sentence contained in sections (4)(a) and (4)(b).

The foregoing interpretation was first recognized and accepted in Donald v. State, 562 So.2d 792 (Fla. 1 DCA 1990), review denied, 576 So.2d 291 (Fla. 1991). In Donald, the court found that the "shall" of section (4)(a) and the "may" of section (4)(b) were both obligatory. These findings were based on the proper statutory construction by examining the context which the words were used and the legislative intent. See S.R. v. State, 346 So.2d 1018 (Fla. 1977). The court found both "shall" and "may" to be obligatory and held that "[o]nce the court decides, however, to sentence a defendant as a habitual felony offender or habitual violent felony offender, then the court is required to impose a sentence in conformity with sections 775.084(4)(a) or 775.084(4)(b), Id. at 795. The Second District has also accepted this interpretation State v. Allen, 573 So.2d 170 (Fla.2 DCA 1991).

This is the most reasonable interpretation of the amended statute. The trial court, simply by finding that the protection of the public does not warrant a habitual offender sentence, may fashion any sentence it wishes, as long as said sentence does not violate the sentencing guidelines. Such sentences may include sentences below the guidelines; sentences within the recommended range; sentences within the permitted range; guideline sentences

with periods of probations as long as the total sentence does not exceed the statutory maximum; and sentence above the guidelines as long as they are supported by valid reasons. The trial court, by finding that the protection of the public warrants a habitual offender sentence, then submits to the will of the legislature and must impose without deviation, the sentences listed in (4)(a) and (4)(b).

The Third District disagreed with the foregoing legal analysis. Without giving any thought to the fact that the amended statute can operate outside of the guidelines, the Third District relied on this Court's permanentness decision of State v. Brown, *supra* for sole support that the sentences in (4)(a) and (4)(b) are not mandatory. The court acknowledged conflict with State v. Donald, *supra*, and also noted that Donald did not cite to Brown. Smith v. State, 574 So.2d 1195 (Fla. 3 DCA 1991).

In Henry v. State, 16 FLW D1545 (Fla. 3 DCA June 11, 1991); the Third District finally gave analytical support to its holding in Smith:

> The State argues that the 1988 and 1989 amendments to the habitual offender statute undercut *Brown* on the point at issue here. *See* ch. 89-280, §1, Law of Fla.; ch. 88-131 §6, Laws of Fla. We disagree. *Brown* was announced after adjournment of the 1988 legislature. See 1988 Laws of Fla., at i. While the 1988 legislation made several substantive changes in the habitual offender statute, the legislation did not address the "shall sentence" provision of the habitual offender statute. In 1989, after *Brown* had been announced, the legislature amended another part of the habitual offender statute but reenacted paragraph 775.084(4)(a)-the

"shall sentence" provision-without change. Under ordinary principles of statutory construction, that is at least some indication that the legislature approved of the *Brown* court's construction of the unchanged part of the statute. *See Davis v. Bossert,* 449 So.2d 418, 402 (Fla. 3d DCA 1984).

While we are bound by *Brown* the *Brown* interpretation is also the most logical one. It results in harmonious reading of the sentencing provisions of the paragraphs (4)(a) (habitual felony offender) and (4)(b) (habitual violent felony offender). It is illogical to assume that the legislature intended to confer sentencing discretion in subparagraphs 775.084(4)(a)(2 and (3) ("a term of years not exceeding 30" and "a term of years not exceeding 10") and throughout paragraph 775.084(4)(b) ("may sentence the habitual violent felony offender as follows")(emphasis added), while eliminating sentencing discretion solely for habitual felony offenders convicted of first degree felonies. There is no reasonable or discernible basis for such a distinction. *See S.R. v. State*, 346 So.2d 1018, 1019 (Fla.1977)(interpretation of the word "shall" as a mandatory or discretionary "depends upon the context in which it is found and upon the intent of the legislature as expressed in the statute.").

The interpretation advanced by the State would lead to one other anomaly which should be mentioned. A trial court can opt out of the habitual offender statute "[i]f the court decides that imposition of *sentence* under this section is not necessary for the protection of the public . . . ." §775.084(4)(c)(emphasis added). There will undoubtedly be cases in which the trail court concludes that an extended sentence is necessary for protection of the public-but not a life sentence. Under the interpretation advanced by the State, in such a circumstance the sentencing judge would not only be able to impose a guidelines sentence. We do not think the legislature intended to create an all or nothing, life or guidelines choice in the situation.

