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IN THE SUPREME COURT OF FLORIDA

FILED
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MAY 27 1992
CLERK, SUPREME COURT
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CASE NO. 79,586

ANDRE HENRY LAMONT

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF A DECISION, WHICH CERTIFIES CONFLICT, OF THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The Petitioner, Andre Henry Lamont, was the defendant in the trial court and the Appellant in the Third District Court of Appeal. The State, the Respondent herein, was the prosecution in the trial court and the Appellee before the lower court. The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript.

STATEMENT OF THE CASE AND FACTS

Following a jury trial, the defendant was convicted of the following offenses, arising out of a single criminal episode[1] which occurred on November 30, 1988: sexual battery with a firearm (R. 49, 52), a life felony under § 794.011(3), Fla.Stat. (1987) (Count I); burglary of a dwelling with a firearm and assault while committing an offense therein, which, although graded by the trial court as a first-degree felony punishable by life (§ 810.02(2), Fla.Stat. (1987)) (R. 50, 52), should have been reclassified to a life felony pursuant to the provisions of § 775.087(1)(a), Fla.Stat. (1987) (Count 11); and kidnapping with a firearm, which, although initially graded as a first-degree felony punishable by life, § 787.01(1)(d), Fla.Stat. (1987), because of the use of a weapon which was not an essential element, is reclassified under § 775.087(1)(a) to a life felony (R. 51, 52) (Count III)).

The sentencing guidelines recommended sentence for the three counts for which the defendant was convicted was life imprisonment (R. 60).[2] The trial court sentenced the defendant as a habitual

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[1] The lower court described the offense as follows: "Lamont entered the home of the female victim early one morning carrying a handgun. He then committed a nonconsensual sexual battery on the victim after directing her into her bedroom. After the sexual battery, Lamont directed the victim and her four year old son at gunpoint to go into the bathroom and remain there, or they would be harmed." Lamont v. State, 17 F.L.W. at D509 n.2. The duration of the incident was approximately twenty to thirty minutes (T. 307-08).

[2] Where the sentencing guidelines recommendation is life imprisonment, imposition of consecutive life sentences constitutes

violent felony offender to concurrent terms of life imprisonment on the sexual battery and kidnapping counts (Counts I and 111, respectively), with fifteen-year habitual offender mandatory minimum and three-year firearm mandatory minimum on each of those counts, and a consecutive life sentence and fifteen-year mandatory minimum on the burglary count (Count 11) (R. 57-58).

On appeal, the cause was initially briefed and orally argued before a three-member panel of the Third District; on its own motion, the Third District subsequently set the cause fox hearing en banc, resulting in an opinion which conflicts with every other district court of appeal in Florida, by holding that life felonies are subject to enhanced sentencing under the provisions of § 775.084, Fla.Stat. (Supp. 1988). Lamont v. State, 17 F.L.W. D507 (Fla. 3d DCA Feb. 18, 1992).[3] Four members of the Court dissented, in an opinion authored by Judge Hubbart.

In addition to being in de facto express and direct conflict with every other district on the point, the Third District

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a departure, requiring a written statement of justifying reasons. Robinson v. State, 520 So.2d 1 (Fla. 1988); Rease v. State, 493 So.2d 454 (Fla. 1986).

The trial court did not, presumably for the reason that it was entering habitual offender sentences, provide a written statement of reasons for upward guidelines departure.

[3] Lamont was paired for review by the Third District with Brooks v. State, DCA Case No. 90-1419. The appellant Brooks filed a motion for clarification in his case, which by the provisions of the appellate rules delayed finality of the decision as to him until ruling by the Third District on that motion on April 28, 1992. 17 F.L.W. D1086. Brooks is presently pending review in this Court.

certified conflict.

Notice of discretionary review was timely filed by the Petitioner Lamont on March 18, 1992.

SUMMARY OF ARGUMENT

The lower court held, despite the absence of a textual provision to support such sentencing, that life felonies were subject to enhancement under the Habitual Offender Act, § 775.084, Fla.Stat. (1989). This holding was erroneous. As a fundamental matter of statutory construction, statutes must be construed according to their plain and clear meaning; moreover, penal statutes must be strictly construed in favor of a defendant. As a matter of separation of powers, it is not the role of the courts to remedy a perceived disparity in penal statutes by reading in a penalty for a particular offense when the Legislature did not so provide.

The construction asserted by the Petitioner as the proper one under the habitual offender statute, that life felonies are not subject to enhancement, is consistent with the holding of every other district court of appeal in Florida on the subject.

The lower court's reliance on subsection (4)(e) of the statute, added in 1988, was flawed for several reasons. First, that amendment did not alter the category of offenses subject to habitual offender enhancement (i.e., first-degree, second-degree and third-degree felonies), but only alteredthe effect of enhanced sentences otherwise properly imposed for those offenses. The amendment did this by removing such sentences from sentencing guidelines constraints (thereby statutorily overruling this Court's prior decisions on the subject), and by eliminating eligibility for parole and for basic gain time. Nothing in the enacting chapter

through which subsection (4)(e) was added (chapter 88-131) amended the Habitual Offender Act by bringing life felonies within its scope.

Life felonies, like capital felonies, have always been outside the scope of the Habitual Offender Act. When the Habitual Offender Act in its modern form waa enacted in 1971 (effective January 1, 1972), life felonies had not vet been created. They were not created until almost a year later. The statute has never been amended to include them within its scope. The lower court's central reliance on subsection (4)(e) constitutes an implicit conclusion of amendment by implication, a conclusion which cannot be sustained under either the text of the statute, the applicable principles of construction, or the history of the statute.

The lower court's further reliance on § 775.084 sentencing reference provisions in criminal offense statutes is similarly fatally flawed, because such reference provisions appeared in the pertinent statutes before life felonies had ever been created. Moreover, such reference provisions continue to appear in numerous misdemeanor offense statutes, although the Habitual Offender Act does not contain any provisions for misdemeanor sentencing enhancement.

The lower court's interpretation of the statute constitutes judicial legislation and cannot be sustained. Its decision should be quashed, and, correspondingly, the holdings of the other four district courts of appeal of Florida on the subject should be approved.

ARGUMENT

THE FLORIDA HABITUAL OFFENDER ACT, SECTION 775.084, FLA.STAT. (1989), DOES NOT PROVIDE FOR EXTENDED TERMS OF IMPRISONMENT FOR LIFE FELONY OFFENSES.

The Florida Habitual Felony Offender statute, § 775.084, Fla.Stat. (1989), contains no provisions for enhancement of life felony offenses; by its express terms, it applies only to first, second and third-degree felonies. The statute provides in its entirety as follows:

> 775.084 Habitual felony offenders and habitual violent felony offenders; extended terms; definitions; procedure; penalties. -
> (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 any combination of two or more felonies in this state or other qualified offenses;
> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date af 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 post-conviction proceeding.
> (b) "Habitual violent 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 a felony or an attempt or conspiracy to commit a felony and one or more of such convictions was for:

a. Arson,
b. Sexual battery,
c. Robbery,
d. Kidnapping;
e. Aggravated child abuse,
f. Aggravated assault,
g. Murder,
h. Manslaughter,
i. Unlawful throwing, placing, or discharging of a destructive device or bomb,
j. Armed burglary, or
k. Aggravated battery;

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 enumerated felony 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 an enumerated felony, whichever is later;

3. The defendant has not received a pardon on the ground of innocence for any crime that is necessary for the operation of this section; and

4. A conviction of a crime necessary to the operation of this section has not been set aside in any post-conviction proceeding.

(c) "Qualified offense" means any offense, substantially similar in elements and penalties to an offense in this state, which is in violation of a law of any other jurisdiction, whether that of another state, the District of Columbia, the United States or any possession or territory thereof, or any foreign jurisdiction, that was punishable under the law of such jurisdiction at the time of its commission by the defendant by death or imprisonment exceeding 1 year.

(2) For the purposes of this section, the placing of a person on probation without an adjudication of guilt shall be treated as a prior conviction if the subsequent offense for which he is to be sentenced was committed during such probationary period.

(3) In a separate proceeding, the court shall determine if the defendant is a habitual felony offender or a habitual violent felony offender. The procedure shall be as follows:

(a) The court shall obtain and consider a presentence investigation prior to the imposition of a sentence as a habitual felony offender or a habitual violent felony offender.

(b) Written notice shall be served on the defendant and his attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence so as to allow the preparation of a submission on behalf of the defendant.

(c) Except provided in paragraph (a), all evidence presented shall be presented in open court with full rights of confrontation, cross-examination, and representation by counsel.

(d) Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.

(e) For the purpose of identification of a habitual felony offender or a habitual violent felony offender, the court shall fingerprint the defendant pursuant to s. 921.241.

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

1. In the case of a felony of the first desree, for life.

2. In the case of a felony of the second desree, 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 desree, for life, and such offender shall not be eligible for release for 15 years.

2. In the case of a felony of the second desree, 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, fax a term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.

(c) If the court decides that imposition

> of sentence under this section is not necessary for the protection of the public, sentence shall be imposed without regard to this section, At any time when it appears to the court that the defendant is a habitual felony offender or a habitual violent felony offender, the court shall make that determination as provided in subsection (3).
>
> (d) A sentence imposed under this section shall not be increased after such imposition.
>
> (e) A sentence imposed under this section shall not be subject to the provisions of s. 921.001. The provisions of chapter 947 shall not be applied to such person. A defendant sentenced under this section shall not be eligible for gain-time granted by the Department of Corrections except that the department may grant up to 20 days of incentive gain-time each month as provided for in s. 944.275(4)(b).

(Emphasis added).

