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CLERK, SUPREME COURT,

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

KENNETH DUANE MIXON,

Petitioner,

v.

CASE NO. 78,608

STATE OF FLORIDA,

Respondent.

_____ /

RESPONDENT'S AMENDED BRIEF ON THE MERITS

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IS A FIRST DEGREE FELONY PUNISHABLE BY A
TERM OF YEARS NOT EXCEEDING LIFE
IMPRISONMENT SUBJECT TO AN ENHANCED
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PRELIMINARY STATEMENT

This amended brief is filed in order to reflect the correct substantive provision under which petitioner was convicted.

Petitioner, Kenneth Duane Mixon, appellant below and defendant in the trial court, will be referred to herein as "petitioner." Respondent, the State of Florida, appellee below, will be referred to herein as "the State." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the transcript of proceedings will be by the use of the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts as being generally supported by the record.

SUMMARY OF ARGUMENT

Petitioner claims that he was improperly sentenced as a habitual felony offender after he was convicted of armed burglary, a "first degree felony punishable by life." However, because there is no distinct felony classification of "first degree felony punishable by life," and because Section 775.084, Fla. Stat. (1989) specifically provides for enhancement of all first degree felonies, petitioner was properly sentenced as a habitual felony offender. Furthermore, the legislature's intent to punish so-called first degree felonies punishable by life under the habitual felony offender statute is reflected by the fact that the substantive statute under which petitioner was convicted provides for punishment under Section 775.084, the habitual felony offender statute.

Finally, a construction of Section 775.084 which excludes defendants convicted of life felonies and first degree felonies punishable by life from sentencing under the habitual felony offender statute leads to the absurd result, not intended by the legislature, that habitual felons convicted of the most serious crimes benefit from the diminished penalties of the sentencing guidelines and receive extensive gain-time, while those convicted of lesser crimes do not. This Court therefore should answer the certified question in the affirmative.

ARGUMENT

CERTIFIED QUESTION/ISSUE PRESENTED

IS A FIRST DEGREE FELONY PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE IMPRISONMENT SUBJECT TO AN ENHANCED SENTENCE OF LIFE IMPRISONMENT PURSUANT TO THE PROVISIONS OF THE HABITUAL FELONY OFFENDER STATUTE?

Petitioner contends that the First District erred in affirming his sentence under the habitual felony offender statute based on his conviction for armed burglary, a so-called "first degree felony punishable by life." Petitioner claims that because the felony classification for the crime of which he was convicted is not specifically listed under the enhancement provision of Section 775.084(4), Fla. Stat. (1989), he cannot be sentenced as a habitual felony offender. For the reasons that follow, this argument must fail.

First, petitioner is incorrect in his assertion that there is a felony classification of "first degree felony punishable by life." Section 775.081(1), Fla. Stat. (1989) provides that

[f]elonies are classified, for the purpose of sentence and for any other purpose specifically provided by statute, into the following categories:

- (a) Capital felony;
- (b) Life felony;
- (c) Felony of the first degree;
- (d) Felony of the second degree; and
- (e) Felony of the third degree.

These are the only felony classifications which the legislature has established. Conspicuously absent from this list is a classification dubbed "first degree punishable by life;" rather, all first degree felonies, no matter what their maximum possible penalties, are included within one classification. Thus, because the enhancement or "bump-up" provision of Section 775.084(4) provides an enhanced maximum sentence for all first degree felonies, and because petitioner was convicted of a first degree felony with a maximum penalty of life, petitioner is indeed subject to sentencing under Section 775.084 and he was properly sentenced as a habitual felony offender.

The First District, when faced with this argument in Burdick v. State, 16 F.L.W. D1963 (Fla. 1st DCA July 25, 1991) (en banc), rev. pending, Case No. 78,466 (Fla.), stated:

In essence, appellant here asks us to judicially amend Section 775.081, Florida Statutes to add another classification of felonious crime, that of "first degree felony punishable by life." We decline appellant's invitation and, in doing so, observe that a first degree felony, no matter what the punishment imposed by the substantive law that condemns the particular criminal conduct involved, is still a first degree felony and subject to enhancement by Section 775.084(4)(a)(1), Florida Statutes.

