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IN THE SUPREME COURT OF FLORIDA

LARRY D. FORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 78,810

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

# PETITIONER'S INITIAL BRIEF ON THE MERITS

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PETITIONER'S INITIAL BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

The state charged petitioner, LARRY D. FORD, with robbery with a deadly weapon, kidnapping, and battery. (R23-24)[1] The state also filed a notice of intent to seek to have Ford sentenced as a habitual violent offender. (R61-62) In a negotiated plea, Ford pled nolo contendere to robbery with a deadly weapon and false imprisonment, with the understanding that the state would dismiss the battery charge. (T3-4) The parties contemplated a 10-year sentence as a habitual violent offender. (T4) The court conducted an inquiry of Ford, then accepted the plea. (T7-13) The state introduced evidence of prior offenses, and defense counsel stipulated to habitual violent offender status. (T15) The court adjudicated Ford guilty of the offenses, found him to be a habitual violent offender, and imposed concurrent sentences of 10 years in prison on the armed robbery and five years on the false imprisonment. (T17-18, R88-92, 105-107)

[1]Herein, record references are designated (R[page number]).

Ford's permitted guideline range, encompassing several other offenses then pending for sentencing, ranged from 22 years to life imprisonment. (R101)

Timely notice of appeal was filed, and the Office of the Public Defender was appointed to represent Petitioner in this appeal. (R110, 126) The state moved to dismiss the appeal, and after ordering supplemental memoranda, the court of appeal denied the motion in a published opinion. Ford v. State, 575 So.2d 1335 (Fla. 1st DCA), rev. denied, 581 So.2d 1310 (Fla. 1991). The court of appeal subsequently affirmed the judgment and sentence without opinion, but on motion for certified question certified the same question as in Burdick v. State, 584 So.2d 1035, 1039 (Fla. 1st DCA 1991), review pending, no. 78,466:

> 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?

Ford v. State, 16 FLW D2607 (Fla. 1st DCA Oct. 4, 1991) (Appendix A). Ford now seeks discretionary review in this Court under Article V, Section 3(b)(4) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v).

## SUMMARY OF THE ARGUMENT

The habitual offender statute does not provide for enhancement of the sentence for a first-degree felony punishable by life. That category of crime was specifically omitted from the statute by the Legislature. Penal statutes must be strictly construed in favor of the defendant. Although the robbery statute cites to the habitual offender statute as a possible penalty, that citation is of no effect because first-degree felonies punishable by life were expressly omitted from the habitual offender statute. Additionally, a habitual felony offender is statutorily defined in part as "a defendant for whom the court may impose an extended term of imprisonment. . . ." As armed robbery may already by punished by a life sentence, the same as the maximum habitual offender sentence for a first-degree felony, the offense is not one for which the court may impose a term of imprisonment extended beyond that which is otherwise authorized by statute.

In negotiating the plea, both parties believed that robbery with a firearm was an offense subject to the habitual offender statute. That was an incorrect assumption, rendering his plea invalid. He must be allowed to withdraw it. Additionally, if this Court in answering the second question certified in Burdick concludes that a life sentence is mandatory for this offense, petitioner's plea will have resulted in an illegal sentence.

Therefore, this Court should reverse the decision of the First District Court of Appeal below, answer the certified

question in the negative, reverse petitioner's judgment and sentence, and remand for further proceedings.

## ARGUMENT

PETITIONER'S CONVICTIONS AND SENTENCES RESULTED FROM A PLEA AGREEMENT IN WHICH THE PARTIES AND COURT MISTAKENLY AGREED TO AN ILLEGAL SENTENCE, REQUIRING THAT HE HAVE AN OPPORTUNITY TO WITHDRAW THE PLEA.

Petitioner's plea of nolo contendere to armed robbery and false imprisonment in exchange for a total sanction of 10 years as a habitual violent offender obviously rests on an assumption that habitual offender sentencing is lawful for his offenses. That assumption is the subject of the certified question in this case. Herein, petitioner will argue first that armed robbery with a firearm is not a crime subject to enhancement under the habitual offender statute, and second, the parties mistaken assumption to the contrary is a mutual mistake of law rendering the plea invalid.

