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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DERRICK ACKERS,
Petitioner,

v.

CASE NO. 80,036

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT

RESPONDENT'S MERITS BRIEF

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STATEMENT OF THE CASE AND FACTS

The state agrees with the statement of the case and facts as set out by the petitioner in his merits brief, with the following additions:

Mr. Ackers was convicted, after a jury trial, in case no. CR-9660 (Orange County) of two counts of robbery with a firearm¹ and one count of aggravated battery², all committed on August 16, 1990. (R 461-2, 555-6) He was convicted, after entering a nolo contendere plea, in case no. CR90-10389 (Orange County) of one count of resisting a law enforcement officer with violence³, committed on September 26, 1990. (R 466, 398-403, 586-7)

Mr. Ackers was sentenced in both cases on May 23, 1991. (R 417-49, 584-5, 605-8, 588-9) On the aggravated battery count in 90-9660, he was sentenced as a habitual offender to ten years' incarceration. (R 584-5) On the resisting arrest with violence count in 90-10389, he was sentenced as a habitual offender to ten years' incarceration, to run concurrent to the ten-year sentence imposed in 90-9660. (R 588-9) On each of the armed robbery counts, he was granted ten years' probation, the terms to run

¹ A first degree felony punishable by life. Section 812.13(2)(a), Florida Statutes (1989). The jury found that Mr. Ackers was guilty as a principal of robbery with a firearm as to both counts but found in special verdicts that he did not have actual possession of the firearm as to either count. (R 550-53) His sentences on Counts I and II were accordingly not enhanced pursuant to Section 775.087. (R 555)

² A second degree felony. Section 784.045(1)(a)2., Florida Statutes (1989).

³ A third degree felony. Section 843.01, Florida Statutes (1989).

concurrent to one another and consecutive to the ten-year prison sentence. (R 605-8)

At sentencing, the trial judge, the Honorable Gary L. Formet, Sr., over the state's objection, ruled that he could not impose a habitual offender sentence on the armed robbery counts, because they were first degree felonies punishable by life. (R 439, 432-4) The judge believed initially, during the sentencing hearing, that if he adjudicated Mr. Ackers to be a habitual offender as to the second-degree felony, he would be required to impose a 30-year sentence. (R 441-4, 439) While under that impression, Judge Formet announced that sentencing Mr. Ackers as a habitual offender was not necessary to protect the public. (R 439-40) After realizing he could impose any sentence up to 30 years on that count, Judge Formet withdrew from his earlier finding, adjudicated Mr. Ackers to be a habitual offender, and imposed the sentences outlined above. (R 443, 444-48, 438)

On the state's cross-appeal to the Fifth District Court of Appeal, the district court held that the trial judge erred in finding that the habitual offender statute does not apply to first-degree felonies punishable by life. Ackers v. State, 601 So.2d 567 (Fla. 5th DCA 1992). The district court also held, relying on its earlier decision in State v. Kendrick, 596 So.2d 1153 (Fla. 5th DCA 1992), that straight probation is an illegal sentence when imposed on a defendant who has been determined to be a habitual felony offender. Id. at 1153. The district court reversed the grants of probation on Counts I and II, case no. 90-9660, remanding for imposition of legal sentences on those counts. Id. at 1153-4.

SUMMARY OF ARGUMENT

The petitioner asserts, correctly, that the Legislature did not expressly state, in the current version of the habitual offender statute, whether straight probation is among the sanctions which may be imposed to protect the public pursuant to that statute. He concludes, from the omission, that the Legislature intended that probation is among the appropriate punishments for habitual offenders, even those from whom the public requires protection. The state contends that the Legislature has made the contrary intention clear, and that the Fifth District's decision in this case should be affirmed.

ARGUMENT

THE DISTRICT COURT CORRECTLY DIS-
CERNED THE LEGISLATIVE INTENT BEHIND
THE HABITUAL OFFENDER STATUTE.

