IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 79,023

ANTONIO LAVET MALONE,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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Preliminary Statement

Petitioner, plaintiff/appellee below, will be referred to herein as either "the State" or "Petitioner". Respondent, Antonio Lavet Malone, defendant/appellant below, will be referred to herein as "Respondent". A copy of the opinion of the case on review is attached hereto as Exhibit "A".

References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Between August 31 and September 22, 1990, undercover police officers bought from Respondent 7 rocks of cocaine for $20 per rock on seven separate occasions (R 1-8). Probable cause affidavits issued on October 3 (R 1-8), and Respondent was arrested on October 5 for all seven sales (R 1). During a search incident to his arrest, two more rocks of cocaine were found on Respondent (R 1). Respondent was charged by information filed October 16, with eight counts of sale or delivery of cocaine, a second-degree felony, and eight counts of possession of cocaine, a third-degree felony (R 9-25).

The state filed a notice of intent to seek habitual offender status in all cases, nos. 90-1447 through 90-1454, on October 17 (R 26-33).

On February 7, 1991, Respondent entered a plea of nolo contendere in open court to all charges with the understanding that the court would treat the state's recommendation of 30 years as a cap (R 283, R 36-37).

At sentencing on April 3, the state introduced certified copies of judgments and convictions in case no. 89-1142 (R 38-41A), case no. 89-1141 (R 42-46), and case no. 89-1140 (R 47-52), all for sale of cocaine and all entered on January 4, 1990. Defense counsel argued that Respondent

should not be classified as a habitual offender because his prior convictions had occurred on the same day (R 4). The court found Respondent did meet the criteria for habitual offender status, classified appellant as a habitual offender, and sentenced Respondent to 30 years in prison on all the second-degree felonies, to run concurrently, and to 10 years concurrent on all the third-degree felonies (R 279-280).

On appeal, the First District Court of Appeal reversed Respondent's habitual offender sentence on the authority of Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991), review pending, case no. 77,751 (Fla.). The First District certified in this case the same question previously certified in Barnes (Exhibit A). Notice to invoke this Court's discretionary jurisdiction was timely filed on December 2, 1991.

SUMMARY OF THE ARGUMENT

The State requests that this Honorable Court answer the certified question in the negative and hold that the plain language of §775.084(1)(a)(1), Florida Statutes (1989), which requires that a defendant must have ". . . previously been convicted of any combination of two or more felonies. . ." to be sentenced as a habitual felony offender in no way requires that each of the felonies be committed after conviction for the immediately previous offense.

This result is correct because the plain language of the provision reflects the legislative intent to habitualize a defendant convicted of two or more felonies, regardless of the order of conviction. The line of cases which state that there must be an interim between convictions were based on a 1947 Florida Supreme Court case in which this Court reached this result by construing the then-existing recidivist statutory scheme which is materially different from the 1988 habitual offender statute. The 1988 and 1989 statutes on their face mandate the result arrived at by the trial judge in this case.

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.

The State respectfully requests that this Court answer the certified question in the negative.

In the opinion below, the appellate court reversed Respondent's habitual felony offender sentence because the predicate convictions relied upon for habitual offender sentencing occurred on the same date. The court relied on its recent en banc opinion in Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991), review pending, case no. 77,751 (Fla.).[1]

In Barnes, five dissenting judges of the court agreed that the plain meaning of §775.084(1)(a)(1), Florida Statutes (Supp. 1988), does not require, in order for a defendant to be sentenced as a habitual felony offender, that the underlying felony convictions must be separated in time or that the convictions be obtained in separate proceedings. The five dissenting judges recognized that

[1] Oral argument in Barnes is set for January 8, 1992.

since the statute is neither ambiguous nor unclear, and since no other obvious legislative policy was expressed which conflicts with the statute's literal interpretation, that the plain meaning necessarily controls its construction. The dissenting judges would end the inquiry there and follow the unambiguous language of the statute.

Five of the six judges comprising the majority agreed that the plain language did not require that habitualization must be supported by sequential convictions, stating that ". . . we are aware that our holding interprets the statute in a manner that goes beyond the plain language of the provision." 16 F.L.W. at D563. These five judges reasoned, however, that

> There is no indication that in amending section 775.084 the legislature sought to alter the purpose behind the habitual offender provision or to excise the sequential conviction requirement that had long been a part of the law. Had the legislature intended to overturn long-standing precedent and the construction that the courts had placed on the statute, then it was obliged to use unmistakable language to achieve its objective.