In concluding, despite the fact that the section refers only to enhancement of first, second and third degree felonies, that subsection (4)(e) provides for enhanced sentences for life felony offenses (but not fox mandatory minimums otherwise imposable under § 4(b) of the statute), the Third District has isolated and divorced that subsection both from the rest of the statute and from the statute's historical development, and used it as an independent sentencing statute. In so doing, it has engaged in a remarkable act of judicial legislation. It has, moreover, as noted by Judge Hubbart dissenting below, placed itself in conflict with every other district court of appeal in the state.[4]

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[4] First District: Glover v. State, 17 F.L.W. D1019 (Fla. 1st DCA Apr. 15, 1992); Conley v. State, 592 So.2d 723 (Fla. 1st DCA 1992); Sibley v. State, 586 So.2d 1245 (Fla. 1st DCA 1991); West v. State, 584 So.2d 1044 (Fla. 1st DCA 1991); Gholston v. State, 589 So.2d 307 (Fla. 1st DCA 1991); Johnson v. State, 568 So.2d 519

OTHER DISTRICT COURTS OF APPEAL: BURDICK v. STATE

Purely as a textual or facial interpretory matter, the four district courts of appeal which have been presented with the question and which have concluded that life felonies are not subject to enhancement under the habitual offender statute, § 775.084, Fla.Stat., are undoubtedly correct. See, e.g., Johnson v. State, 568 So.2d 519, 520 (Fla. 1st DCA 1990) ("[T]here is no provision under the habitual violent felony offender statute for enhancing the sentence of a defendant convicted of a life felony."); Gholston v. State, 589 So.2d 307, 308 (Fla. 1st DCA 1991) (on motion for rehearing or certification) ("Section 775.084, Florida Statutes, makes no provision for enhancing penalties for . . . life felonies, or capital felonies."); Anthonv v. State, 585 So.2d 1172, 1173 (Fla. 2d DCA 1991) ("[T]he habitual offender statute makes no provision for the enhancement of life felonies(.)") Walker v. State, 580 So.2d 281 (Fla. 4th DCA 1991) (life felonies are not subject to enhancement under

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(Fla. 1st DCA 1990); Barber v. State, 564 So.2d 1169 (Fla. 1st DCA), rev. denied, 576 So.2d 284 (Fla. 1990); Second District: Nixon v. State, 595 So.2d 165 (Fla. 2d DCA 1992); Parker v. State, 593 So.2d 1186 (Fla. 2d DCA 1992); Pelham v. State, 595 So.2d 581 (Fla. 2d DCA 1992); Leatv v. State, 590 So.2d 512 (Fla. 2d DCA 1991); Anthonv v. State, 585 So.2d 1172 (Fla. 2d DCA 1991); McKinney v. State, 585 So.2d 318 (Fla. 2d DCA 1991); Ledesma v. State, 528 So.2d 470 (Fla. 2d DCA 1988); Fourth District: Newton v. State, 581 So.2d 212 (Fla. 4th DCA), app. dism., State v. Newton, 593 So.2d 1053 (Fla. 1991), approved, Newton v. State, 594 So.2d 306 (Fla. 1992); Walker v. State, 580 So.2d 281 (Fla. 4th DCA), review dismissed as improvidently granted, State v. Walker, 593 So.2d 1049 (Fla. 1992); Fifth District: Hayes v. State, 17 F.L.W. D1009 (Fla. 5th DCA 1992); West v. State, 584 So.2d 1044 (Fla. 1st DCA 1991), opinion approved, 594 So.2d 285 (Fla. 1992); Paise v. State, 570 So.2d 1108 (Fla. 5th DCA 1990); Power v. State, 568 So.2d 511 (Fla. 5th DCA 1990).

§ 775.084(4)(b)(1)), review dismissed as improvidently granted, 593 So.2d 1049 (Fla. 1992); Power v. State, 568 So.2d 511, 512 (Fla. 5th DCA 1990) ("[L]ife sentences are not subject to habitual offender enhancement(.)"); Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990) (construing Power to refer to life felonies).

The correctness of the foregoing has been implicitly recognized by this Court's decision in Burdick v. State, 594 So.2d 267 (Fla. 1992), which held first degree felonies punishable by life to be subject to enhancement:

> Thus, Burdick argues, in terms of penal policy, there is no difference between a first-degree felony punishable by life imprisonment and a life felony. Burdick concludes that because the district courts of appeal have held that life felonies are not subject to habitual offender enhancement, see, e.g., Johnson v. State, 568 So.2d 519, 520 (Fla. 1st DCA 1990); Power v. State, 568 So.2d 511, 512 (Fla. 5th DCA 1990), neither are first-degree felonies punishable by life imprisonment. We disagree.

594 So.2d at 268.[5]

The lower court's opinion was silent as to Burdick in relation to the life felony enhancement issue; it cited Burdick only with regard to the first-degree felony conclusion. 17 F.L.W. D509. However, the analysis of Burdick, in holding first-degree felonies punishable by life subject to the habitual offender statute, is

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[5] ~~See also~~ Burdick, 594 So.2d at 268, n.3: "We use the terms 'punishable by life,' 'punishable by life imprisonment,' and 'punishable by a term of years not exceeding life imprisonment,' synonymously, as distinguished from a 'life felony.'" (emphasis added).

directly applicable to the issue herein. In rejecting the defendant Burdick's argument that, in essence, first-degree felonies punishable by life were a separate specie of felony in Florida, this Court stated:

> To paraphrase the court below, Burdick would have us judicially amend section 775.081(1) to add another classification of felonious crime, that of "first-degree felony punishable by life," Just as the district court declined this invitation, so must this Court. We cannot rewrite legislative acts.

594 So.2d at 269 (emphasis added).

Just as this Court appropriately declined the invitation to engraft another offense (first-degree felonies punishable by life) into § 775.081(1), so must the invitation to engraft the already existent classification of life felonies into § 775.084 be declined, when that statute does not by its term provide for their enhancement.

CLASSIFICATION OF FELONIES IN FLORIDA AND PRINCIPLES OF CONSTRUCTION

Florida recognizes five categories of felonies, namely, capital felonies, life felonies, first degree, second degree, and third degree felonies. Section 775.081(1), Fla.Stat. The very statute creating these categories of felonies expressly provides that the classification is "for the purpose of sentence and for any other purpose specifically provided by statute(.)" Id. (emphasis added). Obviously, under both the directly applicable basic principle of statutory construction that related statutes must be construed in pari materia, see, e.g., Ferguson v. State, 377 So.2d

709 (Fla. 1979), and the very statement of purpose within the classifying statute itself, § 775.081 must be construed in conjunction with: § 775.082, providing the basic penalties for all five categories of felony; § 775.083, authorizing fining for four of those categories (fining is not authorized for capital felonies); and 775.084, providing for both habitual felony offender and habitual violent felony offender enhancement for three of those categories, namely, first, second and third degree felonies.

Simply put, the Legislature has created life felonies, has provided the penalties therefore, and has not subjected them to the enhancement provisions of § 775.084. That, in and of itself, should end the matter. See, e.g., Perkins v. State, 576 So.2d 1310 (Fla. 1991):

> One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. . . . This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. . . . Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.
>
> . . .
>
> The rule of strict construction also rests on the doctrine that the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch. . . . This principle can be honored only if criminal statutes are applied in their strict sense, not if the courts use some minor vagueness to extend the statutes' breadth beyond the strict language approved by the legislature. To do otherwise would violate the separation of powers.

576 So.2d at 1312-13 (citations omitted).

Clearly, under these principles, it could not be presumed that the Legislature intended punishment to extend further than that which has been expressly provided; a penalty cannot be read in by inference or implication. The lower court's construction to the contrary not only violates the most fundamental of principles regarding penal legislation, but, if accepted, would be unbounded in implication. It is premised on the view that a court -- whenever it perceives a breach in legislative wisdom as to penalties (or, for that matter, as to substantive criminal provisions themselves), or a lack of mathematical precision or symmetry in failing to "appropriately" rank the vast array of offenses in the State in unerring penal proportionality -- may revise or amend the statute. Such a view defies the basic constitutional scheme of separation of powers, and would leave the Florida Criminal Code resting on sand.

For instance, § 775.087(1), Fla.Stat., provides for upward reclassification of felonies whenever a firearm or weapon is involved and is not an essential element of the offense. The statute only provides for reclassification of first, second and third degree felonies. Certainly, according to the reasoning below, if the Legislature intended upward reclassification of the lower three gradations of felony (as it has provided in § 775.084 for sentencing enhancement of the lower three gradations of felony), it must have intended that life felonies be reclassified upon the same operative event upward to a capital

felony. If so, then what is one to make of a specific provision for reclassification upward of a life felony to a capital felony, in another statute (§ 775.0875(2), Fla.Stat. (1989)), when an individual commits a crime involving a firearm taken from a law enforcement officer? Is the provision in one statute, and the absence in the other, irrelevant?[6]

To the contrary, the compelled conclusion, upon due consideration of the nature and implications of the decision below, is that the principles of strict construction of penal statutes and construction of statutes in pari materia require a flat rejection of the argument. So too, distinctly, do the constitutional principles of due process and separation of powers.[7]

Contrary to the segmented, non-contextual construction of the

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[6] See also, e.g., § 775.0845, providing upward reclassification for wearing a mask during an offense, for misdemeanors and second and third degree felonies, but for neither first degree nor life felonies.

[7] Cf. Nephew v. State, 580 So.2d 305, 306 n. 1 (Fla. 1st DCA 1991)(recognizing, upon rejecting an unconstitutional vagueness argument and holding that the twenty-five year mandatory minimum sentence for attempted murder of a law enforcement officer applies to all degrees of attempted murder, that a defendant could receive a lesser sentence fox completing the third degree felony murder (a second degree felony) of a law enforcement officer than for attempting the same offense: "This is certainly questionable as a matter of public policy and perhaps warrants re-visitation by the Legislature(.)"), cause dismissed, 593 So.2d 1052 (Fla. 1992); Carpentier v. State, 587 So.2d 1355, 1358 (Fla. 1st DCA 1991) ("It is true that, under current law, a person convicted of third-degree murder of an law enforcement officer would receive a less severe sentence than one convicted of attempted murder of an officer under Section 784.07(3). However, there is no requirement that the Legislature address all related evils simultaneously or that it even address all related evils.").

statute engaged in by the lower court, the Habitual Offender Act, § 775.084, must be construed as a unitary, cohesive whole. The proper construction is that when both an individual -- pursuant to subsection (1)(a) or (1)(b) -- and his offense -- pursuant to subsection (4)(a) or (4)(b) -- qualify, then a court may[8] impose an extended sentence under subsection (4)(a) or (4)(b). Upon, and only upon, that event occurring, do the provisions of subsection (4)(e) become operative. The lower court, in truncating the statute, has read subsection (4)(e) as if it were a separate sentencing authority. That is not what the statute provides. Subsection (4)(a), and the more recently added subsection (4)(b), quite to the contrary of being so casually disregardable as the lower court viewed them, constitute the actual sentencing authority of the section.

JUDICIAL LEGISLATION

In its decision, the Third District disregarded the plain text of the statute, and engaged in a creative and expansive construction to judicially further what it considered worthy ends, i.e., providing of proportionately greater punishment for proportionately more serious habitual felony offenses. However, it is apodictic that, in addition to the cardinal rule that penal statutes must be strictly construed, see § 775.021(1), Fla.Stat.[9];

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[8] The statute is permissive, not mandatory. Burdick v. State, 594 So.2d at 269-71.

