IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,568

MICHAEL C. KNICKERBOCKER,

Respondent.

RESPONDENT'S ANSWER BRIEF

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I. PRELIMINARY STATEMENT

The respondent, Michael C. Knickerbocker, will be referred to in this answer brief as the "defendant" or by his proper name. The petitioner, the State of Florida, will be referred to in this answer brief as the **"state."** References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number. References to the transcript of proceedings will be by the use of the symbol **"T"** followed by the appropriate page number.

II. STATEMENT OF THE CASE AND FACTS

Michael C. Knickerbocker accepts the state's statement of the procedural history of this case.[1] He also accepts the state's statement of the facts with the following clarifications and additions:

A. HABITUAL VIOLENT OFFENDER ENHANCEMENT ISSUE

At sentencing defense counsel objected to habitual violent offender enhancement for the three counts of sexual battery with a deadly weapon on the basis that the enhancement statute does not apply to life felonies (T-269-270). Defense counsel reminded the trial court that under the sentencing guidelines the court already had the authority to impose life sentences (T-271).

The prosecutor at sentencing acknowledged that a person sentenced to life under the sentencing guidelines may not get paroled, but nevertheless argued that the court should impose habitual violent offender sanctions because of the possibility that some day the legislature might look for new classes of prisoners to parole due to prison overcrowding (T-273-274). The prosecutor argued that habitual offender sanctions would entitle Mr. Knickerbocker to less gain time for parole

[1] Knickerbocker is procedurally barred from seeking discretionary review of the First District Court of Appeal's affirmance of his convictions because that court declined to discuss the reasons for its decision. Knickerbocker does not waive his challenges to his convictions, but instead preserves them for post-conviction relief proceedings.

consideration should the legislature some day change the law to allow parole of life felons (T-274).

B. REQUIRED HABITUAL VIOLENT FELONY OFFENDER FINDINGS ISSUE

In support of habitual violent offender Sanctions, the state submitted certified copies of two 1985 Alachua County felony convictions and two 1985 Santa Rosa County felony convictions (T-280). The trial court took judicial notice for sentencing purposes of the defendant's sworn testimony from another court hearing that the defendant's two Santa Rosa County convictions were uncounseled (R-170-171; T-266). This uncontradicted judicially noticed testimony proved that after Mr. Knickerbocker's public defender attorney was discharged on the Santa Rosa County case, the Santa Rosa Circuit Judge refused Mr. Knickerbocker's request to have a new attorney appointed and to have the services of an investigator (T-91). Defense counsel objected to the trial court's consideration of the uncounseled Santa Rosa County convictions which was overruled by the trial court (T-281). The trial court ruled that because the defendant failed to seek post-conviction relief from the Santa Rosa County convictions, they could be considered for sentencing purposes (T-282).

After the trial court failed to make findings; of fact in support of habitual violent felony offender sanctions, defense counsel lodged an objection that the habitual violent felony offender sentences were not authorized by law *(T-306)*.

III. SUMMARY OF ARGUMENT

ISSUE I: There are at lease twenty-four (24) published decisions from four of Florida's five intermediate appellate courts holding that life felonies are not subject to enhanced sentencing under the habitual felony offenders statute. The legislative history of the habitual offender statute reinforces the conclusion that the legislature did not intend to subject life offenses to the habitual offender statute. The legislature's decision not to subject life felonies to habitual offender enhancement is rational because a person who receives a natural life sentence under the sentencing guidelines is not eligible for parole and does not benefit from gain time, so there is no need for habitualization.

ISSUE II: The first district's decision reversing the defendant's armed burglary and kidnapping sentences because of the trial court's failure to make findings of fact is in accord with precedent from this court. Without such findings, it is impossible for any appellate court to exercise meaningful review. The first district's decision does not conflict with Eutsey v. State, 383 So. 2d 219 (Fla. 1980) because that case involved a different issue: whether there was evidence to support habitual offender findings. In order to preserve judicial resources, this court should mandate that whenever a sentencing court fails to articulate findings in support of habitual offender sanctions, the defendant at resentencing must be sentenced within the sentencing guidelines.

