IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO.: 79,022

MICHAEL D. KROLL,

Respondent.

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner adopts the preliminary statement set forth in its Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Petitioner adopts the statement of the case and facts set forth in its Brief on the Merits.

SUMMARY OF THE ARGUMENT

As the reasons for the requirement that prior convictions must be sequential for habitual felony offender sentencing are no longer valid, the rule of law set forth in Joyner v. State, 30 So.2d 304 (Fla. 1947), no longer applies to the 1989 version of the habitual felony offender statute. The plain language of the statute thus controls its interpretation.

ARGUMENT

ISSUE

WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (1989), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF ANY COMBINATION OF TWO OR MORE FELONIES IN THIS STATE OR OTHER QUALIFIED OFFENSES" REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PREVIOUS OFFENSE?

Petitioner again urges this Honorable Court to answer the certified question in the negative.

The Respondent's merits brief places much reliance on the perception voiced in the majority opinion in Barnes v. State, 576 So.2d 761 (Fla. 1st DCA 1991) review pending, case no. 77,751 that the Legislature failed to use "unmistakable language" to achieve its objective, that objective being to allow trial courts to sentence a defendant as a habitual offender if, inter alia, the defendant has two or more prior felony convictions within five years, regardless of whether the convictions happened to have been entered on the same date. It should be noted that the five dissenting judges in Barnes are of the opinion that the Legislature did use unmistakable and plain language. Although Barnes concerned the application of the 1988 version of the habitual offender statute, the same arguments apply to the 1989 version.

Respondent would have this Court blindly adhere to a precedent which was explicitly based on a statutory scheme which existed forty four years ago but which has been radically transformed. The basis for the "Joyner-Shead" rationale has been removed and that rationale now floats freely, unencumbered by logic and substance.

In 1988 the Legislature amended §775.084. Pursuant to §775.084(1)(a)(1)(a), Florida Statutes (1987), a defendant could be sentenced as a habitual felony offender if the trial court found that the defendant had "(p)reviously been convicted of a felony in this state." The statute was amended in 1988 to require in subsection (1)(a)(1) that "(t)he defendant has previously been convicted of two or more felonies in this state."

Clearly, the 1987 version requiring one prior felony contained no unspoken sequentiality requirement. It is thus incorrect to assume that the 1988 and 1989 requirements of two prior felonies somehow added on an unspoken sequentiality requirement. Respondent's argument in this regard must fail.

Respondent argues that "the Legislature is presumed to know the existing law." Section 775.084, Florida Statutes (1987) contained no sequentiality requirement whatsoever, and there is very little likelihood that the Legislature could have anticipated that a 1947 case would be applied to defeat the clearly-expressed language of its 1988 and 1989 amendments.

There had been no multiple-conviction provision for habitual offender sentencing in Florida since 1971 (Section 775.10, Florida Statutes (1969) provided for a mandatory term of life imprisonment for a fourth felony conviction). Thus from 1971, when §775.084 was enacted, to 1988, when the two conviction requirement was imposed, the rule announced in Joyner had ceased to exist. Consequently it is ludicrous to assert that the Legislature is presumed to know of Joyner when the Joyner rationale was not existing law.

Respondent further argues that the basis of the "Joyner-Shead rationale" is that an opportunity for reform and rehabilitation must be given between convictions. Petitioner asserts that this rationale is no longer viable in light of the legislative intent set forth in Rule 3.701(b)(2), Fla.R.Crim.P., which states that "(t)he primary purpose of sentencing is to punish the offender. Rehabilitation . . . must assume a subordinate role." Rule 3.701 has been adopted by the Legislature. See Laws 1984, c. 84-328, §1; Laws 1986, c. 86-273, §2; Laws 1987, c. 87-110, §1; Laws 1988, c. 88-131, §1.

The "fundamental principles of recidivism statutes" urged by Respondent no longer apply in Florida in light of the legislative intent expressed above and in light of Rule 3.701(d)(1), Fla.R.Crim.P., which precludes sequential convictions in many instances by requiring the consolidation of all pending offenses. See also Clark v. State, 16 F.L.W. S43 (Fla. January 3, 1991).

It is important to note that trial courts have the discretion in the individual case of whether or not to impose a habitual offender sentence even if all the statutory requirements are satisfied. Section 775.084(4)(c), Florida Statutes (1989), specifically states that a habitual offender sentence need not be imposed "(i)f the court decides that imposition of sentence under this section is not necessary for the protection of the public." There is thus no danger that all defendants with two prior felony convictions will be sentenced wholesale as habitual offenders. Answering the certified question in the negative will, however, ensure that those offenders deserving of a sentence under §775.084 will be treated accordingly, as the Legislature intended and pursuant to trial courts' reasoned discretion.

There are at present approximately fourteen cases pending before this Court concerning the instant certified question, both on the 1988 and 1989 versions of §775.084, Florida Statutes. In virtually every case, the respondents' prior convictions arose out of separate criminal episodes which occurred at different times, but which were consolidated for purposes of conviction and sentence.[1] It should not escape this Court's attention that a defendant may have an extensive prior history of repeated felony

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[1] For example, in Barnes, the Respondent was convicted on one day of narcotics violations occurring on separate days. In State v. Johnson, Case No. 77,819, the respondent was convicted on one day of possession of cocaine, dealing in stolen property, and sale of cocaine, all of which occurred on different days over a period of two years.

offenses over a period of years, but if the offenses were consolidated for adjudication, even though charged separately, under Respondent's interpretation the defendant would not qualify as a habitual offender. There can be no doubt that the Legislature did not intend this result.

CONCLUSION

Petitioner again urges this Honorable Court to answer the certified question in the negative and hold that §775.084(1)(a)(1), Florida Statutes (1989) should be applied according to the plain language expressed by the Legislature therein, thus reversing the majority opinion in the en banc decision in Barnes and reinstating the Respondent's habitual felony offender sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 3rd day of February, 1992.

Suzanne G. Printy
Assistant Attorney General