Id at 1545 (Footnote omitted).

Upon close scrutiny, the State submits that the Third District's interpretation is not the most logical one and therefore should be rejected by this Court. The Third District erroneously rejected the State's contention that the 1988 and 1989 amendment overruled *Brown*. It did so simply because the amendments did not address the "shall sentences" of (4)(a). However, this analysis completely misses the point since Brown held that sentences under (4)(a) were not mandatory since the section was implicitly repealed by the sentencing guidelines and therefore such a sentence could only be imposed under a valid departure from the guidelines. With the 1988 Amendments, habitual offender sentences were no longer controlled by the guidelines and therefore the mandatory sentences of (4)(a) and the new section of (4)(b) could be imposed regardless of the guidelines. Therefore, the fact that the Amendments did not deal with the "shall" sentence is irrelevant to the analysis of the problem.

The Third District rejection of "shall" in (4)(a) as obligatory because it would create an anomolous situation because the "may" in (4)(b) would be permissive, once again lacks a solid foundation. This supposed anamoly disappears quickly once the proper statutory construction for "may" is applied. As stated hereinbefore, "may" is obligatory when viewed in the entire context of the statute and the legislative intent of the amended statute. Therefore when the "Shall" of (4)(a) and "may" of

(4)(b) are interpreted as obligatory, both sections of the statute are consistent with each other and with the legislative intent of the amendments.

Finally, the Third District rejected the mandatory requirement of (4)(a), by finding that the legislature did not intend to give trial judges varying degrees of discretion under the statute. This position lacks clarity of thought since the legislature clearly meant to give trial judges the discretion to fashion nonhabitual offender sentences even when the defendant was determined to be habitual offender. The legislature also sought to divest trial judges of sentencing discretion only after a determination that a habitual offender sentence was to be impose.

The State submits that to accept the Third District's interpretation of section 775.084, Florida Statutes (Supp. 1988) would violate well established principles of statutory construction. First, the Legislature is presumed to be cognizant of judicial construction of a statute when contemplating making changes in the statute. State ex rel. Quigley v. Quigley, 463 So.2d 224 (Fla. 1985). Second, it is presumed that when the legislature amends a statute, it intends to accord the statute a meaning different from that accorded it before the amendment Seddon v. Harpster, 403 So.2d 409 (Fla. 1981). Applying these principles hereto, it is clear that the legislature amended section 775.084 in order to change the interpretation this Court gave the statute prior to the amendment. Any other

interpretation of the statute would frustrate the legislative intent and would only require further legislation to once again clarify hat it means to gave habitual offenders lengthy mandatory sentences when it is necessary for the protection of the public.

ISSUE III

THE HABITUAL OFFENDER STATUTE IS CONSTITUTIONAL

Preliminarily, Petitioner - sentenced as an habitual felon - is not affected by the law as to sentencing of mere 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 felons can be sentenced more harshly than mere felons.

Appellant, Eddie Mack Lock, arguing against the weight of case law in this state, contends that section 775.084 Florida Statutes (1989) offends both the due process and equal protection clauses of the U.S. and Florida Constitutions. If he has standing Appellant has not preserved the issue raised.

Appellant's arguments have been analyzed in depth by the various district courts and been denied review by this honorable Court. The State contends that Appellant's argument should be summarily rejected on the authority of case law. Wagner v.State,

578 So.2d 56 (Fla. 1st DCA 1991); Wilson v. State, 574 So.2d 1170 (Fla. 1st DCA 1991) review denied, 583 So.2d 1038 (Fla. 1991) Smith V. State, 573 So.2d 1015 (Fla. 1st DCA 1991); Akbar v. State, 570 So.2d 1047 (Fla. 1st DCA 1990); Barber v. State, 564 So.2d 1169 (Fla. 1st DCA), review denied, 576 So.2d 284 (Fla 1990); Arnold v. State, 566 So.2d 284 (Fla. 1991); King v. State, 4557 So.2d 899 (Fla. 5th DCA) review denied, 564 So.2d 1086 (Fla. 1990); Mitchell v. State, 575 So.2d 798 (Fla. 4th DCA 1991) Collins v. State 571 So.2d 583 (Fla. 4th DCA 1990.

CONCLUSION

Based on the foregoing points and authorities the State respectfully requests that this Court disapprove of and quash the instant decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Kevin Briggs, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33830, on this 24th day of December, 1991.

OF COUNSEL FOR RESPONDENT