IV. ARGUMENT

ISSUE I

MAY A SENTENCE FOR A LIFE FELONY BE ENHANCED PURSUANT TO THE PROVISIONS OF THE HABITUAL OFFENDER STATUTE?

The First,[2] Second,[3] Fourth,[4] and Fifth[5] District Courts of Appeal have all held that a life felony may not be enhanced under the habitual offender law. Only the Third District Court of Appeal in the case of Lamont v. State, 597 So. 2d 823 (Fla. 3rd DCA 1992) (en *banc*), *review pending*, case no. 79,586 (Fla.)

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[2] Sheffield v. Florida, 17 Fla. L. Weekly D2387 (Fla. 1st DCA October 14, 1992; Lee v. Florida, 17 Fla. L. Weekly D2392 (Fla. 1st DCA October 12, 1992) (en *banc*); Glover v. State, 596 So. 2d 1258 (Fla. 1st DCA 1992); Conley v. State, 592 So. 2d 723 (Fla. 1st DCA 1992); Gholston v. State, 589 So. 2d 307 (Fla 1st DCA 1992), *affirmed*, 17 Fla. L. Weekly S554 (Fla. July 23, 1992); Sibley v. State, 586 So. 2d 1245 (Fla. 1st DCA 1991), *rev. denied*, 599 So. 2d 586 (Fla. 1992); West v. State, 584 So. 2d 1044 (Fla. 1st DCA 1991), *affirmed*, 594 So. 2d 285 (Fla. 1992); Graham v. State, 583 So. 2d 1107 (Fla. 1st DCA 1991); and Johnson v. State, 568 So. 2d 519 (Fla. 1st DCA 1990).

[3] Moore v. State, 17 Fla. L. Weekly 02322 (Fla. 2d DCA October 9, 1992); Matyas v. State, 17 Fla. L. Weekly D1911 (Fla. 2d DCA August 14, 1992); Pelham v. State, 595 So. 2d 581 (Fla. 2d DCA 1992); Nixon v. State, 595 So. 2d 165 (Fla. 2d DCA 1992); Parker v. State, 593 So. 2d 1186 (Fla. 2d DCA 1992); Leaty v. State, 590 So. 2d 512 (Fla. 2d DCA 1991); White v. State, 589 So. 2d 1014 (Fla. 2d DCA 1991); Anthonv v. State, 585 So. 2d 1172 (Fla. 2d DCA 1991); and McKinney v. State, 585 So. 2d 318 (Fla. 2d DCA 1991).

[4] Newton v. State, 603 So. 2d 558 (Fla. 4th DCA 1992); Newton v. State, 581 So. 2d 212 (Fla. 4th DCA 1991), *approved*, 594 So. 2d 306 (Fla. 1992); and Walker v. State, 580 So. 2d 281 (Fla. 4th DCA 1991), *jurisdiction improvidently* granted, 593 So. 2d 1049 (Fla. 1992).

[5] Mishoe v. State, 601 So. 2d 1284 (Fla. 5th DCA 1992); Haves v. State, 598 So. 2d 135 (Fla. 5th DCA 1992); and Power v. State, 568 So. 2d 511 (Fla. 5th DCA 1990).

has ruled to the contrary. The parties in Lamont presented oral arguments before this court on November 5, 1992 and this court's ruling in the Lamont case should resolve the conflict between the Third District Court of Appeal and the four other district courts of appeal.

Under the habitual violent felony offender law, the following types of felonies are subject to the following types of enhancement:

> 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.

§775.084(4)(b), Fla. Stat.

When a first degree felony is enhanced to life under the habitual violent offender law, the legislature has explicitly provided that there is no eligibility for release from prison for fifteen years. In contrast, a person who receives a natural life sentence under the sentencing guidelines is not eligible for parole and does not benefit from gain time. Wemett v. State, 567 So. 2d 882 (Fla. 1990). Far this reason it is obvious that a life sentence imposed under the sentencing guidelines, where there is no eligibility for parole, is a more severe sentence than a life sentence imposed under the habitual

violent offender law, where by implication there is eligibility for parole after fifteen years.

