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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

CASE NO. 79,883

ROBERT GLOVER,
Respondent.

_____ /

RESPONDENT'S ANSWER BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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II STATEMENT OF THE CASE AND FACTS

Respondent was charged with attempted first degree murder, robbery with a firearm and possession of a firearm by a convicted felon (R 243). He was tried on the attempted murder and robbery charges and found guilty **as** charged (R 251, **252**). The remaining count **was** severed before trial, and ultimately the state entered **a** nolle prosequi on this count (R 257). After respondent's trial on February 5, 1991, the state **filed** notice to seek habitual offender sentencing.

The trial court found respondent qualified as a habitual felony offender and sentenced him **as** such to concurrent terms of forty years in prison on both counts (R 315-320).

Respondent challenged his habitual offender sentences on direct **appeal** to the District Court of Appeal, First District. The district court affirmed his sentence for armed robbery, but vacated the sentence for attempted murder, finding that Section 775.084, Florida Statutes, did not apply to offenses classified as life felonies. Glover v. State, 596 So.2d 1258 (Fla. 1st DCA 1992). Petitioner sought timely review of that decision in this Court.

III SUMMARY OF ARGUMENT

The trial court sentenced respondent to forty years in prison, pursuant to Section 775.084, Florida Statutes (1989), for an attempted first degree murder with a firearm, a life felony. The district court vacated the sentence, ruling that the habitual offender statute makes no provision for enhancing sentences for life felonies.

The district court's opinion reflects the majority view regarding the applicability of habitual offender sentencing to life felonies and is a proper construction of the statute. The statute lists certain categories of offenses to which it applies -- first degree felonies, second degree felonies and third degree felonies. Section 775.084(4)(a)(b), Fla.Stat. The statute makes no provision for enhancing the sentences of those convicted of life felonies. Reading the plain language of the statute, it is clear that the legislature intended to exclude life felonies from its provisions. This construction does not defeat **the** legislature's intent **to** punish more severely those persons convicted of the most serious offenses since offenders convicted of life felonies are **already** eligible for the most severe sanction short of the death penalty -- life in prison without parole.

Respondent urges this Court to approve the decision under review, disapprove the contrary holding of the Third District in Lamont v. State, infra, and direct that respondent's forty **year** sentence **as** an habitual felony offender be vacated and the cause be remanded for resentencing.

IV ARGUMENT

ISSUE PRESENTED

WHETHER THE HABITUAL FELONY OFFENDER
STATUTE, SECTION 775.084, FLA. STAT.,
IS APPLICABLE TO LIFE FELONIES.

Respondent was convicted of attempted first degree murder with a firearm, which is classified as a life felony, pursuant to Sections 782.04(1)(a), 777.04(4)(a), 775.087(1)(a), Florida Statutes. The trial court sentenced respondent to forty years in prison as a habitual felony offender. On direct appeal, the First District Court of Appeal, following its own precedent and that of three other district courts of appeal, vacated the sentence and remanded for resentencing, holding that the habitual offender statute was inapplicable to life felonies. That decision should be approved.

Petitioner **urges** this Court to reach a conclusion which is arguably reasonable but which ignores the plain language of the statute in question. The issue before the Court is not whether Section 775.084, Florida Statutes, should or must apply to life felonies to satisfy due process and equal protection concerns, see Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), rev. denied, 576 So.2d 1169 (Fla. 1990) (habitual offender statute does not **violate** equal protection because of selective and discretionary application, nor is statute irrational for failure to make any provision for enhancing sentences for life felonies or capital felonies); rather, the question presented here is whether the statute, by its very terms, applies to that category of offenses. One of the most fundamental principles of

Florida law is that penal statutes must be strictly construed according to their literal terms and in a manner most favorable to the accused. Section 775.021(1), Florida Statutes: Perkins v. State, 576 So.2d 1310, 1312-1313 (Fla. 1991). Applying that principle here, it is clear that the habitual offender statute does not apply to life felonies.

The starting point in any statutory construction question is the statute itself. The habitual offender statute provides that once a defendant is found to be an habitual offender or a violent habitual offender, the following penalties apply:

(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 procedures 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.

Section 775.084(4), Florida Statutes (emphasis added).

Nowhere in the habitual offender statute itself does the category of crime at issue here, life felony, appear. The legislature's omission of this degree of crime from the statute evinces its clear intent to exclude this category from its provisions, especially since such crimes are already punishable by life in prison without parole eligibility, pursuant to Sections 775.082(3)(a) and 921.001(11), Florida Statutes. Furthermore, because the statute contains no extended or mandatory terms of imprisonment for a life felony conviction, it is clear that the legislature intended that those convicted of life felonies be sentenced under the sentencing guidelines, Section 921.001(4) **(a)**, Florida Statutes.