Id. at D1964. The First District was eminently correct in refusing to create a new felony classification of "first

degree punishable by life," and this Court should adopt the Burdick court's reasoning and reject petitioner's argument.¹

Even assuming that there is a separate classification of "first degree felony punishable by life," petitioner's argument must nevertheless fail. Petitioner contends that he should not have been sentenced as a habitual felony offender because the legislature's omission of first degree felonies punishable by life in Section 775.084(4) "evinces its clear intent to exclude this category, especially since such crimes are already punishable by life in Section 775.082(3)(b), Florida Statutes." Petitioner's brief at 6. Petitioner, however, has overlooked the fact that although his crime may be punished by a maximum sentence of life imprisonment, that crime is subject to the sentencing guidelines, as are all life felonies. Thus, although

¹ Petitioner mistakenly asserts that the First District, in Jones v. State, 546 So.2d 1134 (Fla. 1st DCA 1989), held that "a first degree felony punishable by life was properly scored as a life felony on a sentencing guidelines scoresheet." Petitioner's brief at 4, n.1. In Jones, the First District held that "[i]t is clear that there is no distinct felony classification of 'first degree punishable by life,' but only a first degree felony which may be punished [by imprisonment for a term of years or, where specifically provided in the pertinent criminal statute, by life]." Id. at 1135. Accordingly, the Jones court determined that the trial court there did not err in reclassifying the defendant's conviction for a first degree felony, punishable by life, to a life felony pursuant to Section 775.087(1)(a), Fla. Stat. (1987), even though the statute did not specifically provide for reclassification of a "first degree felony punishable by life." Id. Thus, it was the reclassification of the crime to a life felony, and not, as petitioner claims, the fact that the defendant was convicted of a "first degree felony punishable by life," which permitted the trial court to score the offense as a life felony.

petitioner's crime is already punishable by life imprisonment, this does not mean that he will receive a life sentence. Indeed, unless a defendant has a serious prior record or unless he or she receives a departure sentence, it is highly unlikely that a defendant convicted of a life felony or a first degree felony "punishable by life" will receive life imprisonment under the sentencing guidelines. Accordingly, petitioner's assertion that he cannot be sentenced under Section 775.084 merely because the crime of which he was convicted carries a possible maximum penalty of life imprisonment is unavailing.

This Court should interpret Sections 775.084(4)(a) and (b) as provisions which enhance the maximum penalties for all first degree felonies, as well as second and third degree felonies, rather than as provisions containing an exhaustive list of the crimes which are punishable under the habitual offender statute. Only by interpreting the statute in this manner can this Court save it from rendering the absurd result that habitual felons convicted of the most serious crimes (i.e., life felonies and, as petitioner argues, first degree felonies punishable by life) retain the diminished penalties of the sentencing guidelines and the benefit of extensive gain-time, while those convicted of lesser crimes do not. Moreover, this interpretation of Section 775.084(4) explains why the legislature omitted life felonies from the subsection: Because life felonies already carry a maximum possible penalty of life imprisonment, the

maximum penalties for those crimes cannot be "enhanced," and there was no need for the legislature to list them in subsection (4).

Reflective of the legislature's intent in this case to punish all felonies, including "first degree felonies punishable by life," under the habitual felony offender statute is Section 810.02(2)(b), Fla. Stat. (1989), the substantive statute under which petitioner was convicted. Section 810.02(2) provides that armed burglary

is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084.

(Emphasis added). Thus, the substantive statute indicates that the legislature expressly intended for armed burglary to be punishable pursuant to the habitual felony offender statute, despite the fact that Section 775.084(4) does not itself specifically provide for enhancement of the maximum penalty for so-called "first degree felonies punishable by life."

The First District squarely addressed the issue presented in the instant case in Watson v. State, 504 So.2d 1267 (Fla. 1st DCA 1986), rev. denied, 506 So.2d 1043 (Fla. 1987). There, the defendant presented the argument that because Section 775.084, Fla. Stat. (1983) only provided for enhancement of first, second and third degree felonies, it was inapplicable to a defendant convicted of a life felony.

The First District rejected Watson's contention, holding that

the statute under which Watson was sentenced, Section 794.011(3), provides that the crime of sexual battery with great force is a life felony punishable as provided in Sections 775.082, 775.083 or 775.084, Florida Statutes. Section 775.084 is the habitual offender statute. Hence, this argument is without merit. While the legislature did not directly set out how a life felony is to be enhanced in Section 775.084, presumably it was their intent that it be enhanced in the same manner as a first degree felony, the highest offense covered.

Id., 504 So.2d at 1269-1270 (emphasis added). See also Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990) (defendant convicted of kidnapping, a first degree felony punishable by life imprisonment, was properly sentenced as a habitual felony offender where kidnapping statute provided for punishment under Section 775.084).

