IN THE SUPREME COURT OF FLORIDA

WILLIAM E. TEAL,

Petitioner,

v. **CASE NO. SC04-102**

STATE OF FLORIDA,

Respondent.
_____/

MERITS BRIEF OF RESPONDENT

_____

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STATEMENT OF THE CASE AND FACTS

The state accepts the petitioner's statement of the case and facts as substantially accurate, but supplements with the follow-ing:

The petitioner's appeal to the Second District Court of Appeal was from the summary denial of his motion to correct illegal sen-tence filed under Florida Rule of Criminal Procedure 3.800(a). The state became involved in the appeal when the Second District ordered the state to address the issues raised on appeal from the denial of the motion to correct illegal sentence on June 2, 2003:

> Appellee is directed pursuant to Florida Rule of Appellate Procedure 9.141(b)(2)(C) to serve a response within 30 days of this order ad-dressing all the issues raised by the appel-lant in his motion to correct sentence filed in the circuit court December 23, 2002. Ap-pellee in its response shall specifically ad-dress, in regards to a habitual felony offen-der sentencing pursuant to section 775.084, Florida Statutes (1995), whether under the requirement contained in section 775.084(5) of separate sentencings, a criminal history of the initial placing of a person on either probation or community control with an adjudi-cation of guilt for a felony offense, years later after revocation of that supervision re-imposing either probation or community con-trol, and, after the second revocation of that supervision, the imposition of a prison sen-tence at the same time as the imposition of prison sentences for the criminal offenses being habitualized qualifies as a sequential prior felony

> offense in relation to the criminal offense being habitualized. Since section 775.084(5) was not enacted until 1993, this court in Schneider v. State, 788 So. 2d 1073 (Fla. 2d DCA 2001), was not faced with the issue of sequential prior offenses. Appellee shall also address what the remedy should be if appellant does not qualify as a habitual offender. (emphasis in original)

The state served its response to the Second District's order July 15, 2003. The state responded to similar orders in Blakeslee v. State, Case No. 2D03-1320 and McCall v. State, Case No. 2D03-1225.

Blakeslee was affirmed, per curiam, November 21, 2003. *See Blakes-lee v. State*, 869 So. 2d 549 (Fla. 2d DCA 2003).

In McCall, the Second District filed its written opinion certifying conflict with *Richardson v. State*, 884 So. 2d 950 (Fla. 4th DCA 2003), *rehearing granted*, 29 Fla. L. Weekly D215, 2004 Fla. App. LEXIS 192 (Jan. 14, 2004) on December 3, 2003. *See McCall v. State*, 862 So. 2d 807 (Fla. 2d DCA 2003).[1] On December 17, 2003 the Second District filed its opinion in the instant case. The opinion states:

> In 1992, in trial court case number 91-20507, Teal was adjudicated guilty of robbery and placed on two years of community control fol-lowed by two years probation.

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[1]On September 13, 2004 the Court stayed the proceedings in McCall, Case No. SC04-136, pending the disposition in the instant case and State v. Richardson, Case No. SC04-174.

He later pleaded guilty to a violation of probation and was sentenced to thirty months in prison. After he filed a petition for reconsideration of sentence, Teal's sentence was vacated and he was again placed on two years of community control followed by two years of probation. He later violated his community control and was sentenced to 5.5 years of imprisonment.

In the present case, in January 1997 Teal was sentenced as a habitual felony offender to 22.5 years in prison consecutive to his sen-tence of 5.5 years in case number 91-20507. Teal subsequently filed a motion to correct illegal sentence alleging that he lacked the necessary predicate offenses for the habitual felony offender sentence. The state relied on Teal's 1992 conviction in case number 91-20507, together with a 1991 conviction for kidnapping, as the two predicate convictions for habitualization.

In his motion, Teal claimed that it was improper to use the conviction in case number 91-20507 as a predicate conviction because the trial court originally placed him on community control. He contended that placement on community control was not a sentence; instead, he asserted that he received a sentence in case number 91-20507 only after the trial court found him guilty of violating his community control and imposed a sentence of 5.5 years in prison. Teal further argued that because his prison sentence in case number 91-20507 was imposed on the same day that he was convicted and habitualized in the present case, the conviction in case number 91-20507 was not a proper predicate for habitualization pursuant to *section 775.084(5), Florida Statutes (2002)*. We disagree.

