IN THE SUPREME COURT OF FLORIDA

CASE NO- 90,047

THE STATE OF FLORIDA,

Petitioner,

vs.

DAVID FBYE,

Respondent

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

INTRODUCTION

The Respondent, DAVID FRYE, was the defendant in the trial court and the Appellant in the District Court of Appeal. The Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and the Appellee in the District Court of Appeal. In this brief the Respondent will be referred to as FRYE and the Petitioner will be referred to as the STATE.

Respondent will use the same method of referring to the record and transcripts as set forth by the STATE in its brief.

STATEMENT OF THE CASE AND FACTS

For the purpose of the issue raised in this appeal FRYE accepts the statement of the case and facts set forth by the STATE as a true and accurate statement. The only additional fact which FRYE would point out is that the Third District Court of Appeal reversed the habitual offender sentence on the charge of burglary with assault or battery and remanded that count for resentencing within the guidelines.

SUMMARY OF THE ARGUMENT

It has already been held by this Honorable Court that sentencing under the applicable statute is permissive not mandatory. There was no limitation placed on that language so the decision as to whether a minimum mandatory is to be imposed should be permissive.

The word "shall" in the statute has been held to mean "may" so the phrase "shall not be eligible for release" means "may not be eligible for release."

The history of the statute and the interpretations of the statute by the court do not support the STATE's position that the mandatory minimum is to be mandatory but show that it is permissive.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY FOUND THAT THE IMPOSITION OF A MANDATORY MINIMUM PROVISION IN A HABITUAL FELONY OFFENDER SENTENCE WAS PERMISSIVE

The issue here is whether FRYE must be or could be sentenced to a fifteen year minimum mandatory provision once the trial judge determined that he was to be sentenced as a habitual violent felony offender. The STATE takes the position that the fifteen year portion of the sentence is mandatory while FRYE takes the position that it is permissive.

The first matter that should be considered is that this Honorable Court, in Burdick **v.** State, 594 So. 2d 267, 271 (Fla. 1992), held that sentencing under sections 775.084(4)(a)(1) and 775.084(4)(b)(1) is permissive, not mandatory. This statement was not limited to the maximum sentence but apparently inclusive of all sentencing under those sections. Clearly, whether a minimum mandatory sentence is to be included in a habitual felony offender sentence is part of sentencing under the statute so under the language of that decision there should be no dispute that imposing a minimum sentence is permissive.

Also to be considered is the fact that in Burdick, supra, it was found that in the statute which is being dealt with in this case, the word "shall" means "may." This being the case it then follows that the phrase, "...shall not be eligible for release for 15 years" means "... may not be

eligible for release for 15 years." Again, the result is that the imposition of the minimum mandatory term is permissive and not mandatory.

The STATE, in its brief (pages 7 and 8) makes much of the fact that the Senate Staff Analysis of the act which became **Ch.88-131,** Laws of Florida states that in the case of a habitual violent felony offender there would be mandatory minimum sentences. The STATE argues that this shows an intention that the mandatory minimum provisions be mandatory and not permissive. FRYE cannot accept this argument.

Early in the same sentence to which the STATE refers there is the statement that both habitual felony offenders and habitual violent felony offenders would be subject to enhanced penalties. It has already been determined that those enhanced penalties **are** permissive **so** the phrase "would be" is clearly not a phrase which has been accepted as being manifestation of an intention that the sentence be mandatory. Also, the phrase is not as unambiguous as the STATE would have this court believe. If the intention were for the the mandatory minimum provision to apply in all cases the phrase to be used should have been that a habitual violent felony offender would "in every case" be subject to a mandatory minimum sentence. As it now reads the phrase could be interpreted to mean that a habitual violent felony offender would be subject to a mandatory minimum sentence when the trial judge decides to impose such a sentence.

As the STATE correctly points out, the word "shall" was

first held to mean "may" in relation to §775.084(4) in State v. Brown, 530 So. 2d 51 (Fla. 1988). Since that decision the legislature has had many opportunities to change the statute so as to make it mandatory. The legislature has never chosen to do so. It is not up to the State or the courts to do what the legislature has chosen not to. In fact, in Burdick v. State, 594 SO. 2d 267, 270 (Fla. 1992) this court found that the only significant change brought about by Ch.88-131, Laws of Florida was in adding subsection (4)(e) to the statute. It was pointed out there that the STATE conceded that the 1988 amendments did not alter the operative language in subsections (4)(a) or (4)(b). The operative language of those sections was all deemed to be permissive language not mandatory language. Nothing has changed since that decision which should change the interpretation of those sections.

Finally, it is interesting to note that in his opinion in Burdick, in which he concurred in part and dissented in part, Justice Overton, while arguing that the life portion of the sentence under §775.084(4)(a)(1) and (b)(1) would be mandatory said that, "... the trial court has the discretion, under subsection (4)(b)(1), to enhance the life sentence to be without parole for fifteen years." Supra at 272. (Emphasis added.) There was no hint anywhere in the opinion that the mandatory minimum provisions were to be other than permissive.

CONCLUSION

WHEREFORE, based on the foregoing, the Respondent respectfully requests that this Honorable Court approve the decision of the Third District Court of Appeal insofar as it holds that the imposition of the minimum mandatory sentences under the habitual violent felony offender statute is discretionary and not mandatory.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 20th day of August, 1997 to Lara J. Edelstein, Assistant Attorney General, 110 Tower, 10th Floor, 110 S.E. 6th Street, Fort Lauderdale, Florida 33301.

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