Should this Court determine that a "first degree felony punishable by life" is indeed a distinct felony classification which differs from the first degree felony classification, the Court should nevertheless answer the certified question in the affirmative by adopting the First District's reasoning in Watson. As was the case in Watson, petitioner in the case at bar was convicted under a substantive statute which provides for punishment under Section 775.084, the habitual felony offender statute. Thus, even though Section 775.084 does not list first degree

felonies "punishable by life" in the enhancement provisions of subsection (4), the legislature clearly intended to make habitual felons convicted of that crime subject to the gain-time restrictions and, more importantly, the exemption for the sentencing guidelines provided by Section 775.084(4)(e), Fla. Stat. (1989). Again, a holding by this Court to the contrary would lead to the absurd result, never intended by the legislature, that habitual felons convicted of the most serious crimes receive greater protections than those convicted of lesser crimes. This Court must avoid such a result. Dorsey v. State, 402 So.2d 1178, 1183 (Fla. 1981) ("In Florida it is a well-settled principle that statutes must be construed so as to avoid absurd results." (Citation omitted)); State v. Webb, 398 So.2d 820, 824 (Fla. 1981).

Petitioner attempts pre-emptively to refute this argument, claiming that a defendant convicted of a first degree felony punishable by life or a life felony is not subject to sentencing under the habitual offender statute, regardless of the fact that the substantive statute under which the defendant is convicted specifically provides for punishment under Section 775.084. Petitioner, relying on Judge Ervin's dissent in Burdick, supra, contends that the legislature's intent not to punish serious offenders under the habitual offender statute is reflected by the fact that the legislature failed to delete references to Section 775.084 when listing the punishments for certain misdemeanors, even after the habitual misdemeanant portion

of Section 775.084 was deleted in 1988. In his dissent Judge Ervin, as quoted by petitioner, stated that

[c]onsidering 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 [the substantive statute] to section 775.084.

Burdick, 16 F.L.W. D1965.

It is true that there are several substantive misdemeanor provisions which still refer to Section 775.084, even though the legislature has abolished the habitual misdemeanant provision. Critically, however, at the time the legislature listed Section 775.084 among the possible penalties for those misdemeanors, there was a habitual misdemeanant provision. Thus, the legislature intended for habitual misdemeanants convicted under the pertinent misdemeanor provisions to remain subject to sentencing under Section 775.084 so long as it was applicable to them. Likewise, at the time the legislature provided for punishment under Section 775.084 in certain substantive criminal provisions for life felonies and first degree felonies punishable by life, there was a habitual felony offender statute, which remains in effect today. Thus, because the legislature clearly intended for defendants convicted of felonies (life or otherwise) in which Section 775.084 is listed as a possible punishment to be subject to sentencing under the habitual felony offender statute so

long as there is one, and because such a provision remains in effect, petitioner's claim that the State cannot rely on the legislature's reference to Section 775.084 in pertinent substantive criminal provisions is without merit.

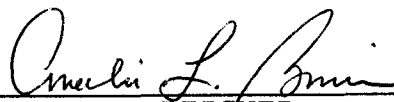
To summarize, the First District in Burdick v. State, supra, correctly interpreted Section 775.081 in determining that there is no felony classification of "first degree felony punishable by life." Hence, because Section 775.084 provides for enhancement of all first degree felonies, petitioner's claim that the habitual felony offender statute is inapplicable to him must fail. Moreover, the substantive provision under which petitioner was convicted specifically lists Section 775.084, the habitual offender statute, as a possible punishment. This reflects the legislature's intent that the so-called "first degree felony punishable by life" of which petitioner was convicted is indeed subject to punishment under the habitual felony offender statute. Finally, an interpretation of Section 775.084 which excludes defendants convicted of life felonies and first degree felonies punishable by life from sentencing under the habitual felony offender statute would lead to the absurd result that habitual felons convicted of the most serious offenses would retain the protection of the sentencing guidelines and gain-time provisions, while those convicted of lesser crimes would not. Accordingly, this Court should answer the certified question in the affirmative.

CONCLUSION

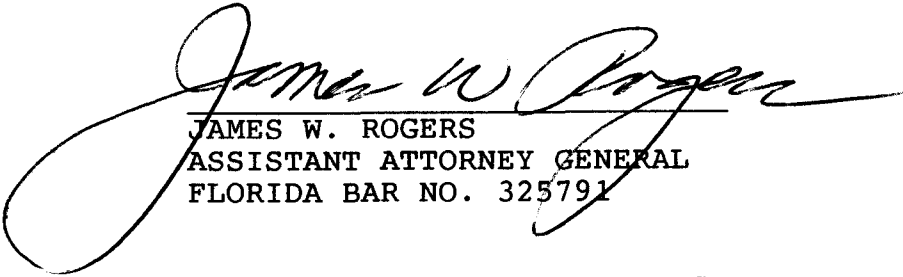
For the reasons set forth herein, the State respectfully requests that this Court answer the certified question in the affirmative.

Respectfully submitted,

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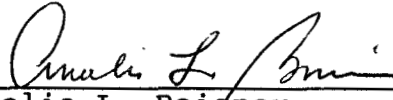
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 7th day of November, 1991.



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