As this court stated in *McCall v. State, No. 2D03-1225, 862 So. 2d 807, 2003 Fla. App.*

> *LEXIS 18328 (Fla. 2d DCA Dec. 3, 2003)*, "when it enacted the habitual felony offender statute, the legislature intended that once a defendant had twice been convicted with sanctions the third conviction would be enhanced. We find that a sentence, as referred to in section 775.084, included the sanction of probation." We conclude that the same analysis applies to a sanction of community control, and therefore, Teal's 1992 conviction and placement on community control in case number 91-20507 could properly serve as a predicate conviction for habitualization in the present case.
>
> Accordingly, we affirm the order of the trial court and, as we did in *McCall*, certify con-flict with *Richardson v. State, 2003 Fla. App. LEXIS 11055, 28 Fla. L. Weekly D 1716 (Fla. 4th DCA July 23, 2003)*.

Teal, 862 So. 2d at 872-873. The petitioner moved to invoke the Court's discretionary jurisdiction and on September 13, 2004 the Court appointed counsel for the petitioner and set a briefing schedule for briefing on the merits while postponing its decision on jurisdiction.

SUMMARY OF THE ARGUMENT

The legislative intent for purposes of the habitual offender statute is to give priority to the prosecution and incarceration of repeat felony offenders. In amending the habitual offender statute after this Court's decision in *State v. Barnes, infra*, (*Barnes* II) that the statute did not require sequential convictions and sen-tences, the legislature intended to carry out the legal justifi-cation for a habitual offender sentence: the philosophy that an in-dividual who has been convicted of one offense and who, with knowl-edge of that conviction, subsequently commits another offense, has rejected his or her opportunity to reform and should be sentenced as a habitual offender.

A reasonable interpretation of the sequential conviction and sentencing requirement leads to the conclusion that placing an offender on community control or probation with an adjudication of guilt qualifies as a separate sentence. Probation in the context of the habitual offender statute is a test. It gives the offender the opportunity to rehabilitate. The purpose and intent of the habitual offender statute is fulfilled – the defendant has been given the opportunity to reform and has rejected that opportunity. Therefore, a sentence of community control or probation qualify as a separate sentence for purposes

of the “sequential conviction” requirement.

ARGUMENT

THE PLACING OF A DEFENDANT ON COMMUNITY CONTROL OR PROBATION WITH AN ADJUDICATION OF GUILT AND THE LATER REVOCATION OF COMMUNITY CONTROL OR PROBATION AND RESENTENCING A DEFENDANT WHILE AT THE SAME TIME IMPOSING AN ENHANCED HABITUALIZED SENTENCE FOR A NEW SUBSTANTIVE OFFENSE SATISFIES THE SEQUENTIAL CONVICTION REQUIREMENT OF THE HABITUAL OFFENDER STATUTE SINCE THE LEGISLATIVE INTENT WAS THAT ONCE A DEFENDANT HAS BEEN TWICE CONVICTED WITH SANCTIONS, THE THIRD CONVICTION COULD BE ENHANCED.

The instant case addresses the sequential sentencing requirement of section 775.084 (5), Florida Statutes (1995), specifically, whether a sentence of probation or community control, a subsequent revocation and reimposition of community control, and the imposing of a prison sentence for the violation of probation or community control at the same time as the offense being habitualized satisfies the sequential sentencing requirement. The state asserts that, based upon legislative intent as well as legislative history, such a scenario does meet the sequential conviction requirement.

1. Principles of Statutory Construction

The first rule of statutory interpretation is "when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory construction; the statute must be

given its plain and obvious meaning." *Streeter v. State*, 509 So. 2d 268, 271 (Fla. 1987) (quoting *A.R. Douglass, Inc., v. McRainey*, 102 Fla. 1141, 1144, 137 So. 157, 159 (Fla. 1931). Inquiry into legislative intent may begin only when a statute is ambiguous on its face. *State v. Egan*, 287 So. 2d 1, 4 (Fla. 1973). If a statute is even slightly ambiguous, an examination of legislative history and statutory construction principles is necessary. *Streeter*, 509 So. 2d at 271.