[9] This subsection mandates that Florida penal statutes "shall be strictly construed; when the language is susceptible of

State v. Wershow, 343 So.2d 605 (Fla. 1977), it is not the role of the courts to disregard or alter the plain meaning of a clear and unambiguous statute to reach what may be regarded as a "more desirable" result.

See, e.g., State v. Barnes, 595 So.2d 22, 24 (Fla. 1992) (that it would make more sense for the habitual offender act to require prior convictions to be sequential does not provide a basis for a court to alter the plain meaning of a clear and unambiguous statute; "The sequential conviction requirement provides a basic, underlying reasonable justification for the imposition of the habitual sentence, and we suggest that the legislature re-examine this area of the law to assure that the present statute carries out its intent and purpose.").

INCORRECT CONSTRUCTION OF SUBSECTION (4)(e) AND FLAWED CONCLUSION OF AMENDMENT BY IMPLICATION

The Third District's decision hinges upon subsection (4)(e), which exempts habitual offender sentences "imposed under this section" from the sentencing guidelines, provisions for parole, and eligibility for basic gain-time. There are numerous flaws in this reliance, not the least of which is, ironically, textual error. The reference in subsection 4(e) to exemption of sentences "imposed under this section" necessarily refers to a sentence otherwise properly imposable under the Habitual Offender Act. As developed herein, the Habitual Offender Act does not otherwise

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differing constructions, it shall be construed most favorably to the accused."

provide for such sentences.[10]

Moreover, the lower court's decision manifests confusion between the concept of sentence (and enhancement thereof) and the concept of time served under a sentence. The Habitual Offender Act provided for enhancement of sentence, i.e., the enhancement of the statutory maximum of sentence, for some seventeen years before subsection 4(e) was enacted. Enhancement under the habitual offender statute has always denoted, by the express provisions of subsection 4(a) and, more recently, 4(b), the extension of an otherwise applicable statutory maximum sentence.

Subsection 4(e) did not, contrary to the reasoning below, alter the definition of enhancement; it altered the effects of enhancement in two respects. In the first instance, responding to this Court's sentencing guidelines decisions which had constrained the operation of the habitual offender statute, see Whitehead v. State, 498 So.2d 863 (Fla. 1986); Winters v. State, 522 So.2d 816 (Fla. 1988), it exempted sentences otherwise properly extended under the habitual offender statute from operation of the

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[10] The same infirmity inheres in the lower court's reliance on §§ 775.0841 and 775.0842 (dealing with career criminal prosecutions), which were enacted along with subsection (4)(e). Nothing in § 775.0841 or 775.0842 altered the definition of offense under the Habitual Offender Act; to the contrary, they specifically incorporated the definition otherwise provided under § 775.084, as clearly manifested by the following language: "(P)rovided that such person qualifies as a habitual felony offender or a habitual violent felony offender under s. 775.084." See § 775.0842. Notwithstanding the clear upgrading of efforts with regard to career criminals represented by these sections, the fact is not altered that life felonies, like capital felonies, do not fall within the scope of § 775.084.

guidelines. See, e.g., Bateman v. State, 566 So.2d 358, 359 (Fla. 4th DCA 1990) ("The amendment to § 775.084(4)(e), Florida Statutes, effective October 1988, supersedes Whitehead v. State. This statute removes habitual offender sentences from the sentencing guidelines."); King v. State, 587 So.2d 899, 903 n. 1 (Fla. 5th DCA 1990), ("This particular subsection was in response to cases such as Whitehead v. State."), rev. denied, 564 So.2d 1086 (Fla. 1990); Owens v. State, 560 So.2d 1260, 1261 (Fla. 1st DCA 1990) (noting effect of amendment on Whitehead).

Subsection 4(e) also impacted sentences otherwise properly extended under the Habitual Offender Act by increasing the amount of time actually served thereunder; it did this by eliminating eligibility both for parole and for basic gain time. In neither of these aspects (removal from guidelines, increasing actual time served) in which the amendment operates does it alter the fact that the statute, in its modern form (i.e., since 1971), as to felonies, has spoken always and only as to enhancement of first, second, and third degree felonies, and not to the other two categories of felonies provided for in Florida law, life felonies and capital felonies.

It is utterly unrecognized in the opinion below that subsection (4)(e) was added only relatively recently to the Habitual Offender Act, by Chapter 88-131, § 6, Laws of Fla., effective October 1, 1988; that the Habitual Offender Act does not in any of its provisions refer to life felonies although it does refer to first, second and third degree felonies; that never was

it held or even implied, at least prior to the decision below, that life felonies were subject to the Act prior to the 1988 amendment; and that nothing in the 1988 amendment, either by title or terms, referred to life felonies.[11] See Chapter 88-131. If life felonies were not enhanceable under § 775.084 prior to that amendment, and it is clear that they indeed were not, nothing in that amendment made them so.

Thus, in addition to violating other fundamental rules of statutory construction, the Third District has necessarily concluded the statute to have been amended by implication by Chapter 88-131. However, amendments by implication are clearly disfavored. See, e.g., State v. J.R.M., 388 So.2d 1227 (Fla. 1980). A fortiori should this be the case where the imputed amendment by implication is of a criminal statute; to the contrary, it is the plain meaning of the statute, as well as the rule of

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[11] The confusion and imprecision inherent in the Third District's en banc Lamont analysis has also been manifested by panels of that court issuing decisions thereunder. The sentence crafted by the Lamont court provided for enhanced sentences for life felonies, but not for mandatory minimum components of those sentences. See Lamont, 17 F.L.W. at D509. However, in Pearson v. State, 17 F.L.W. D905 (Fla. 3d DCA Apr. 7, 1992), the court upheld an enhanced sentence under § 775.084 along with a fifteen-vear mandatorv minimum for a life felony (second-degree murder with a firearm).

Conversely, although this court has conclusively settled that first-degree felonies punishable by life are subject to the sentencing enhancement provisions of § 775.084, Burdick v. State, 594 So.2d 267 (Fla. 1992), which provisions include, in the instance of violent habitual felony offenders, mandatory minimum terms, a panel of the Third District has, in a case describing the offenses as "first-degree felonies punishable by life imprisonment," struck the mandatory minimum terms which the trial court had ascribed to the authority of § 775.084(4)(d). Young v. State, 17 F.L.W. D846 (Fla. 3d DCA March 31, 1992).

strict construction, which must govern.[12] Perkins, 576 So.2d at 1312-13.

Further, an additional necessary implication of its holding, also utterly unrecognized by the Third District, is that capital felonies would also have to be subject to habitual offender enhancement provisions by virtue of the very reasoning and analysis engaged in below; capital felonies are, by definition, more serious offenses than life felonies, and, according to the holding and logic of the Third District, must be presumed therefore to be punishable more heavily.[13]

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[12] Indeed, to the contrary of an amendment by implication conclusion, the prevailing rule of construction has to be that where a statute is re-enacted, the judicial construction previously placed on it is presumed to have been adopted in the re-enactment. Burdick, 594 So.2d at 270-71. Inasmuch as under the 1985 version of the Habitual Offender Act, it had been held that life felonies were not within the statute's scope, see, e.g., Hall v. State, 510 So.2d 979 (Fla. 1st DCA 1987), rev. denied, 519 So.2d 987 (Fla. 1988), by not expressly addressing life felonies in the 1988 amendments, the Legislature must be deemed to have at least tacitly accepted that construction. Burdick, 594 So.2d at 270-71.

[13] Persons convicted of first-degree murder (a capital felony) are, in instances resulting in a life rather than a death sentence, more than arguably treated more leniently under the Florida statutes than persons receiving a first degree (habitual offender) felony enhancement or, as held to be permitted below, a life felony habitual offender enhancement. A first-degree murder capital felon is, after service of the twenty-five year mandatory minimum, eligible both for parole and for basic and incentive gain time (§§ 775.082(1), 944.275), whereas a first degree felony offender who is sentenced to an enhanced (habitual offender) life sentence is not eligible either for parole or for basic gain time (§ 775.084(e)), and has received, in essence, a functional life sentence.

Again, it must be emphasized that, while such disparities may be seen to merit careful reconsideration, it is a matter under our

ERRONEOUS RELIANCE ON REFERENCE PROVISIONS: THESE PROVISIONS PREDATED CREATION OF LIFE FELONIES

The lower court also relied upon the reference provision of the respective offense statutes, sexual battery with a firearm, § 794.011(3); armed burglary of an occupied dwelling, § 810.02(2)(b); and kidnapping (with a firearm), § 787.01(2), Fla.Stat. (1987), which each state that persons convicted thereunder may be punished "as provided in s. 775.082, s. 775.083, or s. 775.084." Lamont, 17 F.L.W. at D508 (emphasis the lower court's). This reliance on the reference provision is, with all respect, in the view of the Petitioner analytically deficient.

At one time, as will be noted below in the historical development portion of this brief, all Florida felony statutes included a self-contained penalty provision. The modern scheme of a unified external penalty provision was established by chapter 71-136, Laws of Fla., effective Jan. 1, 1972. Correspondingly, the penalty provision of each felony statute was amended from a self-contained one to one of reference. A reference that sentencing may be had "as provided in s. 775.084" is meaningless unless § 775.084 by its terms provides for sentencing for the category of offense in question.

This is demonstrated by the fact that provisions for habitual misdemeanor offender enhancement (which were created and codified

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constitutional scheme of separation of powers for the legislature and not for the judiciary to redress. See, e.g., Nephew v. State, 580 So.2d at 306 n.1.

as a separate statute by ch. 74-383, § 8, eff. July 1, 1975, and later that yeas combined with the felony offender provisions under 775.084 by ch. 75-116, § 1, eff. Oct. 1, 1975) were completely deleted in 1988. Ch. 88-131, § 6, eff. Oct. 1, 1988. Yet the enhancement reference provisions remain in a large number of misdemeanor statutes. See, e.g., § 784.03 (battery); § 790.10 (improper exhibition of dangerous weapon); § 790.164(1) (false bomb reports); § 796.07 (prostitution); § 806.13(b)(1), (2), (criminal mischief), etc. These reference provisions are rendered utterly meaningless by virtue of the absence of an enhancement provision within the referenced statute.

It is not, therefore, the existence of a reference within a given offense statute which makes the offense enhanceable, it is the presence of a pertinent provision within the enhancement statute itself.

