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IN THE SUPREME COURT OF FLORIDA

JIMMY LEE MCFADDEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 94,235

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Jimmy Lee McFadden, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of three volumes. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State agrees with the defendant's statement of the case and facts.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Article V, Section 3(b)(4), Florida Constitution, and Fla. R. App. P. 9.030(a)(2)(A)(v).

SUMMARY OF ARGUMENT

The habitual offender statute is unequivocally clear and places only one limitation on predicate offense. Reliance upon felony petit theft as a qualifying offense is not precluded under the statute. The certified question must be answered in the affirmative.

ARGUMENT

ISSUE I

WHETHER A PRIOR CONVICTION FOR FELONY PETIT THEFT MAY BE USED AS A QUALIFYING OFFENSE UNDER SECTION 775.084, FLORIDA STATUTES, WHEN THE STATUTE DOES NOT EXCLUDE ITS CONSIDERATION AS A PREDICATE OFFENSE? (Restated)

The defendant contends that a conviction for felony petit theft may not be used as a qualifier for habitual offender sentencing because: 1) the felony petit theft statute deleted application of habitual felony offender sentencing where felony petit theft is the substantive crime, and 2) had the Legislature intended to permit habitualization where felony petit theft was a predicate offense, it would have specifically said so.

F.S. 775.084 sets forth the conditions under which an individual may qualify for habitual offender sentencing. It allows such sentencing when an offender has previously been convicted of any combination of two or more felonies or other qualified offenses so long as the substantive offense and qualifying offense are within five years of each other. The statute's **sole limitation** as to qualifying offenses is that the substantive felony and one of the two prior felony convictions may not be a violation of F.S. 893.13 relating to the purchase or possession of a controlled substance. The statute therefore does not exclude reliance on felony petit theft as a qualifying offense. The principle *expressio unius est exclusio alterius*

applies. Espinosa v. State, 688 So. 2d 1016, 1017 (Fla. 3d DCA 1997).

General principles of statutory construction provide that courts must give statutes their plain meaning. Perkins v. State, 576 So. 2d 1310, 1312-1313 (Fla. 1991). "This principle [of statutory construction] can be honored only if criminal statutes are applied in their strict sense, not if the courts use some minor vagueness to extend the statutes' breadth beyond the strict language approved by the legislature." Ritchie v. State, 670 So. 2d 924, 928 (Fla. 1996), quoting Perkins v. State, supra. Where a statute is unambiguous, courts do not have the power to construe them in such a way which would extend, modify, or limit their express terms or obvious implications. State v. Mitchell, 666 So. 2d 955, 956 (Fla. 1st DCA 1996); State Department of Agriculture and Consumer Services, Division of Consumer Services v. Quick Cash of Tallahassee, Inc., 609 So. 2d 735 (Fla. 1st DCA 1992).

While the defendant is correct in asserting that F.S. 812.014(2)(d) has omitted reference to the habitual offender statute so that habitual offender sentencing is not permitted where felony petit theft is the **substantive** crime, Berch v. State, 691 So. 2d 1148, 1149 (Fla. 3d DCA 1997),[1] nothing

[1] Thus, Bergen and the remaining cases relied upon by the defendant, Nelson v. State, 23 Fla. L. Weekly D2241 (Fla. 1st DCA October 1, 1998), Ridley v. State, 702 So. 2d 559 (Fla. 2d DCA 1997), and Gayman v. State, 616 So. 2d 17 (Fla. 1993) are inapplicable to the instant case.

supports his contention that felony petit theft has as a result become invalid as a **qualifying offense** under F.S. 775.084. The statute is unambiguous in this regard.

The District Court analogized the instant case to that in Brown v. State, 647 So. 2d 214 (Fla. 2d DCA 1994), wherein a trial court relied upon a 1989 felony DUI conviction and a 1983 conviction for dealing in stolen property as predicate offenses in imposing an habitual offender sentence for Brown's 1990 conviction for felony DUI. The applicable DUI statute, F.S. 316.193(2)(b), provided that:

> (b) Any person who is convicted of a fourth or subsequent violation of this section is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084; however, the fine imposed for such fourth or subsequent violation may be not less than $1,000.

The Brown Court, agreeing with the trial court, held that Brown could be treated as an habitual offender based upon his prior criminal record.

The District Court below held:

> In Brown, as in this case, the qualifying conviction within the preceding five years was a misdemeanor conviction elevated to a third degree felony by virtue of prior convictions. The use of the felony DUI as the predicate conviction was approved in Brown. The only distinction between this case and Brown seems to be that the applicable DUI penalty provision expressly provides that one convicted of felony DUI may be sentences in accordance with section 775.084, the habitual offender statute. By contrast, the felony petit theft provision applicable in this case specifies that punishment may be imposed only in accordance with sections 775.082 and 775.083.

The Court concluded that because principles of statutory construction mandate that penal statutes be interpreted according

to their letter, the deletion of reference to habitual offender sentencing from the felony petit theft penalty provision should be interpreted as pertaining only to the offense then before the court for sentencing. While the Court recognized that prosecution for felony petit theft involves an enhancement from the permissible penalty for a misdemeanor, the argument that further enhancement of the same offense through application of an habitual offender sentence is improper, had no applicability because no double enhancement results when a prior conviction for felony petit theft is used as the qualifying offense for purposes of habitual offender sentencing.

This analysis, which is consistent with principles of statutory construction is correct and should be followed by this Court. The State therefore asserts that the certified question should be answered in the affirmative the use of felony petit theft as a qualifying offense for habitual offender sentencing is not excluded by the statute. This Court should affirm.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the affirmative and the decision of the District Court of Appeal should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Carol Ann Turner, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 30th day of December, 1999.

Giselle Lylen Rivera
Attorney for the State of Florida

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