As the petitioner correctly states, Florida's habitual offender statute allows the trial courts to exercise considerable discretion. While the statute requires trial judges to find that a defendant who meets the listed criteria qualifies as a habitual offender, the statute leaves it to the judge's discretion to impose sentence pursuant to its provisions only when necessary to protect the public. Section 775.084(4)(c), Florida Statutes (1989). The state's position in this case is that once a trial court finds that imposition of sentence pursuant to Section 775.084 is necessary to protect the public, then probation is not one of the sentences authorized by the statute.

The petitioner also correctly observes that the Legislature did not expressly state, in the current version of the habitual offender statute,⁴ whether straight probation is among the sanctions which may be imposed to protect the public pursuant to that statute. He concludes, from the omission, that the Legislature intended that probation is among the appropriate punishments for habitual offenders, even those from whom the public requires protection. The state contends that the Legislature has made the contrary intention clear, and that the Fifth District's decision in this case should be affirmed.

⁴ Mr. Ackers committed the offenses involved in this case in 1990. The 1989 habitual offender statute applies. Section 775.084 has not been amended since 1989.

The 1989 habitual offender statute is identical, in pertinent part, to the 1988 habitual offender statute.⁵ In 1988, the Legislature passed Sections 775.0841 through 775.0843, which 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 attorneys' 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.

775.0843 Policies to be adopted for career criminal cases.

(1) Criminal justice agencies within this state shall employ enhanced law enforcement management efforts and resources for the investigation, apprehension and prosecution of career criminals....

⁵ See Chapter 89-280, §1, Laws of Florida.

(2) Each state attorney's office shall establish a career criminal prosecution unit and may adopt and implement policies based on the following guidelines:

(a) *All reasonable prosecutorial efforts shall be made to resist the pretrial release of a charged defendant meeting career criminal selection criteria.*

(b) A plea of guilty or a trial conviction shall be sought on each offense charged in the accusatory pleadings against an individual meeting career criminal selection criteria.

(c) All reasonable prosecutorial efforts shall be made to reduce the time between arrest and disposition of charges against an individual meeting career criminal selection criteria.

(d) *All reasonable prosecutorial efforts shall be made to persuade the court to impose the most severe sanction authorized upon a person convicted after prosecution as a career criminal....*

See Chapter 88-131, §§3-5, Laws of Florida (emphasis added).

Section 775.084, Florida Statutes, defines habitual felony offenders and habitual violent felony offenders, respectively, as

defendant[s] for whom the court may impose an extended term of imprisonment, as provided in this section, if [the defendant's criminal record meets the relevant criteria.]

Section 775.084(1)(a) and (b) (emphasis added).

The Senate Staff Analysis which accompanied the 1989 Senate bill which was adopted by the Legislature in Chapter 89-280, Section 1, Laws of Florida, characterized the existing law as follows:

The Florida Statutes define habitual felony offenders and habitual

violent felony offenders for the purpose of imposing enhanced sentences which extend beyond the usual statutory maximum penalties.

(Emphasis added; see appendix to this brief.) See also Section 775.084(4)(e) (habitual offenders ineligible for parole, basic gain time, and administrative gain time).

The foregoing authority supports the Fifth District Court of Appeal's decisions in this case and in State v. Kendrick, 596 So.2d 1153 (Fla. 5th DCA 1992). In Kendrick, the district court also pointed out that each of the range of penalties provided for in Section 775.084(4), as construed in Burdick v. State, 594 So.2d 267 (Fla. 1992), consists of a "sentence" for "a term of years." The Fifth District Court went on to note that the Legislature has from the time it created probation defined it in terms of a withheld sentence. Kendrick at 1154. See Chapter 20519, §20, Laws of Florida (1941) ("the court in its discretion may...stay and suspend the imposition of sentence"); Section 948.01(3), Florida Statutes (1989) ("the court, in its discretion, may...stay and withhold the imposition of sentence.")