The language of the statute is plain and unambiguous, and any other construction, no matter how reasonable or appealing, would, in effect, constitute a revision of the legislative act. See Burdick v. State, 594 So.2d 267, 269 (Fla. 1992). Section **775.084** does not mention life felonies and to extend the statutory penalties beyond the strict language approved by the legislature would violate the separation of powers. Art. 11, Section 3, Fla. Const.; Perkins v. State, supra.

Four district courts of appeal have considered the issue now before this Court and ruled that Section **775.084**, Florida Statutes, makes no provision for habitual offender enhancement of a life felony. See, e.g., Knickerbocker v. State, 17 FLW

D1976 (Fla. 1st DCA Aug. 21, 1992)(sexual battery with deadly weapon, a life felony, **may** not be enhanced pursuant to violent habitual offender statute; Matyas v. State, 17 FLW 1911 (Fla. 2d DCA August 14, 1992)(second degree murder with a weapon not subject to habitual offender sentencing); Sibley v. State, 586 So.2d 1245 (Fla. 1st DCA 1991), rev. denied, ___ So.2d ___ (Fla. 1992)(habitual offender statute does not apply to life felony of attempted murder of a law enforcement officer): McKinney v. State, 585 So.2d 319 (Fla. 2d DCA 1991)(life felony of attempted first degree murder with a firearm not subject to habitual violent felony offender statute); Newton v. State, 581 So.2d 212 (Fla. 4th DCA 1991)(habitual offender statute does not apply to kidnapping with a firearm, a life felony); Power v. State, 568 So.2d 511 (Fla. 5th DCA 1990)(habitual offender statute inapplicable to life felonies); Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990) (habitual offender statute does not apply second degree murder with a firearm). This majority view **has** been implicitly approved by this Court. **See, e.g.,** State v. Walker, 593 So.2d 1049 (Fla. 1992): Newton v. State, 594 So.2d 306 (Fla. 1992); and see, Burdick v. State, 594 So.2d 267 (Fla. 1992).

Only one appellate court, the Third District, in a sharply divided ~~en banc~~ opinion, has ruled to the contrary. **See** Lamont v. State, 597 So.2d 823 (Fla. 3d DCA 1992). It is that opinion upon which petitioner relies,

In Lamont, the Third District reasoned that merely because the sentencing provisions of Sections 775.084(4)(a) and (b) do

not specifically provide for enhancement of a life felony, the act as a whole does apply to life felonies because the habitual offender criteria of Section 775.084(1) may apply to any felony conviction, regardless of degree, **so** long as the offender meets the criteria set out in the statute. Accord, Pearson v. State, 17 FLW D1938 (Fla. **3d** DCA Aug. 18, 1992)(On Motion for Rehearing)(defendant properly sentenced to term of years as habitual violent felony offender for life felony, but trial court could not impose 15 **year** mandatory minimum sentence). The majority's interpretation in Lamont cannot be reconciled with either the plain language of the statute or the intent of the legislature.

Section 775.084(1)(a) defines "habitual felony offender" as "a defendant for whom the court may impose an extended term of imprisonment, as provided in this section," Since Sections 775.084(4)(a) and (b) do not provide for an extended term of imprisonment for offenders convicted of life felonies, those convicted of life felonies do not even fall within the statutory definition of habitual felony offenders. Further, the objective of the statute is to impose extended terms, and in some instances mandatory terms, of imprisonment for certain repeat offenders, and it cannot be assumed that the legislature intended to include life felons within the statute when the legislature excluded that category of offenders from both the definitional and enhancement provisions of the act.

Respondent submits that the reasoning in Lamont is flawed and constitutes a liberal, rather than literal, interpretation of the statute. **As** noted by the dissent in Lamont:

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.

Lamont v. State, **597** So.2d at 832 (Hubbart, J., dissenting).

~~See also~~, Pearson v. State, supra, 17 FLW at D1939 (Hubbart, J., concurring).

For **all** the foregoing reasons, respondent contends that the trial court erred in sentencing him as an habitual felony offender for an offense which is categorized **as** a life felony. This Court should **approve** the decision **of** the District Court of Appeal vacating that sentence, and remand the cause for resentencing within the guidelines.

V CONCLUSION

Based upon the foregoing argument respondent requests that this Court approve the decision of the District Court vacating respondent's habitual offender **sentence** for attempted first degree murder with **a** firearm, a **life** felony, and direct that respondent be resentenced within the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that **a** copy of the foregoing Merit Brief of Respondent has been furnished by U.S. Mail to Charlie McCoy, Assistant Attorney General, 2020 Capital Circle, SE, Suite **211**, Tallahassee, Florida, **32301**; and a copy has been mailed to respondent, Robert Glover, this 15th day of September, 1992.

Paula S. Saunders
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