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CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,047

THE STATE OF FLORIDA,

Petitioner,

-vs-

DAVID FRYE,

Respondent.

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

INITIAL BRIEF OF PETITIONER ON THE MEFUTS

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Respondent, DAVID FRYE, was the defendant in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stood in the trial court. The symbols "T.", "R.", and "S." will designate the transcript of the proceedings below, the record, and the transcript of the sentencing hearing, respectively.

STATEMENT OF THE CASE AND FACTS

On October 24, 1994, the Defendant was charged with a second amended information with four (4) counts of armed robbery, burglary with assault or battery therein while armed, attempted first degree murder, and unlawful possession of a firearm by a convicted felon. (R. 13-19).

Prior to trial, the State announced a nolle prosse of the count of attempted first degree murder. (T. **6).** Further, the trial court granted a severance as to the count of unlawful possession of a firearm by a convicted felon. (T. 16). The Defendant stood trial on the remaining five counts. After the State rested, it was announced that the first count of armed robbery was nolle prossed. (T. **348).**

The jury returned verdicts of guilty as charged on the four remaining counts. (T. 521-523, R. 58-61). The Defendant was adjudicated guilty. (T. 526, R. 62-63).

A sentencing hearing was held on May 15,1996. **(S.** 1). The trial judge asked the prosecutor "[l]et me ask this. The violent habitual felony offender automatically carries the minimum mandatory 15?" **(S.** 10). The prosecutor responded that it did. (S.10). Later, the judge asked the prosecutor whether a life sentence is required for the habitual violent felony offender or whether it was any term of years with a minimum mandatory of fifteen years. (S. 15). The prosecutor responded, "[a]ny term of years. Obviously, you couldn't go below the guidelines without departing downwards, but fifteen year minimum mandatory itself is in excess of the guidelines." **(S.** 15). Subsequently, the Defendant was sentenced to a term of twenty-five years in state prison with a 15 year mandatory minimum term on each *count as a habitual violent* felony offender, and a three year mandatory minimum term for the use of a firearm on each count, with all sentences and all

mandatory minimum terms to run concurrently. The Defendant was awarded 612 days as jail credit. (S. 31, R. 64-66).

The Defendant appealed the sentence to the Third District Court of Appeal based on the trial court's belief that a mandatory minimum of fifteen years is automatic upon sentencing under the habitual violent felony offender statute. The Third District found that the imposition of mandatory minimum terms is permissive, not mandatory, and remanded the case for resentencing.

QUESTION PRESENTED

WHETHER THE LOWER COURT ERRED IN FINDING THAT THE IMPOSITION OF **A** MANDATORY MINIMUM TERM IN A HABITUAL VIOLENT FELONY OFFENDER SENTENCE **WAS** PERMISSIVE?

SUMMARY OF THE ARGUMENT

The Legislature intended the imposition of mandatory minimum provisions in habitual violent felony offender sentences to be mandatory, The lower court's finding that the imposition was not mandatory was erroneous because it was based on this Court's interpretation of the legislative history of another section of the statute. The legislative history of that section does not apply to the interpretation of this section, and an examination of the legislative history of this section demonstrates an intent to make the imposition mandatory.

ARGUMENT

I. THE LOWER COURT ERRED IN FINDING THAT THE IMPOSITION OF A MANDATORY MINIMUM PROVISION IN **A** HABITUAL VIOLENT FELONY OFFENDER SENTENCE **WAS** PERMISSIVE.

Section 775.084(4)(b), Fla. Stat. (1993), states:

> (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.

(Emphasis added).

The Third District interprets the language "such offender shall not be eligible for release" as language which allows the trial court discretion to impose a mandatory minimum term where the trial court elects to sentence a defendant as a habitual violent felony offender.

The Third District based its holding below on ***Zequeira v. State,*** 671 So. 2d 279 (Fla. 3d DCA 1996), which in turn relied upon ***Walshingham v. State,*** 602 **So.** 2d 1297 (Fla. 1992). In ***Walshingham,*** the Court held that the imposition of a habitual offender sentence was discretionary, based upon ***Burdick v. State,*** 594 So. 2d 267 (Fla. 1992). ***Burdick*** in turn relied upon *State v. Brown,* 530 So. 2d 51 (Fla. **1988).**

In ***Brown,*** the Court was confronted with the issue of whether the use of the word "shall" in §775.084(4)(a) required a court to sentence a defendant as a habitual offender if he qualified. The Court looked at the session law that first added the section in 1975. The Court determined that the legislature had used the word "may" in the session law and that the word was changed to "shall" in an editorial mistake.

In contrast, the legislative history of Chapter 88-131, Laws of Florida, which first enacted the habitual violent felony offender penalties, indicates that the word "shall" was used in enacting §775.084(4)(b)(1),(2) & (3). Ch. 88-131, § 6, at 708-09, Laws of Fla. The use of the word "shall" demonstrates that the Legislature intended for the imposition of the mandatory minimum provisions to be mandatory. *See City of Miami* ***v. Save Brickell Ave., Inc.,*** **426** ***So.*** 2d 1100 (Fla. 3d DCA 1983); ***Fixel v. Clevsnger,*** 285 So. 2d 687 (Fla. 3d DCA 1973). Had the Legislature intended for the mandatory minimum provisions to be discretionary, it would have used the permissive word "may."

Further, the Senate Staff Analysis of the act that became Ch. 88-131, Laws of Fla., stated that the Legislature intended the overall length of a habitual felony offender sentence or a habitual violent felony sentence to be discretionary:

> The maximum penalties which may be imposed pursuant to this section are: third degree felonies, 10 years; second degree felonies, 30 years: and first degree felonies, life.

Senate Staff Analysis and Economic Impact Statement for Committee Substitute for Committee Substitute for Senate Bill 307 **at** 1 (Jun. 2, 1988). In contrast, **the** Analysis shows that the imposition of a mandatory minimum provision in a habitual violent felony offender sentence was <u>**not**</u> discretionary:

> Both habitual felony offenders and habitual felony offenders would be subject to the enhanced penalties currently in place, <u>**however, in**</u>

> **<u>the case of an habitual violent offender, there would be mandatory minimum sentences of 5 years for a third degree felony, 10 years for a second degree felony and 15 years for a first depree felony.</u>**

Id. at 2 (emphasis added). If the Legislature had intended for the mandatory minimum provision of a habitual violent felony offender sentence to be permissive, it could have used the type of discretionary language used in discussing the overall length of the sentence. As it did not do so, it intended the imposition of the minimum provision to in fact be mandatory. Thus, the lower court erred when it found that the imposition of such provisions was permissive, and this Court should quash that portion of the lower court's opinion.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Petitioner respectfully requests that the Court to quash the decision of the lower court.

Respectfully Submitted,

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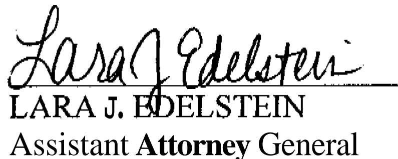
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 31st day of July, 1997, to KENNETH P. SPEILLER, Special Assistant Public Defender, 1507 N.W. 14th Street, Miami, Florida 33125.



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