As the petitioner points out, probation is treated as a sentence in some contexts and is treated as an alternative to a sentence in other contexts. Compare Van Tassel v. Coffman, 486 So.2d 528 (Fla. 1986) with Villery v. Florida Parole & Probation Commission, 396 So.2d 1107, 1110-11 (Fla. 1980) (abrogated in part on other grounds by Chapter 83-131, s. 6, Laws of Florida). An order of probation is, or is not, deemed a sentence depending upon the policy to be served. Cervantes v. State, 442 So.2d 176

(Fla. 1983); State v. Malone, 489 So.2d 213 (Fla. 3rd DCA 1986).

The state submits that the Fifth District Court was correct to hold that, in this case, the distinction is one with a difference. Probation and recidivist sentencing were created by the Legislature to serve entirely different purposes. It is unreasonable to presume that when the Legislature authorized a wide range of sentences for those habitual felons from whom, in the trial courts' view, the public needs protection, that it intended to include among those sentences grants of probation.


Based on the expressions of legislative intent outlined above, the district court's decision in this case should be approved.

CONCLUSION

The Respondent requests this Court to approve the decision of the district court of appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

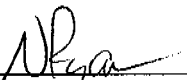


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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Merits Brief has been delivered by hand to Anne Moorman Reeves, Assistant Public Defender, at 112-A Orange Avenue, Daytona Beach, Florida 32114, this 12th day of November, 1992.



NANCY RYAN
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

DERRICK ACKERS,

Petitioner,

v.

CASE NO. 80,036

STATE OF FLORIDA,

Respondent.

APPENDIX TO RESPONDENT'S MERITS BRIEF

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REVISED: April 18, 1988

BILL NO. SB 582

DATE: April 12, 1989

Page 1

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

<u>ANALYST</u>	<u>STAFF DIRECTOR</u>	<u>REFERENCE</u>	<u>ACTION</u>
1. <u>Rudolph</u>	<u>Liepshutz</u>	1. <u>JCR</u>	<u>Fav/2 Amend.</u>
2. _____	_____	2. <u>AP</u>	_____
3. _____	_____	3. _____	_____
4. _____	_____	4. _____	_____

SUBJECT:

Habitual Felony Offender

BILL NO. AND SPONSOR:

SB 582 by
Senator Girardeau

I. SUMMARY:

A. Present Situation:

The Florida Statutes define habitual felony offenders and habitual violent felony offenders for the purpose of imposing enhanced sentences which extend beyond the usual statutory maximum penalties. s. 775.084, F.S. (1988 Supp.). In order to be classified as a habitual felony offender, a convicted felon must have previously been convicted of two or more felonies in the state. In addition to the two prior felonies, a court must find that other statutory criteria are met (i.e. the offense for which the defendant is to be sentenced occurred within 5 years of the last prior felony conviction or within 5 years of the defendant's release from prison; the defendant has not been pardoned for his prior crimes; and the convictions have not been set aside).

A habitual violent felony offender is statutorily defined as a convicted felon who has previously been convicted of committing, attempting to commit or conspiring to commit at least one prior enumerated felony, such as murder, sexual battery, robbery or aggravated assault. In addition to one prior enumerated felony conviction, supplemental criteria similar to that applicable to habitual felony offenders must be met in order for enhanced penalties to apply.

The Florida Statutes also provide legislative direction for criminal justice agencies around the state to concentrate their investigative and prosecutorial resources on arresting and convicting career criminals. s. 775.0843, F.S. (1988 Supp.). Persons arrested for committing, attempting to commit or conspiring to commit a felony in the state shall be the subject of career criminal prosecution if such persons have previously been convicted of two or more felonies under the provisions defining habitual offenders and habitual violent felony offenders. s. 775.0842 (1988 Supp.).

For purposes of career criminal prosecution, a previous felony conviction is defined as a felony conviction in this state or a criminal conviction in any other jurisdiction when additional statutory requirements are met (i.e. the felony was punishable by at least 1 year's imprisonment, or death; the defendant was over 18 years old at the time the offense was committed, or tried as an adult; the offender has been imprisoned at least once previously; and the prior felony has not been pardoned or set aside).