The state's argument that a person convicted of a life felony can have their sentence enhanced under the habitual violent felony offender law, if adopted, would cause an absurd result: under the guise of enhancement a person would actually receive a less severe life sentence than under the sentencing guidelines. Applying well-settled principles of statutory construction, this statute must be construed to avoid absurd results. Dorsevv. State, 402 So. 2d 1178, 1183 (Fla. 1991) and State v. Webb, 398 So. 2d 820, 824 (Fla. 1991).

In this case the state has two motives in support of application of the habitual violent felony offender law to life felonies. First, recall the rationale advanced by the prosecutor at the trial court level for habitual violent felony offender sanctions. The state is concerned that because of prison overcrowding the legislature will be forced to grant life felons eligibility for parole and the state fears that those sentenced under the sentencing guidelines will become eligible for parole immediately. For this reason the state prefers a life sentence under the habitual violent felony offender law because the language explicitly precludes consideration for parole until after fifteen years. To construe the habitual violent felony offender law in the manner suggested by the state because of a fear of how elected officials will react in the future to Florida's ticking time

bomb of an exploding prison population violates Florida's due process clause found in Article I, Section 9 of the Florida Constitution. A penal statute may not be construed, consistent with due process, in anticipation of expected legislation.

The state's second motive for seeking reversal of the First District Court of Appeal in the case sub *judice* is that the state knows that without reversal the trial court cannot impose life sentences under the sentencing guidelines because a guidelines life sentence is a more severe sentence than a life sentence imposed under the habitual violent felony law.

Constitutional due process and the dictates of North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed.2d 656 (1969) forbid the imposition of punishment more harsh than the sentence reversed on appeal. See Banks v. State, 591 So. 2d 282 (Fla. 1st DCA 1991) and Taylor v. State, 576 So. 2d 968 (Fla. 5th DCA 1991). Accordingly, the due process clause of the Fourteenth Amendment protects Michael Knickerbocker from receiving a more severe guidelines life sentence for sexual battery after his successful appellate challenge to his habitual violent offender life sentence. See Gilliam v. State, 582 So. 2d 610, 612 (Fla. 1991) citing North Carolina v. Pearce, *supra*. Article I, Section 9 of the Florida Constitution also forbids the imposition of more severe guidelines life sentences. For this reason the maximum sentence under the sentencing guidelines that can be imposed for each sexual battery offense is a term of imprisonment not exceeding

forty years. See Hayes v. State, 598 So. 2d 135 (Fla. 5th DCA 1992).

The habitual violent offender law does not explicitly provide for enhancement of life felonies and this court may not rewrite legislative acts. Burdick v. State, 594 So. 2d 267, 269 (Fla. 1992). Accordingly, the relief requested by the state should be denied.

ISSUE II

DID THE FIRST DISTRICT COURT OF APPEAL ERR WHEN IT HELD THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT MAKING SPECIFIC FINDINGS OF FACT IN SUPPORT OF HABITUAL VIOLENT FELONY OFFENDER SANCTIONS?

The trial court failed to make any findings in support of habitual violent offender sanctions which the first district correctly held requires reversal. The state incorrectly suggests that the failure of the trial court to make habitual violent offender finding constitutes harmless error:

> [A] defendant, such as here, who appears in open court, accepts the validity of all hearsay information showing the predicate felonies, and offers no legal reason why sentencing should not be accomplished, has fully waived any right on appeal to challenge the absence of evidence or findings that predicate felonies have not been pardoned or set aside.

(Petitioner's brief at page 33). To the contrary, Michael Knickerbocker did not accept the validity of all of the hearsay information offered by the state in support of habitualization; furthermore, Knickerbocker did object to the imposition of habitual violent offender sanctions on the basis that they were illegally imposed.