This point is profoundly underscored by the fact that the references making an offense punishable "as provided in s. 775.082, s. 775.083, or s. 775.084" (e.s.) were placed within the rape, kidnapping, and burglary chapters of the 1971 Florida Statutes (which provisions were effective January 1, 1972, see chapter 71-136, Laws of Fla.) before there even existed any classification of life felonies.[14] Thus, it may be readily seen that the existence of the reference provisions cited by the lower court lend, as a

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[14] Life felonies were not created until nearly a year after establishment of these reference provisions, by chapter 72-724, §§ 1 and 2, effective December 8, 1972. See text at 26-28, infra.

matter of substantive analysis, no support to its conclusion.[15]

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[15] This fundamental flaw in the lower court's analysis is also demonstrable from another perspective. By reasoning that the presence of the reference provision in a given statute is pertinent to its analysis, that court must necessarily be implying that the absence of the reference provision would be significant in indicating a contrary result. The fallacy is demonstrated by the following example.

Section 775.087, a free-standing statute, provides in section (1) for upward reclassification of a felony offense in which a weapon is involved but is not an essential element. The statute provides for mandatory reclassification as follows:

> (a) In the case of a felony of the first degree, to a life felony.
>
> (b) In the case of a felony of the second degree, to a felony of the first degree.
>
> (c) In the case of a felony of the third degree, to a felony of the second degree.

Section 775.087(1), Fla.Stat.

Surely it could not be cogently (much less successfully) argued, as would be implied by the Third District's analysis, that the absence of a reference provision within this statute to punishment "as provided in s. 775.082, s. 775.083, or s. 775.084(,)" or indeed the absence of any reference provision within the felony statutes themselves to this section (775.087), would prevent reclassification and sentencing thereunder.

Or what of § 893.20, Fla.Stat. (Supp. 1990), which penalizes a continuing criminal enterprise under chapter 893 as a life felony, punishable, inter alia, by a sentence of life *ox* a term of not less than twenty-five years imprisonment to which neither the guidelines nor provisions of parole apply? This section contains no reference to § 775.084. Would the lower court, notwithstanding the absence of a reference provision, subject the offense to chapter 775.084? If not, it presumably would be faithfully applying its reference provision analysis. However, it is clear by the terms of § 893.20 that the legislature considered that particular life felony offense more serious than others; how then, according to the "intent" analysis of the lower court, could this offense be punishable less severely than other life felonies which the lower court did conclude to be eligible for habitual offender sentencing?

HISTORICAL DEVELOPMENT OF PERTINENT STATUTES: HABITUAL OFFENDER ACT PREDATED CREATION OF LIFE FELONIES

Additionally, there is a more fundamental, and entirely dispositive, reason why the reasoning employed below must fail -- that is, the historical development of the pertinent statutes.

Until January 1, 1972, felonies in Florida were unclassified and were defined simply as those crimes punishable by death or imprisonment in state prison. § 775.08, Fla.Stat. (1969). The only distinction thus discernable was between capital and noncapital felonies. Prior to 1972, each felony statute contained its own, self-sufficient penalty clause (in capital cases, death, although § 919.23 provided for a majority jury recommendation of mercy which reverted the penalty to a life sentence, and in non-capital cases, imprisonment and/or fine).[16] See, e.g., §§ 782.04 (murder); 784.04 (aggravated assault); 794.01 (rape); 805.02 (kidnapping for ransom); 810.01 (burglary); 811.021 (larceny); and 813.011 (robbery), Fla.Stat. (1969).

Effective January 1, 1972, chapter 71-136, Laws of Fla., in sections 2 and 3, respectively, established a classification of felonies (and of misdemeanors) and a separate, unified penalty

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The foregoing underscores the inherent untenability, as well as the constitutional impermissibility, of the judiciary rather than the legislature "adjusting" or "correcting" criminal penalties.

[16] Penalty provisions for misdemeanors were generally, although not always, also intrinsic in the particular penalizing statute. There was a general "catchall" misdemeanor penalty provision, § 775.07, Fla.Stat. (1969) where a penalty was not provided by the particular statute.

statute for all offenses[17] (§§ 775.081 and 775.082, respectively). The classification created four categories of felonies -- capital, first, second, and third degree felonies. Section 4 of ch. 71-136 established a separate, unified fining statute (§ 775.083) for the respective offense categories, other than capital felonies for which fining was not authorized.

Much of the remainder of ch. 71-136, a massive bill, served to excise the previously existing penalty provision within each criminal statute and add, for felonies, the reference provision "punishable as provided in §§ 775.082, 775.083, or 775.084" and, for misdemeanors, the reference provision "punishable as provided in §§ 775.082 or 775.083." See ch. 71-136, passim.

The very same chapter, in § 5, also effective January 1, 1972, established the modern structure of the habitual felony offender statute (codified as § 775.084). The pertinent provisions of that statute, unaltered to this day, (although, of course, a parallel set of violent habitual felony offender provisions have more recently been added), provided for enhancement only for felonies of the first, second, and third degree; enhancement for capital felonies was not provided for. This, along with the failure to authorize a fine for capital felonies, was obviously not an oversight on the part of the Legislature; it must have concluded that capital felonies were already sufficiently punishable. As to

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[17] The separation of substantive criminal prohibitions from penalty provisions comported with the preferred, modern drafting practice. See Sutherland Stat. Const. § 20.18(4th ed.)

life felonies, they did not exist under the initial, four-felony classification established by ch. 71-136, § 2, and obviously were not intended to be included, nor, a fortiori, could they be included, in the habitual felony offender statute.

Life felonies were not created until almost a year later, by ch. 72-724, §§ 1 and 2, effective Dec. 8, 1972.[18] The habitual offender statute was not then, nor has it ever been, amended to include life felonies. Their non-inclusion cannot be deemed an oversight. There is no evidence whatsoever that the Legislature intended to include them, and indeed, for at least the first decade of the existence of life felonies, there was an indisputably reasonable basis for their exclusion from the habitual offender provisions. From inception, life felonies were punishable by up to life imprisonment. § 775.082(4)(a), as amended by ch. 72-724, eff. Dec. 8, 1972. Since the highest habitual offender enhancement then provided, for first-degree felonies (if the first degree felony was not already specified to be punishable by life), was from thirty years to life imprisonment, the Legislature could, and did, reasonably conclude that, on the basis that short of death, life imprisonment was the severest punishment, it was unnecessary to provide for enhancement for life felony offenses when they were already punishable by life imprisonment.

That the "reasonableness" of this indisputably and clearly manifested intent in the enactments of 1972 to exclude life

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[18] Fining for life felonies was not provided until two-and-a-half years later, by ch. 74-383, § 6, eff. July 1, 1975.

felonies from habitualization may arguably be called into question by events the seeds of which did not begin until over a decade later -- the inception of the sentencing guidelines in 1983, later caselaw subjecting habitual offender sentences to the guidelines, and the more recent and concomitant removal of habitual offender sentences from the guidelines (§ 775.084(4)(e), Fla.Stat. (Supp. 1988) (Ch. 88-131)) and restriction of habitual offender accruable gain time (id.) -- only underscores the case for revisitation. But the lower court constituted the wrong forum. Although circumstances may warrant a revisitation of punishment provided for life felonies,[19] that, of course, is a matter for the Legislature -- which has the authority to enact, repeal or amend substantive penalties -- and not for the courts -- which do not have such authority.

See, e.g, Perkins v. State, 576 So.2d at 1312-13 (The principle that it is for the legislature to create crimes and punishments "can be honored only if criminal statutes are applied

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[19] Any incongruity in faithfully construing § 775.084 to exclude life felonies from its scope arises not from that construction, but from the relationship of the sentencing guidelines to the Habitual Offender Act. See Burdick, 594 So.2d at 270 n.8. However, that incongruity is a matter for legislative, not judicial, resolution. As this court has stated:

> "[W]e have held that placing limits on the length of sentencing is a legislative function. See Smith v. State, 537 So.2d 982, 987 (Fla. 1989). Clearly this Court's role is to interpret, not to legislate. Accordingly, we can do no more than point out what appears to us to be a serious inconsistency between the two statutory sentencing schemes." Id.

in their strict sense, not if the courts use some minor vagueness to extent the statutee' breadth beyond the strict language approved by the Legislature."); Smith v. State, 537 So.2d 982, 985-87 (Fla. 1989) (holding court rules which promulgated sentencing guidelines unconstitutional until time of legislative adoption, notwithstanding the fact that "the Court was obviously following the intent of the legislature (,)"; "Even though the legislative and judicial branches were working together to accomplish a laudable objective, the fact remains that by enacting rules which placed limitations upon the length of sentencing, this Court was performing a legislative function."); Benyard v. Wainwright, 322 So.2d 473, 475 (Fla. 1975) ("The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions. . . . The prescribed punishment for a criminal offense is clearly substantive law."); Nation v. State, 17 So.2d 521, 522 (Fla. 1944) ("[T]he Legislature has the power to denounce any act as a crime and to fix the grade of the offense and prescribe the punishment therefore.")

11.

WHERE THE OFFENSE FOR WHICH THE DEFENDANT WAS CONVICTED UNDER COUNT II WAS MANDATORILY RECLASSIFIED BY THE PROVISIONS OF § 775.087(1)(a), FLA.STAT. (1987) TO A LIFE FELONY, THE LOWER COURT ERRED IN TREATING THE OFFENSE AS A FIRST-DEGREE FELONY PUNISHABLE BY LIFE.