B. Effect of Proposed Changes:

SB 582 would add aggravated battery to the list of offenses which qualify a convicted felon for enhanced sentencing as a habitual violent felony offender. In effect, a person convicted of any felony and who has previously been convicted

of aggravated battery could be sentenced as a habitual violent felony offender.

SB 582 also would provide that persons arrested for felonies shall be subject to career criminal prosecution if they qualify as habitual felony offenders or habitual violent felony offenders under section 775.084, F.S. The existing statutory criteria used to define previous felony convictions for purposes of career criminal prosecution would be deleted. These criteria included the requirements that an offender must have been convicted of 2 or more prior felonies and that the offender must have been imprisoned at least once previously.

Further, SB 582 would reenact section 775.0843, F.S., regarding policies to be adopted for career criminal cases by criminal justice agencies within this state, for the purpose of incorporating the amendment to section 775.0842, F.S.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

None.

B. Government:

The Department of Corrections estimates that SB 582, over a five-year period, would require per diem costs of \$1,854,356. Further, an estimated 70 new prison beds would have to be constructed over the same time period, costing \$1,463,321. The total impact on the department over five years is estimated to be \$3,408,851 (including indirect costs).

Specifically, implementation of SB 582 would result in the following fiscal impact: for F/Y 1989-90, \$0; for F/Y 1990-91, \$357,297; for F/Y 1991-92, \$728,435; for F/Y 1992-93, \$1,023,457; and for F/Y 1993-94, \$1,299,661.

In lieu of incurring the estimated fiscal impact, the department could release early a number of other inmates equivalent to the number of offenders who will be affected by this legislation.

III. COMMENTS:

None.

IV. AMENDMENTS:

#1 by Judiciary-Criminal:

Provides that the two or more prior felony convictions needed to establish that a defendant is a habitual felony offender may also include convictions of certain qualified offenses outside of the

Amends the definition of qualified offense, for purposes of the habitual offender statute, to add that an offense must be substantially similar in elements as well as penalties to a state offense. In addition, the definition is expanded to include those offenses committed in the District of Columbia, United States possessions and territories, and foreign jurisdictions.

#2 by Judiciary-Criminal:

Title.

SENATE COMMITTEE AMENDMENT

SB 582

No. 1
(reported favorably)

HB _____

The Committee on..Judiciary-Criminal..recommended the following amendment which was moved by Senator.....and adopted: and failed:

1 Senate Amendment

2

3 On page 1, lines 17 - 31, and

4 on page 2, lines 1 - 31, and

5 on page 3, lines 1 - 31, strike

6 all of said lines

7

8

9 If amendment is text from another bill insert:

Bill No.	Draft No.	With Changes?	No <u> </u> Yes
10			

11 and insert:

12 Section 1. Section 775.084, Florida Statutes, 1988

13 Supplement, is amended to read:

14 775.084 Habitual felony offenders and habitual violent
15 felony offenders; extended terms; definitions; procedure;
16 penalties.--

17 (1) As used in this act:

18 (a) "Habitual felony offender" means a defendant for
19 whom the court may impose an extended term of imprisonment, as
20 provided in this section, if it finds that:

21 1. The defendant has previously been convicted of any
22 ~~combination of two or more felonies in this state or other~~
23 ~~qualified offenses;~~

24 2. The felony for which the defendant is to be
25 sentenced was committed within 5 years of the date of the
26 conviction of the last prior felony or other qualified offense
27 of which he was convicted, or within 5 years of the
28 defendant's release, on parole or otherwise, from a prison
29 sentence or other commitment imposed as a result of a prior
30 conviction for a felony or other qualified offense, whichever
31 is later;

CODING: Words stricken are deletions; words underlined are additions.