In support of the state's request for habitual violent felony offender sanctions, the state at sentencing produced evidence of four prior felony convictions. The defense introduced uncontradicted evidence that two of these felony convictions were uncounseled felonies. Although the trial court did not make any written findings of fact, the trial court did

state that the uncounseled felony convictions could be considered for enhancement purposes because Mr. Knickerbocker did not pursue post-conviction relief from the uncounseled felony convictions.

More importantly, at the time of Michael Knickerbocker's sentencing, the habitual violent felony offender statute was generally construed to impose mandatory, rather than permissive, sentences. Then in Burdick v. State, 594 So. 2d 267 (Fla. 1992) this court overruled the First District Court of Appeal's decision in which the first district held that the legislature mandated a life sentence for habitual first degree felony offenders. This court remanded that case for resentencing to the trial court because the trial court did not indicate whether it believed it could in fact decline to impose a life sentence.

The legislature has mandated that the trial court make specific findings of fact when sentencing a defendant as a habitual offender, and without these findings meaningful appellate review of sentencing decisions would be difficult, if not impossible. Walker v. State, 462 So. 2d 452, 454 (Fla. 1985). Because of the trial court's failure to make findings in the case at hand, it is impossible for any appellate court to determine whether the habitual violent felony offender sentences for the kidnapping and armed burglary offenses are in part illegally based on uncounseled felony convictions and further whether the court incorrectly believed, as did most

courts at the time, that it was required to impose life sentences.

The state in its petition for review has mischaracterized the holding of the First District Court of Appeal by suggesting that ratification of the district court's decision below will overrule Eutsey v. State, 383 So. 2d 219 (Fla. 1980). In Eutsey the trial court made the required habitual offender findings and the issue was whether there was evidence to support those findings. In this case, the issue before the district court was not whether there is sufficient evidence to support a finding, had a finding been made by the trial court, but rather whether a lack of any findings requires reversal.

The state in its petition complains that the requirement that habitual offender findings be made will result in the wasteful use of scarce judicial resources and taxpayer money, lengthy delays in every habitual sentencing procedure, and "a legal churning'' (petitioner's brief at page 29). There is a very simple solution to this problem. This court should mandate that when a trial court fails to make the necessary habitual offender findings, upon resentencing the defendant cannot be rehabitilized, but must instead by resentenced within the sentencing guidelines.

This type of rule has been quite effective in preventing the "legal churning" that the state complains of in other types of cases. For instance, this court has; held that when a trial court fails to articulate a valid reason in writing for

departure from the sentencing guidelines, it may not articulate at resentencing new reasons for departure from the sentencing guidelines. Pope v. State, 561 So. 2d 554 (Fla. 1990) and Shull v. Dugger, 515 So. 2d 748 (Fla. 1987). In a capital case, the trial court may not reimpose the death sentence when it fails to provide timely written findings in support of the death penalty during the first sentencing proceeding. Stewart v. State, 549 So. 2d 171 (Fla. 1989), *cert.* denied, ___ U.S. ___, 110 S. Ct. 3294, 111 L. Ed. 2d 802 (1990).

Likewise, a sentencing court that fails to make the necessary findings under the habitual offender law should be precluded from again habitualizing a defendant at resentencing. In addition to saving scarce resources, such a rule will encourage the sentencing court and prosecutors to carefully comply with the habitual offender law if they are serious about habitual offender sanctions by making sure that the statutory findings are made.

V. CONCLUSION

For the reasons set forth in this answer brief, Michael Rnicksrbocker respectfully requests that the certified question under Issue I be answered in the negative, and that this court affirm the first district's decision with respect to Issue II except that upon resentencing for the armed burglary and kidnapping offenses, the defendant should be sentenced within the sentencing guidelines and not under the habitual violent offender statute because the trial court failed to make the necessary habitual violent offender findings at the first sentencing hearing.

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the respondent's answer brief has been furnished by U.S. mail *to* Assistant Attorney General Amelia L. Beisneer, Office of the Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 this 23rd day of November, 1992.

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