While a first-degree felony punishable by life is, undisputably, subject to habitual offender enhancement under § 775.084, Burdick v. State, 594 So.2d 267 (Fla. 1992), when a weapon is involved and is a non-essential element of the offense, it is mandatorily reclassified to a life felony by the provisions of § 775.087(1)(a), Fla.Stat. (1987). When such a reclassification (to a life felony) occurs, the offense is no longer subject to the enhancement provisions of the Habitual Offender Act, § 775.084.[20]

Although the offense for which the defendant was convicted

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[20] See the following, each holding the Habitual Offender Act inapplicable to the offense as reclassified: Hayes v. State, 17 F.L.W. D1009 (Fla. 5th DCA Apr. 17, 1992) (kidnapping with a firearm reclassified to life felony); Parker v. State, 17 F.L.W. D497 (Fla. 2d DCA Feb. 14, 1992) (attempted first-degree murder with a firearm reclassified to life felony); McKinney v. State, 585 So.2d 318 (Fla. 2d DCA 1991) (attempted first-degree murder with a firearm reclassified to life felony); Newton v. State, 581 So.2d 212 (Fla. 4th DCA 1991) (kidnapping with a firearm reclassified to life felony), app. dism., State v. Newton, 593 So.2d 1053 (Fla. 1991), approved, Newton v. State, 594 So.2d 306 (Fla. 1992); Walker v. State, 580 So.2d 281 (Fla. 4th DCA 1991) (second-degree murder with a firearm reclassified to life felony), review dismissed as improvidently sranted, State v. Walker, 593 So.2d 1049 (Fla. 1992); Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990); Ledesma v. State, 528 So.2d 470 (Fla. 2d DCA 1988) (attempted first-degree murder with a firearm reclassified to life felony); Hall v. State, 510 So.2d 979 (Fla. 1st DCA 1987) (second-degree murder with a firearm reclassified to life felony), rev. denied, 519 So.2d 987 (Fla. 1988).

under Count II -- burglary of an occupied dwelling with a firearm and with an assault while committing an offense therein -- was graded by the trial court as a first-degree felony punishable by life (§ 810.02(2), Fla.Stat. (1987)), that offense was, as unsuccessfully asserted by the Petitioner below, mandatorily reclassified by the provisions of 775.087(1)(a), Fla.Stat. (1987) to a life felony.[21]

The burglary statute, § 810.02, Fla.Stat. (1987), provides that burglary is a felony of the first-degree punishable by life "if, in the course of committing the offense, the offender: (a) Makes an assault or battery upon any person(,) [or] (b) Is armed, or arms himself within such structure or conveyance, with explosives or a dangerous weapon.'' Where an individual commits a burglary while armed but without making an assault, the weapon is an essential element of the offense as graded and therefore the

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[21] In its Initial Brief of Appellee in this cause, the State failed to respond to the Appellant's assertion that this count was mandatorily reclassified to a life felony because of the use of a weapon as a non-essential element. On supplemental briefing before the court en banc, the Appellant (Petitioner herein) renewed the contention, and the State responded, without explication, that the alternate allegation was "surplusage." The State's response was patently incorrect. Lareau v. State, 573 So.2d 813 (Fla. 1991).

The lower court did not discuss the Appellant's mandatory reclassification assertion; it simply and conclusorily treated the offense as a first-degree felony punishable by life and utilized that as "an alternative basis for affirming our finding that the habitual offender statute was properly applied to Lamont." Lamont v. State, 17 F.L.W. at D509.

reclassification statute, § 775.087(1)(a) does not operate.[22]

However, where an individual while committing a burglary commits an assault or battery, that is itself an independent basis to sustain the burglary as a first-degree felony punishable by life, and a weapon is thereby rendered a non-essential element, which, when employed, invokes the mandatory reclassification provisions of § 775.087(1)(a). See Lareau v. State, 573 So.2d 813 (Fla. 1991) (inasmuch as aggravated battery statute may be satisfied either by great bodily harm as an essential element or use of a deadly weapon as an essential element, where the convicted offense is by means of great bodily harm, use of a deadly weapon is not an essential element and its presence invokes the mandatory reclassification provisions of § 775.087(1)). Cf. Lambeth v. Florida Parole & Probation Commission, 411 So.2d 956 (Fla. 1st DCA 1982) (under parole matrix system which precluded aggravation of range by factors included in definition of offense, parole commission was not precluded from aggravating range for offense of aggravated battery, where defendant both used a deadly weapon and caused great bodily harm).

In the instant case, because, as alternately alleged in the information count (Count II), an assault occurred within the dwelling (T. 253-270, 286-291, 293), the firearm was not an essential element of this offense as graded and therefore the

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[22] The statute by its terms exempts from reclassification a felony "in which the use of a weapon or firearm is an essential element(.)"

offense is reclassified to a life felony pursuant to the provisions of 775.087(1)(a), Fla.Stat. (1987).[23] As such, it is not, for the reasons set forth in Argument I of this brief, subject to enhancement under the Habitual Offender Act.

A brief additional observation is in order as to the lower court's reliance on the offense (as a first-degree felony punishable by life) as "an alternate basis for affirming or finding that the habitual offender statute was properly applied to Lamont." Lamont, 17 F.L.W. at D509. That conclusion is implicitly premised on the assumption that, in a multiple offense context, if a defendant was properly sentenced as an habitual offender on one count but improperly so sentenced on others, the proper sentence would render "harmless" the improper sentence on the other counts. That premise is incorrect and should be explicitly disapproved by this Court. See Troup v. State, 574 So.2d 271 (Fla. 2d DCA 1991) (authorized sentencing of defendant on one offense as an habitual offender would not render harmless an unauthorized habitual offender sentence for another offense). See generally Dorfman v. State, 351 So.2d 954 (Fla. 1977) (pointedly disapproving general sentences).

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[23] Moreover, even had the habitual offender sentence which the trial court entered on Count II been proper, the imposition of a consecutive fifteen-year mandatory minimum (R. 57-58) would not be sustainable. In Daniels v. State, 595 So.2d 952 (Fla. 1992), this Court held that for a single criminal episode (as is involved in the instant case), consecutive mandatory minimum sentences under § 775.084 cannot be imposed.

CONCLUSION

Based on the foregoing argument and authorities cited, the decision of the Third District below should be quashed and this Court should properly hold, as the First, Second, Fourth and Fifth Districts have held, that life felonies are not subject to enhancement under § 775.084, Fla.Stat.

Respectfully submitted,

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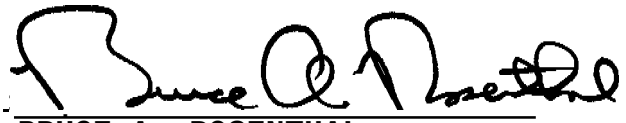
By 
BRUCE A. ROSENTHAL
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida 33128, this 26 day of May, 1992.

BRUCE A. ROSENTHAL
Assistant Public Defender

IN THE SUPEME COURT OF FLORIDA

CASE NO. 79,586

ANDRE HENRY LAMONT,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

APPENDIX

PAGE

Volume 17, Number 9
February 28, 1992

DISTRICT COURTS OF APPEAL

Criminal law—Sentencing—Habitual offender—Life felony—Subsections 775.084(4)(a) and (b) of habitual offender statute do not apply to defendants convicted of life felonies—Remaining portions of statute, specifically including subsection 775.084(4)(e), are applicable to life felonies—Conflict certified—Trial court properly sentenced defendants convicted of life felonies to life imprisonment under habitual offender statute—Error to impose 15-year mandatory minimum sentences pursuant to subsections (4)(a) and/or (4)(b) which are inapplicable to life felonies—Defendants shall not be eligible for parole consideration—Double jeopardy—Separate convictions and sentences for improper exhibition of firearm and second degree murder involving possession and use of same firearm improper

ANDRE HENRY LAMONT, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 89-2917. JAMES BROOKS. Appellant, vs. THE STATE OF FLORIDA, Appellee. Case No. 90-1419. Opinion filed February 18, 1992. Appeals from the Circuit Court of Dade County, Alfonso Sepe, Judge. Bennett H. Brummer, Public Defender, and Bruce A. Rosenthal, Assistant Public Defender and Valerie Jonas, Assistant Public Defender, for appellants. Robert A. Butterworth, Attorney General, and Katherine B. Johnson, Assistant Attorney General, for appellee.

EN BANC

(Before SCHWARTZ, C.J., and BARKDULL, HUBBART, NESBITT, BASKIN, FERGUSON, JORGENSON, COPE, LEVY, GERSTEN, and GODERICH, JJ.)

(LEVY, Judge.) These cases were set for hearing *en* bmrc to determine whether the sentencing provisions of the habitual felony offender statute, Section 775.084, Florida Statutes (1989) [hereafter the "Act"], apply to life felonies. We conclude that the habitual offender statute is applicable to defendants convicted of life felonies and, thus, the defendants in the instant cases were properly sentenced as habitual felony offenders.

James Edwards Brooks and Andre Henry Lamont, the defendants, were both sentenced as habitual felony offenders after being found guilty of life felonies. Defendant Brooks was convicted of second degree murder pursuant to Section 782.04(2), Florida Statutes (1989), a first degree felony, which was reclassified to a life felony, pursuant to Section 775.087, Florida Statutes (1989), because the defendant used a firearm during the commission of the murder.' The trial court found the defendant to be a habitual violent felony offender, and sentenced him to life in prison without eligibility for release for fifteen years under Section 775.084(4), Florida Statutes (1989). Brooks was also convicted for improper exhibition of a firearm pursuant to Section 790.10, Florida Statutes (1989), and sentenced to one year to run concurrent with the life sentence.

Defendant Lamont was convicted of sexual battery with a firearm pursuant to Section 794.011(3), Florida Statutes (1989), a life felony; burglary of an occupied dwelling with a firearm pursuant to Section 810.02(2)(b), Florida Statutes (1989), a first-degree felony punishable by a terms of years not exceeding life imprisonment; and kidnapping with a firearm pursuant to Section 787.01(2), Florida Statutes (1989), a first-degree felony, which was reclassified to a life felony under Section 775.087(1)(a), Florida Statutes (1989), because Lamont used a firearm in the commission of the kidnapping? Lamont was sentenced as a habitual felony offender under Section 775.084(4)(a) to life imprisonment on the sexual battery and kidnapping charges, with a fifteen year habitual mandatory minimum and a three-year firearm mandatory minimum on each of those counts. Lamont received a consecutive life sentence with fifteen years mandatory minimum on the armed burglary, assault and battery count. Both defendants argue, inter alia, that the habitual felony offender statute, in its entirety, is inapplicable to life felonies. In essence, they base their argument on the fact that two particular subsections of the Act, to-wit: (4)(a) and (4)(b), fail to make reference to persons convicted of life felonies.

Section 775.084, Florida Statutes (1989), provides for extended prison sentences for convicted felons who have incurred predicate prior felony convictions within prescribed intervals.

A "habitual felony offender" has incurred two or more prior felony convictions, none of which has been pardoned or otherwise set aside, and the last of which was imposed, or resulted in release from prison, within five years of the subject conviction, § 775.084(1)(a), Fla. Stat. (1989). Section 775.084(4)(a) of the Act provides for sentencing the habitual felony offender for the subject conviction, as follows:

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, far a term of years not exceeding 10.

A "habitual violent felony offender" under the Act has incurred one or more enumerated violent felony convictions, none of which has been pardoned or otherwise set aside, and the last of which was imposed. or resulted in release from prison, within five years of the subject conviction. § 775.084(1)(b), Fla. Stat. (1989). Section 775.084(4)(b) provides for sentencing 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, mid such offender shall not be eligible for release for 5 years.

