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IN THE SUPREME COURT OF FLORIDA

CALVIN LEE WEEMS,

Petitioner,

v. CASE NO. 78,543

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CITATIONS

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PRELIMINARY STATEMENT

The court's "corrected order" of October 8 postponed the decision on jurisdiction. Therefore, the State's argument will be in two parts; the first suggesting that jurisdiction not be exercised, and the second responding on the merits. Otherwise, Respondent adopts Petitioner's statement.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement, with the following addition for clarity and emphasis:

Petitioner's conviction on Count II was for robbery with a firearm. (R 38). Pursuant to §812.13(2)(a), Florida Statutes, armed robbery is a first degree felony punishable by imprisonment not exceeding life. This court's discretionary jurisdiction was invoked on the basis of a question certified to be of great public importance.

SUMMARY OF ARGUMENT

A. Jurisdiction

All of the district courts of appeal, correctly and through largely consistent rationale, have concluded that the habitual felon statute applies to first degree felonies punishable by life. The question is no longer one of great public importance. Discretionary jurisdiction should not be exercised. The First District's decision should be allowed to stand.

B. Response on Merits

The habitual felony offender statute (violent and nonviolent) expressly applies to first degree felonies. Merely because the more serious first degree felonies may be punishable by life in prison does not render such felonies into "life" felonies. Section 775.081, Florida Statutes,

does not specify a separate category or type of offense for first degree felonies punishable by life. No such classification of felony exists in Florida. Robbery with a firearm is still a felony of the first degree. Punishment under the habitual felon statute is expressly authorized by cross-reference in the armed robbery statute. Therefore, Appellant was properly sentenced as an habitual violent felon.

All of the district courts have reached the same conclusion, that the habitual felon statute applies to first degree felonies punishabe by life. While obviously not binding on this court, the consistency of those decisions weighs heavily in favor of the opinion below.

ARGUMENT

ISSUE

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

A. Jurisdiction

This court's discretionary jurisdiction has been invoked on the basis of a question certified to be of great public importance. The same question -- whether the habitual felon statute applies to first degree felonies punishable by life -- has been answered affirmatively in recent decisions by all five district courts. See, *for example*, Burdick v. State, 16 FLW D1963 (Fla. 1st DCA July

25, 1991) (en banc)[1] (habitual felon statute applies to burglary with a firearm); Lock v. State, 582 So.2d 819 (Fla. 2d DCA 1991) (violent habitual felon statute applies to a first degree felony punishable by life); Westbrook v. State, 574 So.2d 1187 (Fla. 3d DCA 1991), *appeal pending* (habitual felon statute applies to robbery with a deadly weapon); Newton v. State, 581 So.2d 212 (Fla. 4th DCA 1991) (habitual felon statute applies to first degree felonies punishable by life, but not to life felonies); and Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990) (habitual felon statute applies to kidnapping).

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

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[1] Burdick is pending before this Court (Case No. 78,466). There, a second question was certified. Oral argument is set for January 7, 1992.

Here, the certified question does not involve a difficult issue; whatever great public importance the question once had has been dissipated by unanimity of results reached by the district courts. The State respectfully suggests that jurisdiction be declined, and the decision below be allowed to stand.

B. Response on the Merits

Appellant's argument avoids the real issue. He assumes, without arguing, that first degree felonies punishable by life are equivalent to life felonies for purposes of sentencing under the habitual felon statute.

Appellant is wrong. 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.").

The Legislature, in §812.13(2)(a), could have declared armed robbery a life felony. It did not do so. The only remaining possibility is that the Legislature simply authorized a more severe penalty for armed robbery, while still classifying the offense as a first degree felony.

This logic is consistent with §775.087, Florida Statutes, which reclassifies first degree felonies to life felonies when a firearm is used, and use of a firearm is not an essential element of the offense. Here, use of a firearm is an essential element, therefore Appellant's offense could not be reclassified. To compensate, the legislature authorized a life sentence.

Appellant cites to First District decisions holding that the habitual felon statute does not apply to life felonies. He 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 -- life felony -- was "without merit"). In any event, cases involving life felonies are irrelevant as to Appellant, who was convicted for a first degree felony.

The habitual felon statute expressly applies to first degree felonies. Section 812.13(2)(a), Florida Statutes, under which Appellant was convicted, provides:

> (2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment, or as provided in §775.082, §775.083, or §775.084. [e.s.]

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

The remainder of Appellant's initial brief (p. 8-11) consists largely of two lengthy quotes from Judge Ervin's dissent in Burdick, supra. Ignoring that Judge Ervin was alone in his position, Appellant urges this court to adopt it.

Relying on legislative history, Judge Ervin concluded an enhanced sentence was not intended for first degree felonies. 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 Appellant 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 sentenced under the guidelines) could commit several such felonies and never be subject to treatment as habitual felons. Appellant relies on a position that is twice absurd. This court must not interpret the habitual felon statute in such manner. City of St. Petersburg v. Siebold, 48 So.2d 291 (Fla. 1950).

Finally, the Ervin dissent contains the same flaw as Appellant's opening argument -- it implicitly and without justification equates a first degree felony punishable by life with a life felony. 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.

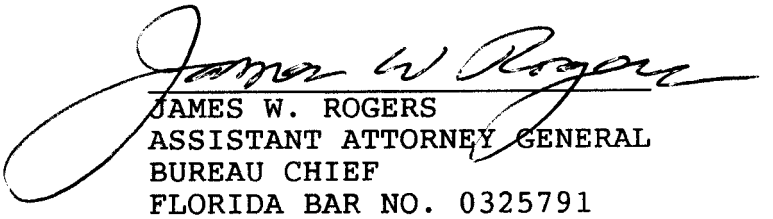
In short, Appellant's offense is a first degree felony carrying a more severe penalty due to use of a firearm. No one can reasonably maintain that by authorizing more severe punishment for use of a firearm, the legislature intended such felons to avoid enhanced punishment when their crimes were "habitual." Appellant's position would give him the benefit of his own wrongdoing, the use of a firearm to commit robbery. That position is absurd, and contrary to legislative intent of all the statutes discussed above. It must be rejected.

CONCLUSION

This court should decline to exercise its discretionary jurisdiction, and let the First District's opinion stand. If review is granted, the decision below must be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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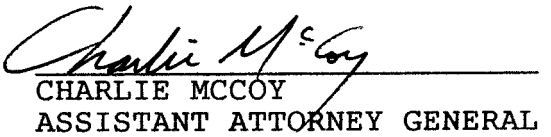

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, Tallahassee, Florida 32301, this 23d day of October, 1991.

Charlie McCoy
Assistant Attorney General