* Amendment No. 1, taken up by committee: 4/18/89 Adopted x *

* Offered by Senator Girardeau Failed * *

(Amendment No. Adopted Failed Date / /)

SENATE COMMITTEE AMENDMENT

SB 582

HB _____

1 3. The defendant has not received a pardon for any
2 felony or other qualified offense that is necessary for the
3 operation of this section; and

4 4. A conviction of a felony or other qualified offense
5 necessary to the operation of this section has not been set
6 aside in any post-conviction proceeding.

7 (b) "Habitual violent felony offender" means a
8 defendant for whom the court may impose an extended term of
9 imprisonment, as provided in this section, if it finds that:

10 1. The defendant has previously been convicted of a
11 felony or an attempt or conspiracy to commit a felony and one
12 or more of such convictions was for:

- 13 a. Arson,
14 b. Sexual battery,
15 c. Robbery,
16 d. Kidnapping,
17 e. Aggravated child abuse,
18 f. Aggravated assault,
19 g. Murder,
20 h. Manslaughter,
21 i. Unlawful throwing, placing, or discharging of a
22 destructive device or bomb, or
23 j. Armed burglary, or
24 k. Aggravated battery;

25 2. The felony for which the defendant is to be
26 sentenced was committed within 5 years of the date of the
27 conviction of the last prior enumerated felony or within 5
28 years of the defendant's release, on parole or otherwise, from
29 a prison sentence or other commitment imposed as a result of a
30 prior conviction for an enumerated felony, whichever is later;
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SENATE COMMITTEE AMENDMENT

SB 582

HB _____

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

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

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

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

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

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

29 (b) Written notice shall be served on the defendant
30 and his attorney a sufficient time prior to the entry of a
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SENATE COMMITTEE AMENDMENT

SB 582

HB _____

1 plea or prior to the imposition of sentence so as to allow the
2 preparation of a submission on behalf of the defendant.

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

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

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

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

17 1. In the case of a felony of the first degree, for
18 life.

19 2. In the case of a felony of the second degree, for a
20 term of years not exceeding 30.

21 3. In the case of a felony of the third degree, for a
22 term of years not exceeding 10.

23 (b) The court, in conformity with the procedure
24 established in subsection (3), may sentence the habitual
25 violent felony offender as follows:

26 1. In the case of a felony of the first degree, for
27 life, and such offender shall not be eligible for release for
28 15 years.

29 2. In the case of a felony of the second degree, for a
30 term of years not exceeding 30, and such offenders shall not
31 be eligible for release for 10 years.

SENATE COMMITTEE AMENDMENT

SB 582

HB _____

1 3. In the case of a felony of the third degree, for a
2 term of years not exceeding 10, and such offender shall not be
3 eligible for release for 5 years.

4 (c) If the court decides that imposition of sentence
5 under this section is not necessary for the protection of the
6 public, sentence shall be imposed without regard to this
7 section. At any time when it appears to the court that the
8 defendant is a habitual felony offender or a habitual violent
9 felony offender, the court shall make that determination as
10 provided in subsection (3).

11 (d) A sentence imposed under this section shall not be
12 increased after such imposition.

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

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SENATE COMMITTEE AMENDMENT

SB 582

No. 2
(reported favorably)

HB _____

The Committee on..Judiciary-Criminal..recommended the following amendment which was moved by Senator.....and adopted: and failed:

1 Senate Amendment

2

3 In title, on page 1....., line 3.....,
4 after the ";"

5

6

7

8

9 If amendment is text from another bill insert:

Bill No.	Draft No.	With Changes?	No	Yes
			—	

11 insert:

12 providing that prior convictions for qualified
13 offenses outside of the state may be used to
14 determine if a defendant is a habitual felony
15 offender; expanding the definition of qualified
16 offense for purposes of habitual felony
17 offender;

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CODING: Words stricken are deletions; words underlined are additions.

* Amendment No. 2, taken up by committee: 4/18/89 Adopted x *
* Offered by Senator Girardeau Failed _ *

(Amendment No. ____ Adopted ____ Failed ____ Date __/__/__)