The defendants argue that because these two particular subsections of the Act, (4)(a) and (4)(b), do not specifically provide for enhanced sentencing where the subject conviction is a life felony, the Act, *as a whole*, does not apply to life felonies. We find this argument unpersuasive for the following reasons,

First, we find the interpretation urged by tlie defense to be contrary to legislative intent. It is a fundamental principle of statutory construction that statutes will not be interpreted in such a manner as to lead to an unreasonable or ridiculous result or a result obviously not intended by the legislature. *Drury v. Harding*, 461 So.2d 104 (Fla. 1984); *McKibben v. Mallory*, 293 So.2d 48 (Fla. 1974); *Allied Fidelity Ins. Co. v. State*, 415 So.2d 109 (Fla. 3d DCA 1982); *Palm Springs General Hospital, Inc. of Hialeah v. State Farm Mutual Automobile Insurance Co.*, 218 So.2d 793 (Fla. 3d DCA 1969), *affirmed*, 232 So.2d 737 (Fla. 1970). Sections 775,0841 and 775.0842, Florida Statutes (1989), discuss the intent of the legislature in the prosecution of career criminals. These Sections clearly reflect that the legislature intended persons qualifying as career or habitual criminal offenders to receive enhanced punishment, and provide as follows:

> 775.0841 Legislative findings and intent.—The Legislature hereby finds that a substantial and disproportionate number of serious crimes is committed in Florida by a relatively small number of multiple and repeat felony offenders, commonly known as career criminals. The Legislature further finds that priority should be given to the investigation, apprehension, and prosecution of career criminals in the use of law enforcement resources and to the incarceration of career criminals in the use of available prison space. The Legislature intends to initiate and support increased efforts by state and local law enforcement agencies and state attorney's offices to investigate, apprehend, and prosecute career criminals and to incarcerate them for extended terms.

775.0842 Persons subject to career criminal prosecution efforts.—A person who is under arrest for the commission, attempted commission, or conspiracy to commit any felony in this state shall be the subject of career criminal prosecution efforts provided that such person qualifies as a habitual felony offender or a habitual violent felony offender under s. 775.084.

It is obvious that the legislature intended that defendants with prior criminal records of habitual crimes receive greater punishment than others, As recognized by the First District in *Barber v. State*, 564 So.2d 1169, 1171 (Fla. 1st DCA) rev. *denied* 576 So.2d 284 (Fla. 1990):

> The legislature chose to restrict the class of felons encompassed by section 775.084, based upon the number of prior felonies and misdemeanors committed, and based upon the length of time since the defendant committed the last crime. It is apparent that the legislature intended to enact this law in the belief that increased sentences for repeat offenders will deter their criminal conduct, at least during the time that they are incarcerated. There can be no question that enhanced punishment of repeat felons is a legitimate goal within the state's police power.

To follow the defendants' construction of the Act would defeat the expressed legislative intent of providing enhanced penalties for career criminals in order to deter criminal conduct. It is not rational, to say the least, to interpret the statutes so that those career criminals who commit the most serious of felony crimes are not subject to enhanced punishment under the habitual offender statute, while those that commit less serious crimes are included within its scope.

Second, it is significant that the statutory sections under which the defendants were convicted specifically provide for sentencing under the habitual offender statute. Defendant Brooks was convicted of second degree murder with a firearm, under Section 782.04(2), which states that persons convicted under this statute may be punished "as provided in s. 775.082, s. 775.083, or s. ***775.084.***" (Emphasis added). Defendant Lamont was convicted of sexual battery with a firearm, kidnapping with a firearm, and burglary of an occupied dwelling with a firearm. Section 794.011(3), which defines sexual battery with a firearm, Section 810.02(2)(b), Florida Statutes (1989), which defines burglary of an occupied dwelling with a firearm, and Section 787.01(2) which defines kidnapping, all state that persons convicted under the statute may be punished "as provided in s. 775,082, s. 775.083, or s. ***775.084.*** (Emphasis added).[3] The legislature would not have specifically indicated in each statute that Section 775.084 was to be used in determining a defendant's sentence if it had intended *to* exclude defendants convicted of such felonies from the scope of the Act.' The fact that some or all of the underlying crimes are life felonies, either by definition, or by reclassification pursuant to Section 775.087, only means that those individual crimes which are life felonies cannot be affected by the provisions of subsections (4)(a) and (4)(b) af the Act, because those two *particular subsections* do not provide for the sentencing of life felonies. However, that does not affect the applicability of the *remainder* of the Act to life felonies. The statutory sections relating to the offenses for which the defendants were convicted refer to Section 775.084 *it; its entirety*. Viewing the Act as a whole, it is clear that persons convicted of life felonies may be sentenced pursuant to other portions of the Act, such as subsection (4)(e).

Subsection (4)(e) of the Act states that:

> (e) A sentence imposed under this section shall not be subject to the provisions of s. 921.001. The provisions of chapter 947 shall not be applied to such person. A defendant sentenced under this section shall not be eligible for gain-time granted by the Department of Corrections except that the department may grant up to 20 days of incentive gain-time each month as provided for in s. 944.275(4)(b).

In other words, under the language of Section 775.084(4)(e), once an offender has met the criteria of Section 775.084(1), and has been classified as a habitual offender, such a defendant need not be sentenced within the sentencing guidelines. Accordingly, a person convicted of a life felony (either by definition or by reclassification) can be sentenced to the maximum of life imprisonment. Furthermore, such a defendant would not be eligible for parole.[5]

In order to give effect to legislative intent, and to avoid a construction of the statutory language which would lead to an absurd result, our analysis must focus upon a consideration of the Act as a whole.' Accordingly, a far more reasonable construction of the statute which would give effect to the legislative intent of deterring repeat offenders, would be to recognize that extended terms of imprisonment for life felons are authorized under subsection (4)(e) of the statute. Thus, a more accurate analysis of the applicability of the act would be as follows. Once a defendant has been classified as a habitual felony offender, then "the court may impose an extended term of imprisonment as provided in this section . . . ." §775.084(1)(b), Fla. Stat. (1989). Referring to subsection (4)(e) "in this section," the court may then sentence life felony defendants to life imprisonment because subsection (4)(e) of the statute removes habitual violent felony offenders from the sentencing guidelines, makes them ineligible for parole and removes their eligibility for gain-time (except that specified).'

We recognize that other District Courts of Appeal have held that the Act does not apply to life felonies. In ***Johnson v. Stare. 568*** So.2d 519 (Fla. 1st DCA 1990), and Walker ***v. Store, 580*** So.2d 281 (Fla. 4th DCA 1991), the defendants were convicted of second degree murder, pursuant to Section 784.04(2), Florida Statutes (1989), which was reclassified to a life felony, pursuant to Section 775.087, Florida Statutes (1989), because of the use of a firearm during the commission of each murder. In each of these cases, the trial court found the defendants to be habitual violent felony offenders and sentenced them, pursuant to Section 775.084(4)(b)(1). to life in prison without eligibility for release for fifteen years. The First and Fourth District Courts of Appeal reversed for resentencing stating that: "[T]here is no provision under the habitual violent felony offender statute for enhancing the sentence of a defendant convicted of a life felony," *Johnson v. State,* 568 So.2d at 520, and "Under the plain language of the statute, only first degree felonies—not those which are already made life felonies—can be enhnnced under section 775.084(4)(b)1," Walker ***v. State, 580*** So.2d at 281. ***See*** also ***Graham v. State, 583*** So.2d 1107 (Fla. 1st DCA 1991) (holding that Section 775.084 does not apply to sentencing of defendant convicted of life felony); *Gholston v. State*, __ So.2d __ (Fla. 3d DCA Case No, 89-2826, opinion filed, December 17, 1990) [16 FLW D46] (holding that Section 775.084 does not apply to sentencing of defendant convicted of sexual battery while armed with a deadly weapon, a life felony); ***Barber v. State,*** 564 So.2d at 1173 (in rejecting argument that habitual offender statute is unconstitutional, court noted in dictum that statute was not expressly applicable to life felonies). The Fifth District Court of Appeal in ***Power v. State, 568*** So.2d 511 (Fla. App. 5th DCA 1990), and the Second District Court of Appeal in *McKinney v. State*, __ So.2d __ (Fla. 2d DCA Case No. 89-02666, opinion filed, July 24, 1991) [16 F.L.W. D1921] have similarly stated that life felony sentences are not subject to habitual offender enhancement. ***See also White v. State,*** __ So.2d __ (Fla. 2d DCA Case No. 91-00295, opinion filed November 20, 1991) [16 F.L.W. D2935] (holding that trial court could not sentence defendant as habitual violent felony offender because defendant's second-degree murder conviction was reclassified to a life felony); *Paige v. State, 570* So.2d 1108 (Fla. 5th DCA 1990) (noting in dictum that the habitual offender statute is inapplicable to life felonies). However, each of these decisions appear to have focused exclusively on subsections (4)(a) and (4)(b)—the portions of the statute which increase the possible sentence for specified degrees of crimes. None of the opinions rendered by the other

District Courts of Appeal addressed the Act in its entirety or specifically discussed the applicability of subsection (4)(e) of the Act.

For the reasons discussed above, we find that a more reasonable construction of the statute, in accordance with legislative intent, supports our holding that life felonies are subject to the provisions of the habitual offender act, specifically including Section 775.084(4)(e), and accordingly affirm the sentencing of the life felony defendants as habitual offenders.' Although we agree with the above cited cases from the First, Fourth, and Fifth District Courts of Appeal holding that subsections 775.084(4)(a) and (b) do not apply to persons convicted of life felonies, the result we reach herein is different than that reached by the other District Courts of Appeal due to the fact that we find that the *remaining portions* of Section 775.084, specifically including subsection 775.084(4)(e), *do* apply to persons convicted of life felonies. To that extent, we certify the conflict that apparently exists between the result reached herein and the results reached by the other District Courts of Appeal.

As to defendant Lamont's conviction for burglary of an occupied dwelling with a firearm, a first-degree felony punishable by a terms of years not exceeding life imprisonment, the trial court correctly sentenced the defendant to life imprisonment under the habitual offender statute in accordance with the Florida Supreme Court's recent holding in *Burdick v. State*, __ So.2d __ (Fla. Case No. 78,466, opinion filed, February 6, 1992) [17 FLW S88], and this Court's holdings in *Westbrook v. State*, 574 So.2d 1187 (Fla. 3d DCA 1991) and *Henry v. State, 576* So.2d 409 (Fla. 3d DCA 1991). Thus, as to that offense, we note an alternative basis for affirming our finding that the habitual offender statute was properly applied to Lamont. However, we reverse and vacate that part of defendant Lamont's sentence containing the provision that he serve a minimum mandatory of 15 years. The trial court incorrectly ascribed its authority as to the 15 year minimum to the provisions of Section 775.084(4)(a) and Section 775.082(1), neither of which are applicable to the offense for which Lamont was convicted.