The first question comes to this Court following a confused course through the first district. In Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990), the First District Court of Appeal held that the 1988 revised habitual offender statute did not apply to life felonies because that category of crimes was not included in the statute. In Gholston v. State, 16 FLW D46 (Fla. 1st DCA December 17, 1990), the court held that it did not apply to first-degree felonies punishable by life because they too were not included in the statute.[2]

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[2]In another context, the court held that a first degree felony punishable by life was properly scored as a life felony on (Footnote Continued)

In Burdick v. State, 584 So.2d 1035 (Fla. 1st DCA 1991) (en banc), review pending, Fla.S.Ct. no. 78,466, the court receded from Gholston and held that the habitual offender statute did apply to first-degree felonies punishable by life, even though they were not included in the statute.[3]

Finally, in West v. State, 16 FLW D2044 (Fla. 1st DCA August 7, 1991), review pending, case no. 78,570, the court reaffirmed its Johnson position and held that life felonies are not subject to the habitual offender sentencing because they are not included within the statute, and because a life sentence is already available as a penalty.

This confusing sequence of decisions prompts two responses: referees should usually stick with the first call they make, because it is most likely the correct one; and the same statute cannot be read two different ways.

The starting point in resolving any question of statutory construction is the wording of the statute itself. Section 775.084 provides that once a defendant is found to be an habitual offender or a violent habitual offender, the following penalties apply:

> (4)(a) The court, in conformity with the procedure established in subsection (3), shall sentence the habitual felony offender as follows:

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(Footnote Continued)
a sentencing guidelines scoresheet. Jones v. State, 546 So.2d 1134 (Fla. 1st DCA 1989).

[3]Judge Ervin dissented, and petitioner will relay heavily upon his views in this brief.

> 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.

Section 775.084(4),(5), Florida Statutes (emphasis added).

Nowhere in the habitual offender statute itself does the category of crime at issue here, first-degree felony punishable by life, appear. Thus, the Legislature's omission of this degree of crime from the statute 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.

In addition, it must be remembered that in construing penal statutes, the most favorable construction to the accused must be used. 49 Fla. Jur. 2d Statutes §195; Section 775.021(1), Florida Statutes:

> 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.

This Court recently applied these principles in Perkins v. State, 576 So.2d 1310 (Fla. 1991) to find that cocaine trafficking is not a "forcible felony" because it was not defined as such by the Legislature.

The lower tribunal's response to this argument in Burdick was both predictable and superficial. The court found that a first-degree felony punishable by life is subject to habitual offender enhancement as a first-degree felony. The court did not mention its contradictory holding in Jones, supra, note 1, but merely cited to Section 775.081(1), Florida Statutes, for the proposition that first-degree felonies punishable by life do not exist as a separate degree of crime.

Judge Ervin's dissent in Burdick sets forth the legislative history and the proper analysis:

> Turning to the second point, that the lower court erred in imposing an enhanced life sentence upon appellant because the substantive underlying offense for which he was convicted is punishable by a maximum penalty of life imprisonment, I agree and would reverse. In my judgment it is illogical to assume that the legislature intended for a trial judge to have the authority to impose an enhanced sentence of life upon one who was already subject to a maximum sentence of life imprisonment for the offense for which he or she was convicted. My conclusion is supported by the legislative history of both sections 775.082 and 775.084, Florida Statutes.
>
> Section 775.082(3)(b), Florida Statutes (1987), provides two methods of punishing persons convicted of felonies of the first degree: "[B]y a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment of a term of years not exceeding life imprisonment[.]" See also Jones v. State, 546

So.2d 1134, 1135 (Fla. 1st DCA 1989). When the 1971 legislative session enacted in the same legislative act section 775.082, establishing penalties for various categories of crimes, as well as section 775.084, creating the habitual offender classifications, the trial court's discretion to impose a maximum sentence within the range specified for all noncapital felonies was left unimpaired and remained so until October 1, 1983, the effective date of guideline sentencing.

