IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,015

THE STATE OF FLORIDA,

Petitioner,

vs.

LARRY COTTON,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

ANSWER BRIEF OF THE RESPONDENT

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INTRODUCTION

The Petitioner, the State of Florida, was the Appellee in the District Court of Appeal, Third District. The Respondent, Larry Cotton, was the Appellant below. The parties will be referred to as they stand before this Court. The symbol "R" will designate the record on appeal and the symbol "T" will designate the transcript of the proceedings.

STATEMENT OF THE CASE AND FACTS[1]

The Respondent, Larry Cotton, was tried and convicted of violating Section 812.13, Florida Statutes. Armed robbery is a first degree felony punishable by life imprisonment. (R. 1-3, 19-21).

At the sentencing hearing the Petitioner advised the trial court that a life sentence was mandatory. (T. 320) The trial court sentenced the Respondent to a term of life imprisonment without eligibility for release for a minimum of 15 years. (R. 20-21, T. 323).

On appeal before the Third District Court of Appeal, the Respondent argued that the trial court had committed error by sentencing the Respondent to a life term based on the Petitioner's representation that such a sentence was mandatory.

In the instant case, the Third District Court of Appeal held that the sentence imposed by the trial court was not mandatory and vacated the sentence. The Third District Court of Appeal remanded for re-sentencing so the trial court could consider the sentence as a matter within its discretion. The Third District Court of Appeal also certified the issue to this Court. (R. 32-34). The Petitioner filed a Petition for Discretionary Review by this Court and adopted its brief filed in State v. Washington, Case No. 77,626. This Reply Brief follows.

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[1] In view of the Petitioner's adoption of a brief filed in State v. Washington, Case No. 77,626, the Respondent is including a Statement of the Case and Facts for the Court.

SUMMARY OF THE ARGUMENT

There is a question in the this State as to whether or not the habitual felony offender statute applies to a felony punishable by life. If this Court should decide that the statute does not apply, this Court must remand for re-sentencing.

The Third District Court of Appeal was correct in ascribing a permissive interpretation to the sentencing portion of Section 775.084(4)(b)(1), Florida Statutes. Subsection (b) of the statute contains the word "may". Subsection (a) is the portion of the statute which contains the word "shall".

This Court has construed both provisions of the statute to be permissive in nature. Neither section has been amended by the Legislature, although other portions of the statute were amended in 1988 and 1989. The lack of action by the Legislature implicitly signals approval of this Court's interpretation.

The State failed to serve written notice upon the Respondent of its intention to seek habitual offender status. The failure to serve written notice requires the Respondent's sentence to be vacated. Additionally, this Court should interpret Section 775.084(3)(b), Florida Statutes, as requiring the Petitioner to notice a defendant as to under which section of the habitual offender statute it will seek to have the defendant sentenced.

The statute under which the Respondent was sentenced is unconstitutional on its face, and therefore, the Respondent must be remanded for re-sentencing.

ARGUMENT

I. THE HABITUAL VIOLENT FELONY OFFENDER STATUTE DOES NOT AUTHORIZE OR MANDATE A TRIAL COURT TO ENHANCE A SENTENCE FOR A FIRST DEGREE FELONY PUNISHABLE BY LIFE IN PRISON.

The question of whether or not Section 775.084 applies to a felony punishable by life has been certified to this Court in Burdick v. State, 584 So.2d 1034 (Fla. 1st DCA 1991)(en banc). This Court has granted review of this issue in Tucker v. State, No. 77,854. The Respondent respectfully suggests that should this Court determine that Section 775.084 does not apply to a felony punishable by life, this Court must remand for re-sentencing.

II. A LIFE SENTENCE IS PERMISSIVE, NOT MANDATORY, UNDER SECTION 775.084(4)(b), FLORIDA STATUTES.

Section 775.084(4)(b), Florida Statutes, provides in pertinent part: (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 fifteen years. (emphasis added).

At sentencing, the Petitioner incorrectly informed the trial court that it had no discretion to sentence the Respondent to anything other than a life term with fifteen years minimum mandatory.

