

IN THE  
SUPREME COURT OF FLORIDA

ad 7  
**FILED**

SID J. WHITE

**JAN 25 1999**

CLERK, SUPREME COURT  
By \_\_\_\_\_

Chief Deputy Clerk

JIMMY LEE McFADDEN,

Petitioner,

CASE NO. 94,235

vs.

STATE OF FLORIDA,

Respondent.

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**PETITIONER'S REPLY BRIEF**

**NANCY A. DANIELS**  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

CAROL ANN TURNER  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NO. 243663

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**ATTORNEY FOR PETITIONER**

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Section 812.014(2)(d), Florida Statutes

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Section 893.13, Florida Statutes

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REPLY

ISSUE:       WHETHER A PRIOR CONVICTION FOR  
              FELONY PETIT THEFT CAN BE USED  
              AS A QUALIFYING OFFENSE UNDER  
              SECTION 775.084, FLORIDA STATUTES

The Florida Legislature has utilized two methods for exempting certain crimes from certain consequences of enhancement under the provisions of the habitual felony offender statute. The first method became effective October 1, 1992. The Legislature amended the petit theft statute to remove any reference to punishment as an habitual felony offender. Section 812.014(2)(d), Florida Statutes.

The second method, which occurred about a year later, was an amendment to the punishment statute itself rather than an amendment to the substantive crime statute. Section 775.084(1)(a)(3), Florida Statutes, was designed to limit the number of drug offenders receiving enhanced punishment by providing that the "felony for which the defendant is to be sentenced" and "one of the two prior felony convictions" could not be a violation of section 893.13, Florida Statutes, relating to the purchase or possession of a controlled substance.

Had The Florida Legislature intended that the crime of petit theft be utilized as one of the predicate prior felony convictions for enhanced sentencing, it would have said so. It certainly had no trouble a year later in articulating just such a scheme for multiple-conviction drug users.

Petitioner urges this Court to honor the legislative intent that convictions under the petit theft statute not be utilized in any fashion to enhance a sentence pursuant to the provisions of the habitual felony offender statute. Should the Court be reluctant to accept Petitioner's reasoning, he asks it to act pursuant to the rule of lenity encoded in section 775.021(1), Florida Statutes (1995), and pursuant to the urging of Justice Barkett dissenting in *Gayman v. State*, 616 So. 2d 17 (Fla. 1993).

CONCLUSION

Based upon the statutes, case law and legal argument presented, petitioner respectfully requests that this Court answer the certified question in the negative, and return this matter to the district court for further action pursuant to that decision.

Respectfully submitted,

NANCY A. DANIELS  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida; and a copy has been mailed to appellant on this 25th day of January, 1999.

  
CAROL ANN TURNER