Additionally, during the special session of November 1972, the legislature amended section 775.081 by designating "life felony" as an additional category to the list of felonies, and amended section 775.082 by adding subsection (4)(a), establishing as the penalty for a life felony "a term of imprisonment in the state prison for life, or for a term of years not less than thirty." Ch. 72-724, Sections 1,2, Laws of Fla. In 1983, the penalty for a life felony was amended, providing for life felonies committed before October 1, 1983, a term of imprisonment for life or a term of years not less than thirty, and for life felonies committed on or after October 1, 1983, a term of imprisonment for life or a term of imprisonment not exceeding forty years. Ch. 83-87, Section 1, Laws of Fla. The obvious intent of such amendment was to make Section 775.082((3)(a), Florida Statutes (1983), consistent with the newly created guideline sentencing, providing at Section 921.001(4)(a), Florida Statutes (1983), that the guidelines were to be applied to all felonies committed on or after October 1, 1983, except capital felonies, and to all felonies committed prior to October 1, 1983, except capital felonies and life felonies, when sentencing occurred subsequent to such date and the defendant chose to be sentenced under the guidelines. Ch. 83-87, Section 2, Laws of Fla.

Even though the legislature as early as 1972 created the classification of life felonies, it never amended the habitual felony offender statute to include enhanced sentencing for life felonies. As

> previously stated in this dissent, the legislature was no doubt aware that the trial courts' discretion to impose sentence for the substantive offense within the maximum range remained unaffected until the creation of guideline sentencing. Consequently, the result reached by the majority is that persons who commit severe felony offenses categorized as life felonies after October 1, 1983 are eligible for guideline sentencing, whereas persons such as appellant who commit first-degree felonies punishable for a term of years not exceeding life imprisonment are denied such consideration upon being classified as habitual felons, because section 775.084(4)(e) excludes habitual felony sentences from guideline sentencing and other benefits. My thesis is, of course, not that the legislature could not validly make this kind of distinction -- only that it did not intend to make it.

Burdick, 584 So.2d at 1040-1041 (Ervin, J., dissenting) (footnotes omitted).

The state also argued below that because the statutes defining crimes as first-degree felonies punishable by life refer to the habitual offender statute as a possible penalty,[4] the Legislature intended for that enhanced punishment to apply. Again, Judge Ervin's dissent in Burdick sets forth the legislative history and the proper analysis:

> The reference in section 810.02(2) to section 775.084 appears in all noncapital felony and misdemeanor statutes listed under Title XLVI of the Florida Statutes. Thus, even though offenses which are designated life felonies were never made subject to enhanced sentencing under the

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[4] e.g., the statute defining armed robbery, Section 812.13(2)(a), Florida Statutes, and the one defining armed burglary, Section 810.02(2), Florida Statutes.

> habitual felony statute, reference to such statute is nonetheless made within each statute prescribing the penalty for life felonies. See, e.g., Section 787.01(3)(a)5., Fla.Stat. (1980) (kidnapping); Section 794.011(3), Fla. Stat. (1989) (sexual battery). Additionally, although section 775.084 had formerly provided enhanced sentencing for habitual misdemeanants, the legislature, effective October 1, 1988, deleted the provisions relating to habitual misdemeanants. See Ch. 88-131, Sections 6,9, Laws of Fla. In the 1989 Florida Statutes, however the legislature failed to delete references to section 775.084 in providing punishments for specified misdemeanors. See, e.g., Section 784.011(2), Fla.Stat. (1989) (assault), Section 784.03(2), Fla.Stat. (1989)(battery). 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.

Burdick, 1584 So.2d at 1041 (Ervin, J., dissenting).