576 So.2d at 761.

The majority and the dissent, however, concurred in certifying the following question as one of great public importance:

> Whether section 775.084(1)(a)1, Florida Statutes (Supp. 1988), which defines habitual felony offenders as those who have "previously been convicted of two or more felonies," requires that each of the felonies be committed after conviction for the immediately previous offense?

Section 775.084, Florida Statutes (Supp. 1988), the statute under which Barnes was sentenced, states in pertinent part:

> (1) As used in this act:
>
> (a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if it finds that:
>
> 1. The defendant has previously been convicted of two or more felonies in this state;
>
> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later;
>
> 3. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this section; and
>
> 4. A conviction of a felony or other qualified offense necessary to the operation of this section has not been set aside in any postconviction proceeding.

Petitioner maintains that the statute clearly provides for the sentencing of a defendant as a habitual felony offender if two or more felony convictions have been entered within five years of the instant conviction, regardless of whether the prior convictions were adventitiously entered the same day.[2]

Initially, §775.084, Florida Statutes (1988 Supp. and 1989) on their face clearly do not require that one previous conviction must precede another previous conviction for a defendant to qualify for habitual offender status. The 1989 statute clearly states that a defendant must only have ". . . previously been convicted of any combination of two or more felonies . . ." . To require that there must be an interim between the two or more convictions ignores the plain meaning of the statute and leads to an absurd result, especially where a defendant habitually engages in felonious behavior of an ongoing nature but, for one reason or another, is convicted and sentenced on one day for multiple separate offenses.

This Court has repeatedly held that unambiguous statutory language must be accorded its plain meaning. Carson v. Miller, 370 So.2d 10 (Fla. 1979). See also Graham v. State, 472 So.2d 464 (Fla. 1985) (when the language of a

---

[2] The 1989 amendment to §775.084(1)(a)(1) does not alter this result.

penal statute is clear, plain, and without ambiguity, effect must be given to it accordingly. Where the language of a statute has a definite and precise meaning, courts are without power to restrict or extend that meaning); Jenny v. State, 447 So.2d 1351 (Fla. 1984) (where a statute is unambiguous and clear upon its face, courts must accord the statute its plain meaning and are not free to construe it otherwise); State v. Egan, 287 So.2d 1 (Fla. 1973) (where legislative intent as evidenced by statute is plain and unambiguous, then there is no necessity for any construction or interpretation of the statute and effect need only be given to the plain meaning of its terms. Rules of statutory construction are useful only in the case of doubt and should never be used to create doubt, but only to remove it); Leigh v. State ex rel. Kirkpatrick, 298 So.2d 215 (Fla. 1974) (when the terms and provisions of a statute are plain, there is no room for judicial or administrative interpretation, and the Legislature is presumed to have meant what it said); Ervin v. Peninsular Tel. Co., 53 So.2d 647 (Fla. 1951) (where the intent of a statute is clear on its face and when it is susceptible of but one construction, that construction must be given); Citizens of the State of Florida v. Public Service Commission, 435 So.2d 784 (Fla. 1983) (where the words of a statute are clear and unambiguous, judicial interpretation is not appropriate to displace the expressed intent); White v. Pepsico, Inc., 568 So.2d 886 (Fla. 1990)

(statutes are construed to effectuate the intent of the Legislature in light of public policy. First, the court must look to the plain and ordinary meaning of the language in the section at issue).

Before the 1988 amendment to §775.084, Florida Statutes, in order to be sentenced as a habitual felony offender, a defendant need only have been previously convicted of one felony prior to the instant conviction. See §775.084(1)(a)(1)(a), Florida Statutes (1987). The provision was amended in 1988 to provide that a habitual felony offender must previously have been convicted of two felonies prior to the instant conviction. See Chapter 88-131, Laws of Florida 1988.

The clear intent of the Legislature in amending the statute was to merely require two predicate felonies instead of one. To read into the new statutory language a requirement that did not exist in the 1987 statute and which was not even hinted at by the Legislature is patently absurd and completely rejects the plain legislative expression. This Court has held that the result of a legislative modification of a statute changes the law of Florida so that the Court's previous decisions in that regard are no longer controlling. Dees v. State, 19 So.2d 705 (Fla. 1944).