In determining legislative intent, the court must consider the act as a whole, the evil to be corrected, the language of the act, including its title, history of enactment, and state of law already in existence bearing on the subject. *State v. Webb*, 398 So. 2d 820, 824 (Fla. 1981). The ambiguity in section 775.084 (5) stems from the language:

> In order to be counted as a prior felony for purposes of sentencing under this section, the felony must have resulted in a <u>conviction sen-tenced separately prior to the current of-fense and sentenced separately from any other felony conviction that is to be counted as a prior felony</u>. (e.s.)

While the statute provides that the placing of a person on proba-tion without an adjudication of guilt may be treated as a prior <u>conviction</u> if the subsequent offense for which the defendant is to be sentenced was committed during such

probationary period, it leaves open the question whether the placing of a person on com-munity control/probation qualifies as a "sentence" for purposes of the separate sentencings requirement.

In denying the motion to correct illegal sentence, the trial court did not directly focus on the question raised by the Second District's order. The state will proceed to address the predom-inant conflict issue.

2. Purpose and Intent of Sequential Conviction Requirement

To determine whether the legislature intended that an initial disposition or sentence of probation was intended to be a "sen-tence" for purposes of the requirement of separate sentencings first requires a finding of legislative intent. That intent is expressed by section 775.0841, Florida Statutes (1995):

> The Legislature finds a substantial and dis-proportionate number of serious crimes are committed in Florida by a relatively small number of repeat and violent felony offen-ders, commonly known as career criminals. The Legislature further finds that priority should be given to the investigation, apprehension, and prosecution of career criminals in the use of law enforcement resources and to the incar-ceration of career criminals in the use of available prison space. The Legislature intends to initiate and support increased ef-forts by state and local law enforcement agen-cies and state attorneys' offices to investi-

> gate, apprehend, and prosecute career crimi-nals and to incarcerate them for extended terms; and, in the case of violent career criminals, such extended terms must include substantial minimum mandatory terms of impri-sonment.

See also Fla. Stat. s. 775.0843 (1995) (policies to be adopted for career criminal cases). Thus, the legislative intent is to give priority to the prosecution and incarceration of repeat felony of-fenders. *See Hale v. State*, 630 So. 2d 521, 524 (Fla. 1993) (legislative intent to provide for the incarceration of repeat offenders for longer periods of time); *Eutsey v. State*, 383 So. 2d 219, 223 (Fla. 1980) (purpose of habitual offender act to allow enhanced penalties for defendants who meet objective guidelines indicating recidivism).

The legislative intent in adding section 775.084(5) was to re-turn the habitual offender statute to its pre-*State v. Barnes*, 595 So. 2d 22 (Fla. 1992) (*Barnes* II) status which required not only sequential convictions but sequential offenses as well. *Rhodes v. State*, 704 So. 2d 1080, 1083 (Fla. 1st DCA 1997). This pre-*Barnes* status was discussed by the First District in *Barnes v. State*, 576 So. 2d 758 (Fla. 1st DCA 1991) (en banc) (*Barnes* I). In *Barnes* I, the two predicate felonies were committed days apart in September, 1997. Although they were charged separately, the defendant, Barnes, pled guilty or

nolo contendere to both offenses on the same day, and was subsequently sentenced for both felonies at the same sentencing hearing. *Id*. at 759.

The trial court sided with the state because the 1988 version of the habitual offender statute made no mention of sequential con-victions. On appeal, the First District noted that counsel had thoroughly briefed the issue, covering forty years of Florida's ex-perience with habitual offender provisions. The appellant in arguing that sequential convictions were required stated the rule requiring sequential convictions:

> It is the established law of this state, as well as the overwhelming weight of authority throughout the country, that, when the statute requires two or more convictions as a prere-quisite to an enhanced sentence on a present case, the defendant must have committed the second offense subsequent to his conviction on the first offense. Two or more prior convic-tions rendered on the same day are, therefore, treated as one offense for purposes of such a provision in a habitual criminal statute.