Another consideration, not expressly addressed in Burdick, compels the conclusion urged here. Section 775.084(1)(a) and (1)(b), Florida Statutes, defines habitual felony offenders and habitual violent felony offenders in part as defendants "for whom the court may impose an extended term of imprisonment. . . ." For a first-degree felony, that extended term is life. S. 775.084(4)(a)1 and (4)(b)1. However, robbery with a firearm is a crime already punishable by a life sentence. S. 812.13(2)(a). Thus, the offense is not one for which the court may impose a term of imprisonment extended beyond that which is otherwise authorized by statute. Robbery with a firearm and other "first-degree felonies punishable by life" are distinct from

first- , second- and third-degree felonies for which the habitual offender statute provides the means to extend the maximum authorized punishment beyond what those who commit such felonies could otherwise receive. From this perspective, the question is not whether first-degree felonies punishable by life are first-degree felonies, but whether they are offenses for which the habitual offender statute authorizes an extended term of imprisonment. Because the same term of imprisonment is authorized elsewhere, the question must be answered in the negative.

For the reasons expressed herein, this Court should hold that robbery with a firearm (as well as other first-degree felonies for which a life sentence is authorized) is not an offense subject to habitual offender sentence enhancement.

If this Court rules as urged above, petitioner must be allowed to withdraw his plea because it was based on a mistaken assumption that he could be habitualized for armed robbery. This result is guided by Jolly v. State, 392 So.2d 54 (Fla. 5th DCA 1981). Jolly involved a mistake of law similar to the one here. The defendant pled guilty to shooting into an occupied vehicle and received a three-year mandatory minimum sentence on the assumption by both parties and the court that the sentence was statutorily mandated. It wasn't. The appellate court held that when a plea incorporates negotiations based on a material mistake of law, the plea is invalid and no legal sentence may be imposed. The sole remedy is either to remand and allow the the defendant to choose whether "to be bound by the

misconceived bargain." Id. at 56. If he does not, the plea must be set aside and the original charges reinstated. Petitioner's plea, like Jolly's, was based on a mutual mistake of law that the negotiated sentence was authorized by statute. Accord, Forbert v. State, 437 So.2d 1079, 1081 (Fla. 1983) (guilty plea based on mistaken understanding that resulting sentence is lawful requires that defendant have opportunity to withdraw the plea when later challenging the sentence).

Another mistaken assumption also vitiates the plea. In Burdick, the court certified a second question:

> IS A LIFE SENTENCE PERMISSIVE OR MANDATORY UNDER THE 1988 AMENDMENT TO SECTION 775.084(4)(a)(1), FLORIDA STATUTES?

584 So.2d at 1039. Ford agreed to a 10-year sentence under the provision. If this Court concludes that a life sentence is mandatory, as did the court of appeal in Burdick, appellant will have received an illegal sentence.

Below, Ford raised the issue of the mandatory vs. permissive life sentence for the first time on rehearing. The court of appeal declined to address the issue, noting the issue had not been briefed and ruling that the challenge "must be raised initially by way of a motion to withdraw or a motion for post-conviction relief." 16 FLW at D2607. While wishing to show no disrespect to the court of appeal, petitioner maintains that this sub-issue may now be raised before this Court, despite its tardy appearance in the proceedings below. As recently held by the Fourth District Court of Appeal, following accepted precedent, a defendant cannot acquiesce in an illegal

sentence, and can attack an illegal sentence at any time. Purvis v. Lindsey, 16 FLW D2673 (Fla. 4th DCA October 16, 1991).

Therefore, if this Court holds either that Ford's armed robbery offense did not subject him to habitual offender enhancement, or that a life sentence is mandatory for his offense under the habitual offender statute, his plea rests on mistaken assumptions and has resulted in an illegal sentence. In either event, the judgment and sentence must be vacated and this cause must be remanded to the trial court so the parties may be given an opportunity to rescind their misconceived bargain.

## CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, Petitioner requests that this Honorable Court reverse his convictions and remand to the trial court for further proceedings.

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon James Rogers, Assistant Attorney General, The Capitol, Tallahassee, 32399, on this 5th day of November, 1991.

GLEN P. GIFFORD

ASSISTANT PUBLIC DEFENDER