In the case at bar, the Petitioner asserted:

> That being the case, since the jury found him guilty of first degree felony punishable by life, under statute 775.084 subsection four A, excuse me, four B, the Court in the case of a

> felony in the first degree, the Defendant is to be sentenced for life and such offender should not be eligible for release for 15 years.
>
> That is the sentence for violent felony, habitual offender, life with a minimum of 15. No discretion to give him anything other that. (T. 320)

The Petitioner incorrectly asserted that the trial court had no discretion in sentencing the Respondent. It is clear that subsection (4)(b) uses the term "may" with reference to sentencing under this provision. A literal reading of the provision of the statute at issue mandates permissive sentencing. Furthermore, this Court has previously held that the term "shall" in subsection (4)(a) does not require a mandatory life penalty. State v. Brown, 530 So.2d 51, 53 (Fla. 1988). It is clear that sentencing under subsection (4)(b) is also discretionary.

In Brown, this Court analyzed the legislative history of the statute and concluded that the Legislature never intended the word "shall", in subsection (a), to be mandatory. The Court determined that the inclusion of the word "shall" was either an editorial error or a misapprehension of the actual legislative intent by the editors.[1] Id. at 53. This Court stated that it was clear that a life sentence was a permissive maximum penalty. Id.

This Court clarified its position in Brown and unequivocally stated that sentencing under the habitual offender statute is discretionary, not mandatory. Brown at 53. The Petitioner's

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[1] It is axiomatic that the statutory revision service cannot rewrite statutes and substitute words used by the legislature. See, McCulley Ford, Inc. v. Calvin, 308 So.2d 189, 193 (Fla. 1st DCA 1974).

reliance on Whitehead and Winters is misplaced in view of this Court's opinion in Brown.

Furthermore, the Legislature specifically addressed a portion of this Court's opinion in Brown in Ch. 88-131, Laws of Fla., and that amendment to the Habitual Offender Statute did not address this Court's interpretation of the statute as being permissive in nature.

It appears from the record on appeal in the instant case that the trial court accepted the Petitioner's assertion regarding the mandatory character of the penalty, and therefore, this Court must vacate the Respondent's sentence.

In Henry v. State, 581 So.2d 928 (Fla. 3d DCA 1991), the Third District Court of Appeal held that the section of the habitual offender statute indicating that the trial court "shall sentence" a defendant convicted of a first degree felony to a life sentence is permissive, not mandatory. In Henry, the trial court also

sentenced the appellant under the misapprehension that a life sentence was mandatory, not permissive.

In Henry, the appellant was convicted of aggravated assault with a firearm and aggravated battery with a firearm. At sentencing, the appellant was found to be a habitual offender. The State argued that, pursuant to the statute, the trial court was required to sentence the appellant to a life term. The Third District Court of Appeal stated that it appeared from the record that the trial court accepted the State's assertion regarding the mandatory character of the penalty.

The decision in Henry follows the decision of this Court in Brown. The Third District Court of Appeal noted that the Legislature amended the statute after the decision in Brown was announced and the amendments did not address or modify the "shall" sentence portion of the statute. The lack of action by the Legislature is a clear indication of approval of this Court's permissive interpretation of the "shall sentence" portion of the statute.

The Petitioner states that the Third District relied upon Brown, a pre-amendment decision, in deciding Henry, however, it should be noted that the Legislature, in amending the statute after the decision in Brown, did not amend the portion of the statute at issue. This lack of action is not irrelevant, as stated by the Petitioner,[3] but rather signals the approval of the Legislature of this Court's interpretation as announced in Brown.

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[3] Initial Brief of the Petitioner at p. 11.

In point of fact, within the amending enactment Ch. 88-131, Laws of Fla., the Legislature created subsection (b), the habitual violent felony offender provision, which states that the "trial court may sentence the habitual violent felony offender as follows...." Section 775.084(4)(b)(1), Florida Statutes Supp. 1988. It would be illogical to conclude that the Legislature intended, by including the term "may", that sentencing under this provision be mandatory.

Applying the Petitioner's rules of statutory construction[4] to this Court's interpretation of the statute, the Legislature amended the statute after this Court's opinion in Brown was announced and therefore is presumed to be cognizant of judicial construction of the term "shall" and still the Legislature did not amend this portion of the statute. Secondly, if the Legislature intended to accord a new meaning to the portion of the statute at issue, it would have amended said provision.

In Delaney v. State, 190 So.2d 578 (Fla. 1981), this Court more fully enunciated the former principle:

> In this state, as in most others, the rule prevails that in reenacting a statute the legislature is presumed to be aware of constructions placed upon it by the highest court of the state, and, in the absence of clear expressions to the contrary, is presumed to have adopted these constructions. Indeed, there is substantial authority for the proposition that such reenactment of the statute bars the court from subsequently changing its earlier construction.

