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CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CHARLES ANDREW WALSHINGHAM,

Petitioner,

vs.

CASE NO. 79,399

STATE OF FLORIDA,

Respondent.

_____ /

**DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT**

BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

Although this Court has recently held in Burdick v. State, 594 So.2d 267 (Fla. 1992) that habitual offender sentencing under section 775.084, Florida Statutes is permissive rather than mandatory, the life sentence imposed by the trial court upon Petitioner's resentencing was appropriate and lawful under the facts of this case, and should be allowed to stand.

ARGUMENT

WHETHER THE INSTANT DECISION IS IN
CONFLICT WITH THE OPINION OF THIS
COURT IN BURDICK v. STATE, 594
So.2d 267 (FLA. 1992)?

Respondent acknowledges this Court's recent decision in Burdick v. State, 594 So.2d 267 (Fla. 1992), which holds that habitual offender sentencing under sections 775.084(4)(a)(1) and 775.084(4)(b)(1), Florida Statutes is permissive rather than mandatory. However, Respondent respectfully submits that this Court should decline to exercise its discretion to review this case since the life sentence imposed by the circuit court is subject to affirmance on grounds other than those at issue in Burdick and related cases.

The life sentence imposed by the trial court at resentencing is both lawful and appropriate in light of the egregiousness of the crime, Petitioner's prior criminal conduct, and the future threat to the safety and well-being of the victim and her children.

Petitioner was convicted of arson of a dwelling in violation of section 806.01(1), Florida Statutes, a felony of the first degree. (R 1-2). The arson victim, Linda Carter, testified at the resentencing hearing that she feared for own and her children's lives if Petitioner is released:

Q. Would you state your full name?

A. Linda Gail Carter.

Q. And back on November 5th, 1988, did a fire occur?

A. Yes, it did.

Q. And were you the victim in that fire?

A. Yes, I was, my children and myself.

Q. Did you testify in this trial?

A. Yes, I did.

Q. Did the defendant make any threats to you prior to the fire?

A. I tried to get in at the hearing and I wasn't allowed to. The judge cleared the courtroom. He threatened my life, Mr. Langford's life, and my landord's life that night.

Q. Was it a threat to kill?

A. Yeah. He pulled up in my car and ordered me to get in it, and I told him no. And he said he was going to kill me. I said just do it here, not taking me off to kill me, do it here. And King was standing right there and so was Mr. Langford.

Q. What were--would your feelings be if the Court should impose a guideline sentence that might result in the defendant being released in the future?

A. I'm scared to death that he might get out. That's why I'm here.

Q. Do you feel he would be a danger to yourself and your children?

A. Yes, I'm sure of that.

(R 57-58).

Robert Maffet, an employee of the Lakeland Fire Department, described the danger the firefighters faced:

Q. And could you tell the Court whether that fire was a risk to your life and the lives of the fellow firefighters with you?

A. I believe it was. In fact, it was unusually difficult to put out. It was tried to put out from an exterior attack and then finally we had to go inside, and it took several times of applying the water to the fire in different places before it went out.

Q. Was that an extremely hot fire in your experience?

A. Yes, sir.

Q. Was there danger of flashover at the time you went in?

A. Well, not only danger of flashover but it had vented through the roof, had damaged the structural integrity of the roof. We had it collapse in a couple of places while we were inside.

Q. And on other occasions have you seen roofs collapse under similar circumstances?

A. Yes, sir, when there's been an accelerate used.

(R 55-56).

The trial judge stated at resentencing that he was not comfortable in making a finding that the interest of society do not require the maximum sentence. (R 63). The court certainly felt that the offense committed in this case deserved a severe punishment, stating ". . . I think the crime of arson and particularly arson as we have in this case under all the facts and circumstances deserves an extremely severe punishment both destruction of property, the potential for destroying other nearby property, the endangering of the lives of the firemen that fight the fire, and all the reasons that has always made arson of

a residence a horrendous crime that's been dealt with severely by the court." (R 62). In concluding that Petitioner should be sentenced as an habitual offender rather than under the a guidelines, the trial court declared, "I think society is better off with Mr. Walsingham out of circulation for an extremely long period of time . . ." (R 63). Respondent submits the life term imposed upon resentencing was necessary for the protection of society, and appropriate under the circumstances of Petitioner's case. Although the terms of incarceration set out in section 775.084 are permissive, great deference should be given to the sentences established by legislative mandate. In this case, as set out in section 775.084(4)(a)1, the Legislature determined that a life sentence is appropriate for a habitual felon who commits a first degree felony. Therefore, the sentence should remain in effect.

CONCLUSION

WHEREFORE, based on the above reasons and authorities, the State asks this Honorable Court to decline to review this case or, alternatively, to approve the decision of the Second District Court of Appeal.

Respectfully submitted,

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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. Regular Mail to Robert D. Rosen, Assistant Public Defender, Public Defender's Office, P.O. Box 9000--Drawer PD, Bartow, Florida 33830 on this 13th day of May, 1992.

Michele Taylor
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