In §775.084, Florida Statutes (Supp. 1988 and 1989), the Legislature specifically listed four predicate conditions for sentencing a defendant as a habitual felony offender [§775.084(1)(a) (1-4)]. The decision in Barnes effectively adds a fifth condition in direct contravention of the well-settled rule that the express mention of one thing implies exclusion of another (expressio unius est exclusio alterius). See e.g. Thayer v. State, 335 So.2d 815 (Fla. 1976).

The district court of appeal cases which have determined that prior convictions entered the same day do not qualify as the "two or more felonies" required by the 1988 version of the habitual offender statute have relied on this Court's opinion in Joyner v. State, 30 So.2d 304 (Fla. 1947), and the line of cases which follow Joyner. The rationale espoused in Joyner, however, no longer applies to the 1988 habitual offender statute. This Court's decision in Joyner was predicated on the particular configuration of the then-existing habitual offender statutory scheme found in §§775.09 and 775.10, Florida Statutes (1941), which were as follows:

> 775.09 Punishment for second conviction of felony. - A person who, after having been convicted within this state of a felony or an attempt to commit a felony, or under the laws of any other state, government or country, of a crime which, if committed within

this state would be a felony, commits any felony within this state is punishable upon conviction of such second offense as follows: If the subsequent felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then such person must be sentenced to imprisonment for a term no less than the longest term nor more than twice the longest term prescribed upon a first conviction.

775.10 Punishment for fourth conviction of felony. - A person who, after having been three times convicted within this state of felonies or attempts to commit felonies, or under the law of any other state, government or country of crimes which, if committed within this state, would be felonious, commits a felony within this state shall be sentenced upon conviction of such fourth or subsequent offense to imprisonment in the state prison for the term of his natural life. A person to be punishable under this and the preceding section need not have been indicted and convicted as a previous offender in order to receive the increased punishment therein provided, but may be proceeded against as provided in the following section.

In explaining this two-tiered system, the court stated:

To constitute a second or a fourth conviction within the purview of Sec. 775.09 or Sec. 775.10, supra, the information or indictment must allege and the evidence must show that the offense charged in each information subsequent to the first was committed and the conviction therefor was had after the date of the then last preceding conviction. In other words, the second conviction must be alleged and proved to have been for a crime committed after the first conviction.

> The third conviction must be alleged and proved to have been for a crime committed after both the first and second convictions, and the fourth conviction must be alleged and proved to have been for a crime committed after each of the preceding three convictions. . .
>
> If there was no second offense chargeable as contemplated by the statute certainly such second conviction could not be used as a basis for charging the offense contemplated by Sec. 775.10, supra.
>
> Sec. 1 of the 1927 Act, now Sec. 775.09, fixed the standard for the determination of the question as to whether or not one could be prosecuted as a second or subsequent offender and, as hereinbefore, said, without it being required that the second offense should have been committed after the first conviction and that the third offense should have been committed after the second conviction, and so on. Under the standard so fixed, the requirement is clearly apparent . . .

Joyner, supra at 306.

The two-tiered system of habitualization for felony offenses has not existed since 1971, when the Legislature enacted Section 775.084, Fla. Stat. (1971), which stated in pertinent part that in order to be habitualized, it must be demonstrated that

> (c) The defendant has previously committed a felony in this state or another qualified offense which was committed after the defendant's seventeenth birthday. For the purpose of this subsection, the term "qualified offense" includes any crime in violation

> of a law of another state or of the United States that was punishable under the laws of such state or the United States at the time of its commission by the defendant by death or imprisonment exceeding one year.
>
> (d) The felony for which the defendant is to be sentenced was committed within five years of the date of the commission of the last prior felony or other qualified offense of which he was convicted, or within five years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later.

The 1971 change from the tiered system signaled an end to the sequential conviction requirement construed in Joyner. The Joyner court's rationale for requiring sequential convictions was twofold. The first reason was based on the configuration of the statutes:

> This construction is implicit in the statutes. The statute was originally chapter 12022, Acts of 1927. The present Sections (775.09, 775.10 and 775.11, supra, were respectively sections 1, 2 and 3 of that Act, Sec. 775.09, supra) provide in terms that the second offense must have been committed subsequent to the first conviction.

Joyner, supra at 306.

The second reason was:

> because the purpose of the statute is to protect society from habitual criminals who persist in the commission of crime after having been theretofore

> convicted and punished for crimes previously committed. It is contemplated that an opportunity for reformation is to be given after each conviction.

Joyner, supra at 306.