Id. at 581-2. (emphasis added and citations omitted). See also, Walsingham v. State, 250 So.2d 857, 859 (Fla. 1971).

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[4] Initial Brief of the Petitioner at p. 12.

It is a fundamental principle of statutory construction that failure by the legislature to amend a statute which has been construed by the Court amounts to legislative approval of the construction rendered by the Court. See, Johnson v. State, 91 So.2d 185, 187 (Fla. 1956)(en banc). The Legislature amended the habitual offender statute after this Court's decision in Brown was announced and did not amend the provision at issue in the instant case. Clearly the Legislature accepted and approved of the Brown decision.

Another principle of statutory construction was enunciated by this Court in Parker v. State, 406 So.2d 1089, 1091 (Fla. 1981). In Parker, this Court chose not to depart from the plain, literal meaning of the statute at issue, however the Court stated, "Such departure is permitted when a literal interpretation would lead to an illogical result or one not intended by the lawmakers." (citations omitted).

In Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991), the First District Court of Appeal interpreted the previous conviction requirement of the statute. After delineating a detailed examination of the legislative history of this portion of the statute afforded by the court, the court openly went beyond the plain meaning of the statute "in order to carry out the purpose and intent of the statute." Id. at 762. As stated by Judge Zehmer, in a specially concurring opinion:

> Absent clear and unambiguous language evidencing legislative intent to change or abrogate these long-standing legal principles governing the application of the habitual offender statute, the courts should refrain

> from reinterpreting and repudiating those long-standing principles. That is the function of the legislature, not the courts, for the courts cannot ascertain, nor be certain that the statute was not amended with the expectation of the continued application of these long-standing principles.[5]

Barnes at 765.

The law of Florida requires strict construction of criminal statutes. See, Perkins v. State, 576 So.2d 1310, 1312 (Fla. 1991) and State ex rel Lee v. Buchanan, 191 So.2d 33 (Fla. 1966). If any reasonable doubt exists as to the meaning of a statute, the doubt must be construed in favor of the accused. See, Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) and Perkins v. State, 576 So.2d 1310, 1312 (Fla. 1991).

This concept is also embodied in Section 775.021(1), Florida Statutes which states:

> The provisions of this Code and the offenses defined by other statutes shall be strictly construed; when language is susceptible of differing constructions, it shall be construed most favorably to the accused.

The Petitioner relies, in part, upon the decision in Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990), wherein the First District Court of Appeal held that the "may" sentence provision in the statute is mandatory, not permissive. The Donald decision is fundamentally flawed in that it did not address this Court's

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[5] Judge Zehmer also noted the inconsistent positions taken on the issue by the Office of the Attorney General, a factor also present in the case at bar. In State v. Washington, Case No. 77,626, the Petitioner expressly conceded, in its brief filed with the Third District Court of Appeal, that sentencing under Section 775.084(4)(b)(1) is discretionary in nature. The Petitioner must be held to its previously stated position. See, Answer Brief of the Respondent at p. 8-9.

opinion in Brown and, more importantly, the Donald decision runs counter to this Court's decision in Brown.

The court in Donald stated that its decision was based on the legislative intent underlying the statute, however, the Donald decision did not make any reference to the legislative history of the statute, nor did the court refer to a study of the same. This Court clearly studied the legislative history to discern the legislative intent underlying the statute in order to render its decision in Brown.

It is respectfully submitted that the decision reached in Donald was incorrect and this Court's opinion in Brown, as well as the Third District decision in Henry, correctly analyzed legislative intent and correctly applied the sentencing provisions of the statute in a permissive manner. This Court must affirm the decision of the Third District Court of Appeal and remand for re-sentencing of the Respondent.

Because the trial court failed to recognize, and thereby failed to exercise its proper discretion, the Third District Court of Appeal was correct in remanding this cause for re-sentencing.

See, Smith v. State, 574 So.2d 1195 (Fla. 3d DCA 1991)(justice requires vacating of life sentence where appellate court uncertain whether or not the trial court believed that it could decline to impose life sentence); Berezovsky v. State, 350 So.2d 80 (Fla. 1977)(where trial court imposed a sentence of 30 years under misapprehension that it was required to do so pursuant to statute, and that probation was not available, sentence reversed and

remanded) and Doe v. State, 499 So.2d 13 (Fla. 3d DCA 1986) (where trial court imposed a five year minimum mandatory drug sentence under misapprehension that it could not reduce the sentence below the sentence recommended by the State, sentence reversed and remanded for re-sentencing).