As to defendant Brooks, we find the trial court erred in convicting and sentencing Brooks for improper exhibition of a firearm, in addition to convicting and sentencing him for the second degree murder which involved his possession and use of the same firearm. Dual convictions and sentences for murder with a firearm and improper exhibition of the same firearm are violative of the double jeopardy clause of the state and federal constitutions. *Cleveland v. State*, __ So.2d __ (Fla. Case No. 77.491, opinion filed, October 17, 1991) [16 F.L.W. S675]; *Dixon v. State*, 546 So.2d 1194 (Fla. 3d DCA 1989), *approved, 558* So.2d 1001 (Fla. 1990); *Evans v. State*, 528 So.2d 125 (Fla. 3d DCA 1988), *appeal after remand* 545 So.2d 452 (Fla. 3d DCA), *review denied* 554 So.2d 1167 (Fla. 1989).

In conclusion, both the finding by the trial court that Brooks and Lamont are habitual felony offenders, as provided for in Section 775.084, Florida Statutes (1989), and the subsequent sentencing of the defendants thereunder are affirmed. Other than subsections (4)(a) and (b), all portions of Section 775.084, specifically including subsection (4)(e), fully apply to each of these defendants. Accordingly, each of the defendants were properly sentenced to life imprisonment and neither of them shall be eligible for consideration for parole. The portion of each defendant's sentence that requires that they serve fifteen (15) years before being eligible for release, purportedly pursuant to subsection (4)(a) and/or (4)(b), is vacated since such language is both without statutory basis and, in view of the foregoing, moot. Lastly, as previously discussed, Brooks' *conviction and sentence* for improper exhibition of a firearm is vacated.

Affirmed in part and reversed in part. (SCHWARTZ, C.J., and BARKDULL, NESBITT, JORGENSON, COPE and GERSTEN, JJ., concur.)

'The facts surrounding the arrest and conviction of defendant Brooks are as follows. James Brooks shot and killed one Leon Ned at approximately 3:00 a.m. outside a local bar. Brooks defensc at trial was that the shooting was an accident induced through voluntary intoxication. Brooks had been heavily drinking, and was walking in front of the bar, when he stumbled and fell onto the hood of Ned's car. Ned got out of the car and the two men began to fight. Ned then grabbed a black jack and repeatedly struck Brooks. The two were separated, and Brooks went to the bar. Shortly thereafter, Brooks returned to the car with a gun and shot Ned. According to Brooks, he only wanted to frighten Ned with the gun; however, he was dazed from the liquor and wounds to his head, and stumbled, accidently striking the roof of the car and causing the gun to discharge.

'The facts surrounding defendant Lamont's arrest and conviction are as follows. Lamont entered the home of the female victim early one morning carrying a handgun. He then committed a nonconsensual sexual battery on the victim after directing her into her bedroom. After the sexual battery, Lamont directed the victim and her four year old son at gunpoint to go into the bathroom and remain there, or they would be harmed.

'Section 794.011(3) states specifically that: "A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon . . . is guilty of a life felony, punishable as provided in s. 775.082, s. 775.083 or *775.084*." (Emphasis added). Section 810.02 reads in pertinent part: "Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083 or s. *775.084* if, in the course of committing the offense, the offender: . . . (b) is armed . . . ." (Emphasis added.). And, Section 787.01(2) states in pertinent part: "A person who kidnaps a person is guilty of a felony of the first degree. punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or *s. 775.084*." (Emphasis added).

'Moreover, the sexual battery statute under which defendant Lamont was convicted, Section 794.011(3), specifically refers to a life felony conviction as being subject to the penalty provisions of Section 775.084. The sexual battery statute states, in pertinent part, that: "A person who commits sexual battery . . . is guilty of a *life felony*, punishable as provided in s. 775.082, s. 775.083, or s. *775.084*." (Emphasis added.) It is evident from this statutory language that the legislature did in fact intend for the habitual offender statute to apply to life felonies.

'The fact that life felonies are not provided for as a specific category in subsections (4)(a) and (4)(b) of the Act is not illogical or a "legislative oversight" as urged by the defendants, because the maximum enhancement possible for habitual offenders—life imprisonment with no parole—as clearly provided for in (4)(e), makes it unnecessary to provide for further enhancement in the other subsections.

'The Florida Supreme Court in State v. Webb, 398 So.2d 820 (Fla. 1981) noted that a fundamental rule of statutory construction in giving effect to legislative intent is to focus upon the statute as a whole. The court stated specifically that:

> To determine legislative intent, we must consider the act as a whole—"the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject."

State v. Webb, 398 So.2d at 824 (quoting Foley v. State. 501 So.2d 179, 184 (Fla. 1951) (emphasis omitted).

'In the recent case of Westbrook v. State, 574 So.2d 1187 (Fla. 3d DCA 1991), this Court held that the defendant, who was convicted of robbery with a deadly weapon, a first degree felony punishable by life imprisonment, was properly sentenced to life imprisonment pursuant to the habitual felony offender statute because the robbery statute under which the defendant was convicted permits, on its face, sentencing pursuant to the habitual felony offender statute. We also recognized removal of the habitual offender statute from the sentencing guidelines in order to impose enhanced penalties. As we stated in *Westbrook*, 574 So. 2d at 1188:

> First, the robbery statute on its face permits sentencing under the habitual offender statute. Even though conviction under section 812.13(2)(a) is a first-degree felony punishable by life imprisonment, the trial judge is required to enter a guidelines sentence. In defendant's case, his guidelines scoresheet total provided for a recommended sentence of twelve to seventeen years, not life imprisonment. The defendant's highest permitted sentence under the guidelines, without the necessity of written reasons for departure, would have been twenty-two years imprisonment with a one-cell upward departure. However, because the robbery statute permits sentencing under the habitual offender statute where applicable, the trial judge, upon finding the defendant recidivist, was permitted to impose the enhanced life sentence.
>
> Secondly, the statement in *Barber*, 564 So.2d at 1173, concerning the possible nonapplicability of the habitual offender statute to those convicted of a first degree life felony is purely dicta. Moreover, Barber is not controlling here since the habitual offender statute addressed in that case was the 1987 version which was substantially rewritten by the Florida Legislature . . . to take penalties prescribed under the habitual offender statute outside the province of the sentencing guidelines and to allow the trial court to impose the penalty of life imprisonment on a

defendant by simply making a determination that the defendant fit the statutory definition of a habitual felony offender. See *Owens* v. *State*, 560 So.2d 1260 (Fla. 1st DCA 1990).

See also Ch. 88-131, §6, Laws of Fla.

'In affirming the defendants sentences, we note that the trial courts apparently attempted to apply 4(a) and 4(b), but neither of these subsections contain any provisions relating to life felonies. Thus, technically the sentencing order is incorrect. However, because we find 4(e) applies, the judge was permitted to give the defendants life imprisonment without the benefit of parole.

(HUBBART, **JUDGE,** dissenting.) I must respectfully dissent. I would reverse the life sentences, together with the fifteen-year mandatory minimum terms, which were imposed below as habitual violent felony offender sentences under Section 775.084(4)(b), Florida Statutes (1989), (1) on the defendant James Edward Brooks for the reclassified life felony of second-degree murder with a firearm, §§ 782.04(2), 775.087(1)(a), Fla. Stat. (1989), and (2) on the defendant Andre Henry Lamont for (a) the life felony of sexual battery with a deadly weapon, § 794.011(3), Fla. Stat. (1989), and (b) the reclassified life felony of kidnapping with a firearm §§ 787.01(2), 775.087(1)(a), Fla. Stat. (1989)—and remand the cause to the trial court with directions to resentence the above defendants pursuant to the sentencing guidelines.

I

I would reach this result because, simply stated, the Habitual Offender Act [§ **775.084,** Fla. Stat. (1989)] by its plain terms contains no extended term of imprisonment for a life felony conviction—and consequently, a defendant who is convicted of a life felony, as here, must be sentenced under the sentencing guidelines. $$ 921.001(4)(a); 921.005, Fla. Stat. (1989); Fla.R.Crim.P. 3.701, 3.988. Section 775.084(4)(a), (b), Florida Statutes (1989), sets out in its entirety the extended terms of imprisonment for a defendant who qualifies as an habitual felony offender [§ 775.084(1)(a), Fla. Stat. (1989)] or an habitual violent felony offender [§ 775.084(1)(b), Fla. Stat. (1989)]:

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

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."

Plainly, the statute contains no extended term of imprisonment for a defendant who is convicted, as here, of a life felony. Indeed, the sentences imposed in the case at bar—life imprisonment with no eligibility for release for fifteen years—represent the extended term of imprisonment for an habitual violent felony offender who has been convicted of a felony in the first degree, not a life felony. § 775.084(4)(b)(1), Fla. Stat. (1989). This being so, it is clear that the above sentences under review must be reversed and the cause remanded for resentencing under the sentencing guidelines; this result is in full accord with the decisions of the First, Second, Fourth, and Fifth District Courts of Appeal which, when presented with the same issue, have come to precisely the same conclusion.'

II

I think today's contrary decision—which puts us in conflict with every district court in the state on this issue—represents a classic example of judicial legislation which we have no authority to accomplish. Under the guise of statutory interpretation, the court has simply rewritten the Habitual Offender Act so as to provide an extended term of life imprisonment with no parole for an habitual violent felony offender who is convicted, as here, of a life felony. The court purports to find this extended term of imprisonment in Section 775.084(4)(e), Florida Statutes (1989), which provides as follows:

"(e) A sentence imposed under this section shall not be subject to the provisions of s. **921.001.** The provisions of chapter 947 shall not be applied to such person. A defendant sentenced under this section shall not be eligible for gain-time granted by the Department of Corrections except that the department may grant up to 20 days of incentive gain-time each month as provided for in s. **944.275(4)(b).**"

Obviously, this subsection contains no extended term of imprisonment for a life felony conviction or, for that matter, any other felony conviction; it provides only that as to sentences imposed under the Habitual Offender Act [which are exclusively found in Section 775.084(4)(a),(b)], the sentencing guidelines [s. 921.001], probation and parole [ch. 947], and gain time [except for s. 944.275(4)(b)] are inapplicable. To find in this subsection an extended term of imprisonment for an habitual violent felony offender who is convicted of a life felony, as the court has done, is to find something which simply is not there.