Petitioner submits that there is no indication whatsoever that the "opportunity for reformation" policy of the halcyon days of the 1940s continues to apply to the crime-ridden 1990s. The majority opinion in Barnes finds that there has been no change in this policy, stating:

> Having examined the staff analyses for the Senate and House Committee on Criminal Justice, we find no indication of a shift in legislative intent, nor is there a suggestion that the change in language was directed at the sequential conviction requirement. See Senate Staff Analysis, S. Bill 307, June 1, 1988, p.2; House of Representatives Committee on Criminal Justice, Staff Analysis, H. Bill 1710, May 20, 1988, pp.1-2.

576 So.2d at 762.

This reasoning is astonishing in that it elevates the role of the legislative staff above that of the Legislature itself. The Legislature has taken the ground out from under the Joyner sequential conviction rationale by deleting the language and the tiered system on which it rested. The court below holds that enactment of the amended statute is not enough, that it must be accompanied by a staff report stating that deletion of the language overrules judicial

decisions based on the deleted language. There is no rule of statutory interpretation requiring that unambiguous language be "explained" by a staff report.

It can equally be argued that the silence of the staff report indicates no intent to retain the outdated Joyner policy in the face of unmistakable statutory language to the contrary. See Senate Staff Analysis, S. Bill 307, June 1, 1988, attached hereto as Exhibit "B". The State maintains that judicial policy is inadequate to overturn clear legislative language.

The United States Supreme Court has held that courts should be faithful to the meaning of a statute, and, if legislative policy is couched in vague language, a court should not stifle a policy by a pedantic process of construction, but the court cannot draw on some unexpressed spirit outside of the normal meaning of the words. Addison v. Holly Hill Fruit Products, 322 U.S. 607, 88 L.Ed. 1488, 64 S.Ct. 1215, rehearing denied 323 U.S. 809, 89 L.Ed. 645, 65 S.Ct. 27 (1944).

This Court has held that it has a duty to interpret the law as given to it by the people in the constitution or by the Legislature, and is not permitted to substitute judicial cerebration for the law or command the enforcement of that which the Supreme Court might think the law should be. In

re Investigation of Circuit Judge of Eleventh Judicial Circuit of Fla., 93 So.2d 601 (Fla. 1957).

The district courts of appeal which have addressed the issue at bar before Barnes have considered themselves bound by the rationale espoused in Joyner in 1947, even though the statutory scheme on which Joyner was based has changed in a material way. Section 775.084, Florida Statutes (1974 Supp.) stated, in pertinent part:

> 775.084 Subsequent felony offenders; extended terms.-
>
> (1) Unless otherwise specifically provided by statute, the court, after reasonable notice to the parties and opportunity to be heard, may sentence a person who has been convicted of a felony within this state to the punishments provided in this section if it finds all the following:
>
> (a) The imposition of sentence under this section is necessary for the protection of the public from further criminal activity by the defendant;
>
> (b) The defendant has previously committed a felony or has twice previously been convicted of a misdemeanor of the first degree in this state or another qualified offense which was committed after the defendant's 18th birthday. For the purpose of this subsection, the term "qualified offense" includes any offense in violation of a law of another state or of the United States that was punishable under the laws of such state or the United States at the time of its commission by the defendant by death or imprisonment exceeding 1 year or that was equivalent in penalty to a misdemeanor of the first degree;

The death of the two-tiered statutory scheme should have alerted the district courts to the death of the Joyner rationale that an interim period between convictions was required for habitual offender sentencing, but the Third District relied on Joyner when it ruled that simultaneous convictions of two misdemeanors committed on the same day did not meet the statutory requirement of "twice previously been convicted of a misdemeanor", based on §775.084, Florida Statutes (1975). Shead v. State, 367 So.2d 264 (Fla. 3d DCA 1979).

The same flawed rationale was relied on in Snowden v. State, 449 So.2d 332 (Fla. 5th DCA 1984), quashed on other grounds, 476 So.2d 191 (Fla. 1985). In Wilken v. State, 531 So.2d 1011 (Fla. 4th DCA 1988), the court felt that it was bound by Joyner, but expressed some hesitation, stating:

> Even though the above principle was said to be implicit in the statutes, Joyner mentions that the habitual offender statutes in effect in 1947 made explicit reference to the requirement that the second offense have been committed after conviction for the first. Inspection indicates this was found in then section 775.09, but not the two succeeding sections which also were habitual offender statutes. We find no such language in the present statute, which appears to be something more than a mere rewrite of previous law.

Wilken, supra at 1011, 1012.