III. THE PETITIONER FAILED TO MEET THE REQUIREMENT OF SECTION 775.084(3)(b), FLORIDA STATUTES THAT WRITTEN NOTICE TO BE SERVED ON THE DEFENDANT AND HIS ATTORNEY PRIOR TO THE IMPOSITION OF SENTENCE SO AS TO ALLOW THE PREPARATION OF A SUBMISSION ON BEHALF OF THE DEFENDANT.

Upon the conviction of the Respondent, the Petitioner announced its intention to seek an enhanced sentence and filed a notice with the clerk of the court. (R. 16, T. 311). The certificate of service indicates that counsel for the Respondent was served, however there is no indication that the Respondent was served with a copy of the notice. The failure of the State to provide the Respondent with written notice is reversible error. Furthermore, the Respondent is not required to demonstrate harm as a result of the State's failure to provide him with written notice.

In Edwards v. State, 576 So.2d 441 (Fla. 4th DCA 1991), at a plea conference, the appellant was told by the trial court that his failure to appear at sentencing would cause him to be sentenced as a habitual offender. No written notice was provided to the appellant at the plea conference hearing.

The appellant failed to appear as ordered but surrendered himself approximately one week later. During the subsequent hearing, the State provided the appellant with written notice of intent to habitualize. The trial court then sentenced the

appellant to fifty years pursuant to the habitual offender statute. On appeal, the State argued that the appellant was not surprised by the habitual offender classification. The court found that the lack of harm to the defendant was not the proper test to apply and, therefore, the sentence was illegal. Id. at 442. The Fifth District has also found the failure to serve written notice on a defendant to be reversible error.

The purpose of the notice requirement is to allow an individual to prepare a submission on his behalf to ameliorate the possible sentence. A plain reading of the statute requires service on both the defendant and his attorney. In the instant case the Respondent did not receive written notice of the State's intention to seek an enhanced sentence.

See, Sweat v. State, 570 So.2d 1111, 1112 (Fla. 5th DCA 1990)(the record on appeal does not show that advance written notice of the State's intention to seek enhanced sentence was served on the appellant as required by law.) and Nunziata v. State, 561 So.2d 1330, 1331 (Fla. 5th DCA 1990)(this court has recently held that the statute does not require notice to be filed with the court, but only that the notice be served on the defendant and his attorney.)(emphasis in the original). See also, Grubbs v. State, 412 So.2d 27 (Fla. 2d DCA 1982). But see, Brown v. State, 575 So.2d 1360 (Fla. 3d DCA 1991) and Meehan v. State, 16 F.L.W. 3095 (Fla. 1st DCA December 9, 1991).

In Massey v. State, 16 F.L.W. 2765 (Fla. 5th DCA October 31, 1991)(en banc), the State failed to serve written notice upon the

defendant. The State asserted that because the required notice was filed of record and the defendant had actual knowledge of the said notice, the intent of the statute had been met.

The Fifth District Court of Appeal receded from its initial opinion wherein it found that lack of harm to the defendant is not the proper test to apply. On rehearing, the court stated that the State, by affirmatively proving no harm, can bring the technical error of failure to serve the defendant within the purview of the harmless error rule.

A review of the transcript of the sentencing hearing in the instant case reveals that the Respondent was harmed by the failure of the Petitioner to serve him with notice, specifically notice of its intention to seek sentencing under subsection (b).

> A. The Petitioner should be required to notify a defendant as to under which provision of the statute it will seek to have the defendant sentenced.

In the instant case, neither the Respondent, nor his attorney, was given notice that he would be sentenced under Section 775.084(4)(b), Florida Statutes. The consequences of a being sentenced as a habitual violent felony offender are much harsher that those under the habitual felony offender provision. As a result of being sentenced pursuant to the former provision, the Respondent was sentenced to a life term with fifteen years minimum mandatory incarceration and loss of gain time. The disparity of sentencing of Sections (4)(a) and (4)(b) necessitates proper notice to a defendant as to under which portion of the statute the State is seeking to have a defendant sentenced.

The statute should be construed as requiring the Petitioner to notify a defendant as to which portion of the statute it will seek to have the defendant sentenced. Because the State is required to notice a defendant prior to the sentencing hearing, the State may be presumed to have determined which portion of the statute it intends to utilize.