Although legislative intent is the polestar by which the court must be guided when interpreting a statute: where the language of a statute is clear and unequivocal, as here, legislative intent may be gleaned from the words of the statute, and the court's duty is to give effect to the plain and unambiguous language of the statute without resorting to rules of construction.[3] Clearly, this court has no authority under the guise of statutory construction to amend a statute, as here, in order to accomplish a desirable policy goal or avoid untoward consequences,' as, without question, the judiciary "cannot rewrite legislative acts." *Burdick v.* State, __ So.2d __, __ (Fla. 1992) (case no. 78,466; opinion filed February 6, 1992) [17 F.L.W. S88]. Moreover, it is well settled that a penal statute, as here, must be ***strictly*** construed according to its literal terms in a manner most favorable to the accused and cannot be extended in scope beyond that, As the Florida Supreme Court has recently stated:

> ***"One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. E.g., Stare v. Jackson,*** 526 So.2d 58 (Fla. 1988); ***State ex rel. Cherry v. Davidson,*** 103 Fla. 954, 139 ***So.*** 177 (1931); ***Ex parte Bailey,*** 39 Fla. 734, 23 ***So. 552*** (1897). This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. *E.g.*, ***Brown v. State,*** 358 So.2d 16 (Fla. 1978); ***Franklin v. State,*** 257 So.2d 21 (Fla. 1971); State v. Moo ***Young, 566*** So.2d 1380 (Fla. 1st DCA 1990). ***Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.***
>
> Indeed, our system of jurisprudence is founded on a belief that everyone must be given sufficient notice of those matters that may result in a deprivation of life, liberty, or property. ***Scull v. Stare, 569*** So.2d 1251 (Fla. 1990) (on petition for clarification); ***Franklin,*** 257 So.2d at 23. For this reason,
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> > [a] penal statute must be written in language sufficiently definite, when measured by common understanding and practice, to apprise ordinary persons of common intelligence of what conduct will render them liable to be prosecuted for its violation.
>
> *Gluesenkamp v. State,* 391 So.2d 192, 198 (Fla. 1980), ***cert. denied,*** 454 U.S. 818, 102 S.Ct. 98, 70 L.Ed.2d 88 (1981) (citations omitted). Elsewhere, we have said that
>
> > [s]tatutes criminal in character must be strictly construed, In its application to penal and criminal statutes, the due process requirement of definiteness is of especial importance.

State ex rel. Lee v. Buchanan, 191 So.2d 33, 36 (Fla. 1966) (citations omitted); *accord State v. Valentin*, 105 N.J. 14, 519 A.2d 322 (1987). Thus, *to the extent that definiteness is lacking, a statute must be construed in the manner most favorable to the accused.* Palmer *v. Stare*, 438 So.2d 1,3 (Fla. 1983); *Ferguson v. State*, 377 So.2d 709 (Fla. 1979).

The rule of strict construction also rests on the doctrine that the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch. *Borges v. State*, 415 So.2d 1265. 1267 (Fla. 1982); *accord United States v. L. Cohen Grocery Co.*, 255 US. 81, 87-93, 41 S.Ct. 298, 299-301, 65 L.Ed. 516 (1921) (applying same principle to Congressional authority). As we have stated,

> The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary. *See* Article II, Section 3, Florida Constitution.

Brown, 358 So.2d at *20; accord Palmer*, 438 So.2d at *3. This principle can be honored only if criminal statutes are applied in their strict sense, not if the courts use some minor vagueness to extend the statutes' breadth beyond the strict language approved by the legislature.* To do otherwise would violate the separation of powers. *Art.* II, \$3, Fla. Const."

***Perkins v. State*, 576** So.2d **1310, 13 12-13** (Fla. **1991)** (emphasis added) (footnote omitted). The court's holding today, which broadens the scope of the Habitual Offender Act beyond its strict terms, does obvious violence to the above rules of statutory construction; clearly, the court has liberally [rather than strictly] construed a penal statute beyond its express terms in a manner most favorable to the state [rather than the defendant] and in the process has engaged in impermissible judicial legislation.

One final point. The court relies, in part, on language which is found in all Florida statutes proscribing felonies [including the felony statutes involved in this *case],* namely, that a violation of a felony statute *inter alia* is "punishable ... as provided in s. 775.082, s. 775.083, or s. *775.084."* (emphasis added). One must consult each of these referenced statutes, however, to determine the nature of the punishment prescribed; if no such punishment is provided by one or more of these statutes, as here, obviously no penalty can be imposed thereunder.

For the above-stated reasons, then, I would reverse the life sentences, which were imposed below under the Habitual Offender Act for life felony convictions, and remand for resentencing under the sentencing guidelines. (BASKIN, **FERGUSON** and **GODERICH,** JJ., concur.)

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[1]*FIRST DISTRICT*: Gholston v. State, 589 So.2d 307 (Fla. 1st DCA 1991); Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990); Barber v. State, 564 So.2d 1169 (Fla. 1st DCA), *rev, denied,* 576 So.2d 284 (Fla. 1990); *SECOND DISTRICT*: Ledesma v. State, 528 So.2d 470 (Fla. 2d DCA 1988); *FOURTH DISTRICT*: Newton v. State, 581 So.2d 212 (Fla. 4th DCA), *juris. accepted,* 589 So.2d 291, 292 (Fla. 1991); Walker v. State, 580 So.2d 281 (Fla. 4th DCA), *juris. accepted,* 589 So.2d 292 (Fla. 1991); *FIFTH DISTRICT*: Power v. State, 568 So.2d 511 (Fla. 5th DCA 1990).

[2]Parker v. State, 406 So.2d 1089 (Fla. 1981).

[3]St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1982); Reino v, State, 352 So.2d 853 (Fla. 1977); Thayer v. State, 335 So.2d 815 (Fla. 1976); Foley v. State ex rel. Gordon, 50 So.2d 179 (Fla. 1951); Ross v. Gore, 48 So.2d 412 (Fla. 1950); Voorhees v. City of Miami, 145 Fla. 402, 199 So. 313 (1940) (en banc); State ex rel. Grodin v. Barns, 119 Fla. 405, 161 So, 568 (1935); Taylor v. State, 117 Fla. 706, 158 So. 437 (1934); Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918).

[4]Graham v. State, 472 So.2d 464 (Fla. 1985); McDonald v. Roland, 65 So.2d 12 (Fla. 1953); Barns, 119 Fla. at 419, 161 So. at 573; Fine v. Moran. 74 Fla. 417, 77 So. 533 (1917).

* * *

Criminal law—Sentencing—Habitual offender—Life felony—No error to impose life sentence without parole for life felony of second degree murder with firearm under habitual offender statute—Error to impose 15-year mandatory minimum—Conflict certified—Separate convictions and sentences for second degree murder with firearm and possession of firearm in commission of that murder improper

ANTHONY SESSIONS. Appellant, vs. **THE STATE OF FLORIDA,** Appellee. 3rd District. Case No. 90-2186. Opinion filed February 18, 1992. An Appeal from the Circuit Court for Dade County, Allen Kornblum, Judge. Bennett H. Brummer, Public Defender and Lydia A. Fernandez, Special Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General and Jorge Espinosa, Assistant Attorney General, for appellee.

(Before **SCHWARTZ,** C.J., and HUBBART and **GERSTEN,** JJ.)

(SCHWARTZ, Chief Judge.) After a jury trial, the appellant was convicted of second degree murder with a firearm and possession of a firearm in the commission of the second degree murder. While the only substantive point is frivolous, two other issues require further treatment.

1. On the authority of *Lamont v. State*, __ So.2d __ (Fla. 3d DCA Case nos. 89-2917 & 90-1419, opinion filed, this date) [17 F.L.W. D507], the life sentence without parole imposed upon Sessions for the life felony of second degree murder with a firearm is affirmed under section 775.084(4)(e), Florida Statutes (1989) of the habitual offender act. The fifteen year minimum mandatory provision is, however, vacated. See *Lamont*, __ So.2d at __; slip op. at 14-15. We make the same certifications of conflict as those contained in the *Lamont* opinion.

2, The separate judgment and sentence for possession of the firearm are also set aside on the authority of *Cleveland v. State*, 587 So.2d 1145 (Fla. 1991). Accord ***Davis v. State***, __ So.2d __ (Fla. 3d DCA Case no. 90-2443, opinion filed, December 3, 1991) [16 FLW D2990).

Affirmed in part; reversed in part. (**GERSTEN,** J., concurs.)

(HUBBART, JUDGE, concurring.) I think the trial court erred in sentencing the defendant to life imprisonment without parole [with a fifteen-year mandatory minimum term] as a habitual violent felony offender under Section 775.084, Florida Statutes (1989), for the life felony of second-degree murder with a firearm; this is so because the Habitual Offender Act contains no extended terms of imprisonment for a life felony conviction as here. Accordingly, the sentence under review should be reversed and the cause remanded to the trial court with directions to resentence the defendant under the sentencing guidelines, rather than the Habitual Offender Act. This result reflects the views which I expressed in my dissenting opinion in *Lamont v. State*, __ So.2d __ (Fla. 3d DCA 1992) (case nos. 89-2917 and 90-1419, opinion filed this date) [17 F.L.W. D507] (en banc) (Hubbart, J., dissenting) and is in accord with decisions of the First, Second, Fourth and Fifth District Courts of Appeal.[1]

Nonetheless, I am obviously bound by the contrary decision of the en banc majority in *Lamont*, and, therefore, reluctantly concur with the court's decision to affirm the sentence under review, although striking the fifteen-year mandatory minimum provision. I concur with no reservations, however, in the court's decision on the remaining points on appeal as discussed and disposed of in the court's opinion.

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[1]*First District*: Gholston v. State, 589 So.2d 307 (Fla. 1st DCA 1990); Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990); Barber v. State, 564 So.2d 1169 (Fla. 1st DCA), *rev. denied,* 576 So.2d 284 (Fla. 1990); *Second District*: Ledesma v. State, 528 So.2d 470 (Fla. 2d DCA 1988); *Fourth District:* Walker v. State, 580 So.2d 281 (Fla. 4th DCA). *juris. accepted,* 589 So.2d 292 (Fla. 1991); Newton v. State, 581 So.2d 212 (Fla. 4th DCA), *juris. accepted,* 589 So.2d 291, 292 (Fla. 1991); *Fifth District*: Power v. State, 568 So.2d 511 (Fla. 5th DCA 1990).

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Contracts—Guaranty—No error in entering summary judgment in favor of defendant in action seeking to hold president of corporation liable as guarantor on loan to corporation where credit application was ambiguous as to president's individual liability and where there was substantial competent evidence that parties understood that president did not intend to be personally liable

UNITED REFRIGERATION, INC., d/b/a UNITED REFRIGERATION