In Taylor v. State, 558 So.2d 1092 (Fla. 5th DCA 1990), the Fifth District considered an enhanced sentence pursuant to §775.084, Florida Statutes (1988 Supp.), and reversed that sentence, relying on Joyner and the subsequent cases discussed above. The court stated:

> In the case *sub judice*, although the State did prove that Taylor had been previously convicted of 12 felonies, each felony was contained in the same judgment of conviction. Thus, none of the felonies could have been committed after conviction of an initial felony and the court erred in enhancing Taylor's sentence.

Taylor, supra at 1093.[3]

Petitioner submits that the clear legislative mandate to give enhanced sentences to felons who have the predicate two felony convictions is thwarted by continued reliance on Joyner. This is particularly evident considering a further change in Florida law regarding sentencing which supports the State's position. Rule 3.701(d)(1), Fla.R.Crim.P. requires in pertinent part that "(o)ne guidelines scoresheet shall be utilized for each defendant covering all offenses pending before the court for sentencing." This Court recently expanded this rule, holding that:

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[3] But see: DeBose v. State, 580 So.2d 638 (Fla. 5th DCA, 1991), and Valentine v. State, 577 So.2d 714 (Fla. 5th DCA, 1991), which seem to suggest a different view.

> Defendants should be allowed to move a trial court to delay sentencing so that a single scoresheet can be used in two or more cases pending against the same defendant in the same court at the same time, regardless of whether a plea of guilty or nolo contendere or a conviction has been obtained. The trial court must grant the motion, we believe, when the defendant can show that the use of a single scoresheet would not result in an unreasonable delay in sentencing. For each sentence that would not be unreasonably delayed, the trial court must order simultaneous sentencing.

Clark v. State, 575 So.2d 1387, 1391 (Fla. 1991).

Thus, Rule 3.701, Fla.R.Crim.P., which was enacted in 1988, effectively mandates that even though one offense and conviction may precede another, the cases must be consolidated for sentencing, with the result that "convictions" may be entered simultaneously even though the offenses were not simultaneous.

But for Rule 3.701, Petitioner maintains that an argument based on Joyner v. State, and its progeny would not even apply to the majority of cases in which Appellants rely on Joyner. Consolidating cases for adjudication and sentencing is undeniably in the interest of judicial economy, but judicial economy does not change the fact that separate offenses are still separate, regardless of whether offenses are consolidated for purposes of entering judgment and sentence. Prohibiting habitualization in these

circumstances would allow a rule of judicial convenience to take precedence over a substantive legislative pronouncement. This defeats the clear legislative intent of permitting trial courts to habitualize defendants who have ". . . previously been convicted of any combination of two or more felonies. . .", as well as the statement of legislative intent set forth in §921.001(4)(c)(2), Florida Statutes (1989), that intent being to "provide substantially enhanced terms of imprisonment for habitual felony offenders". By perpetuating the outdated policy dicta set forth in Joyner v. State in 1947, this clear intent is thwarted.

Further, the Barnes majority's construction of §775.084, F.S. (1988 Supp.) ignores the amendment to the rules of construction which was submitted in the same bill as the amendment to §775.084, F.S. Section 775.021(4)(a), F.S. (1988 Supp.) requires that a defendant be sentenced separately for each criminal offense. Subsection (b) states that

> The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent.

It is clear that the habitual offender statute was enacted for the benefit of the public by protecting the public from habitual criminals. Statutes enacted for the benefit of the public should be construed liberally in favor of the public even though they contain penal provisions. State v. Hamilton, 388 So.2d 561 (Fla. 1980). A proper construction of §775.084(1)(a), Florida Statutes (1988 Supp. and 1989) would thus permit habitual offender sentencing for a defendant found to have been previously convicted of two or more felonies, regardless of the timing of the convictions obtained therefrom, as the statute plainly says.

As stated in the dissenting opinion in Barnes, "[i]n a situation such as we have in the instant case, the courts should refrain from legislating and follow the legislative intent as expressed in the unambiguous language of the statute itself." Barnes, supra at 766.

CONCLUSION

Based on the foregoing argument and citation of legal authorities, Petitioner 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 below and reinstating the Respondent's habitual felony offender sentence.

Respectfully submitted,

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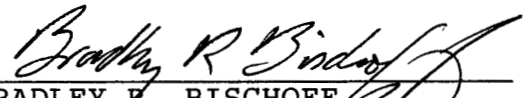

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Nada Carey, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 17th day of December, 1991.

Bradley R Bischoff

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