Requiring the State to specify subsection (a) or (b) would not burden the State because, as stated above, the State is already required by the statute to notify the defendant, as well as counsel, of its intention to seek habitualization. It would be more efficient for the State to specify which subsection of Section 775.084, Florida Statutes it plans to employ, especially in view of the fact that the Petitioner is already required to prove that the defendant meets the requirements of either section of the statute, and therefore, has obviously already determined which section of the statute it intends to advance as the basis for sentencing.

In addition, such a requirement would better fulfill the underlying intent of the notice requirement which is to allow a defendant to prepare a submission on his or her behalf for sentencing. Because each subsection contains different requirements which must be met before one qualifies for habitualization, it is reasonable to require meaningful notice to the defendant as to which subsection, and its corresponding requirements, the State will seek habitualization.

In the instant case counsel for the Respondent did not prepare such a submission because neither the Respondent, nor counsel, was notified of the State's intention to seek an enhanced sentence under the habitual violent felony offender section. This clearly prejudiced the Respondent. Trial counsel argued:

> However, when the State is asking under the habitual violent felony offender, that was never done in the written notice which the statute requires under 885.0836 4-B. (sic)
>
> According to my understanding, it didn't specify that they were seeking a sentence under habitual felony violent offender for which there is a difference in not only the minimum mandatory but in the time served. (R. 321-322).

Trial counsel asked the court to consider the lack of evidence presented by the State and the Respondent's mother's testimony that the Respondent has changed and reformed. (R. 322). Trial counsel also asked the court to sentence the Respondent under subsection (4)(a), as opposed to subsection (4)(b). (R. 322). It is clear that trial counsel was unprepared to respond to sentencing under subsection (4)(b). Had the Respondent and his attorney been notified of the State's intentions, the submission would have addressed the specific requirements of subsection (4)(b).

The Respondent almost did not meet the requirements of this subsection. His previous convictions were either entered on the same date, and therefore count as one conviction (see, Lampley v. State, 583 So.2d 1109 (Fla. 3d DCA 1991); Wesley v. State, 578 So.2d 418 (Fla. 4th DCA 1991) and Goodman v. State, 578 So.2d 11 (Fla. 1st DCA 1991), or misdemeanors which do not count as

qualifying convictions. Only an illegal weapon possession charge in Broward County allowed the Respondent to be sentenced as a habitual violent felony offender.[6]

Due to the State's failure to notify the Respondent or his attorney of their intention to seek habitual violent felony offender status, the Respondent was deprived of an opportunity to submit any argument based on these facts. The lack of proper notice clearly prejudiced the Respondent and requires reversal.

IV. SECTION 775.084, FLORIDA STATUTES (1989), AS AMENDED, VIOLATES THE SINGLE SUBJECT RULE OF ARTICLE III, SECTION 6, FLORIDA CONSTITUTION AND IS UNCONSTITUTIONAL.

The general rule of law in Florida requires an appellant to present an issue to the lower court in order to preserve the issue for review on appeal. There is, however, an exception to this rule in the case of fundamental error. This is especially true where the issue on appeal concerns the facial invalidity of a statute. Trushin v. State, 425 So.2d 1126, 1129 (Fla. 1982).

The statue under wihich the Respondent was sentenced was recently declared unconstitutional in Johnson v. State, 16 F.L.W. 2876 (Fla. 1st DCA Nov. 15, 1991), because it violates the single subject rule of Article III, section 6 of the Florida Constitution. In that case the court found the sections four through eleven, which pertain to Chapter 493 provisions governing private investigation and patrol services, failed to have a natural or

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[6] Additionally it should be noted that the Respondent barely met the "five year" requirement of Section 775.084(b)(2). Mr. Cotton was released from prison on or about, October 1, 1985, (T. 319), and was convicted on July 11, 1990. (R. 20-21).

logical connection to the primary subject matter of the statute. The court certified the question as being of great public importance. Should this Court consider this issue and find the statute to be unconstitutional, the Respondent must be re-sentenced.

CONCLUSION

Based on the foregoing argument and authority, the Respondent prays this Honorable Court affirm the opinion of the Third District Court of Appeal and remand for re-sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Marc Brandes, Office of the Attorney General, 401 N. W. 2nd Avenue, Suite N-921, Miami, Florida 33128, this 17th day of January, 1992.

By: C A Greenfield
Cynthia A. Greenfield