Barnes I, 576 So. 2d at 759 (quoting *Shead v. State*, 367 So. 2d 264 (Fla. 3d DCA 1979). This "sequential conviction requirement" makes it necessary that each of the prior offenses be separated by a conviction. This requirement, which the defendant argued was not premised upon the precise language of

a specific habitual offender provision, "contemplated that an opportunity for reformation ... be given after each conviction." *Barnes* I, 576 So. 2d at 759. The appellant argued that the sequential conviction requirement had been applied throughout the history of the habitual offender stat-ute, including the 1988 version of the statute. *Id*.

After extensive analysis of the sequential conviction re-quirement in earlier versions of the habitual offender statute, and upon recognizing that the 1988 version of the habitual offender statute did not on its face require sequential convictions such that the defendant would qualify as a habitual offender under the 1988 statute, the *Barnes* I court stated:

> Up until the 1988 amendments, the purpose be-hind Florida's habitual offender provision had been to protect society from those criminals who persisted in crime after having been given opportunities to reform. As noted previously, the sequential conviction requirement is a means of insuring that defendants have the chance to reform prior to being treated as habitual offenders. This was true when the requirement had a basis in the language of the habitual offender provision, see *Joyner, supra*, and continued to be true long after the old two-tiered provision was discarded, see *Shead, supra*. Although the 1988 amendments brought a change in the language which seemed to leave little room for sequential convic-tions, the amendments do not appear to have brought a corresponding change in the purpose of the statute. There is no indication that in amending section

> 775.084 the legislature sought to alter the purpose behind the ha-bitual offender provision or to excise the sequential conviction requirement that had long been a part of the law. Had the legislature intended to overturn long-standing precedent and the construction the courts had placed on the statute, then it was obliged to use unmistakable language to achieve its objective. See *State ex rel. Housing Author-ity of Plant City v. Kirk*, 231 So. 2d 522, 524 (Fla. 1970); *American Motors Corp. v. Abrahantes*, 474 So. 2d 271, 274 (Fla. 3d DCA 1985). Not only did the legislature fail to use unmistakable language, but it is doubtful that any change in the sequential conviction requirement was intended or contemplated. Having examined the staff analyses for the Senate and House Committee on Criminal Justice, we find no indication of a shift in legislative intent, nor is there a suggestion that the change in language was directed at the sequential conviction requirement. See Senate Staff Analysis, S. Bill 307, June 1, 1988, p. 2; House of Representatives Committee on Criminal Justice, Staff Analysis, H. Bill 1710, May 20, 1988, pp. 1-2. (e.s.)

Barnes I, 576 So. 2d at 761-62. Thus, the *Barnes* I court held that despite the fact sequential convictions were not required by the plain language of section 775.084(1)(a)1, Florida Statutes (Supp. 1988), the requirement was necessary to carry out the purpose and intent of the habitual offender statute. *Id.* at 762.

Of course, the First District certified the question which the supreme court in *Barnes* II answered in the negative, i.e.,

the statute did not require sequential convictions. In response to *Barnes* II, the legislature amended the habitual offender statute in chapter 93-406 s. 2, Laws of Florida[2], to make it clear that sequential convictions are necessary. As the legislative history states:

> In February 1992, the Florida Supreme Court ruled in *State v. Barnes*, 595 So. 2d 22 (Fla. 1992), that in order to qualify as a habitual felony offender, the statutory requirement of two prior felony convictions may arise from a single prior sentencing event. For example, an offender who was previously convicted of two counts of purchasing cocaine at a single sentencing event would now be eligible for sentencing as a habitual offender. Prior to the *Barnes* decision, the habitual offender statute had been interpreted to require se-quentially separate convictions, at separate sentencing events.

H.R. Comm. on Crim. Justice, SB 26-B, June 18, 1993, Final Bill Analysis, p. 6. The staff analysis recognized that the *Barnes* II court had recommended the legislature reexamine the language of the statute in view of its construction of the statute according to its plain meaning. The *Barnes* II court had recommended "[t]he sequen-tial conviction requirement provides a basic, underlying reasonable justification for the imposition of the habitual sentence ..." *Id*. at 24.

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[2]The effective date of the amendment was June 17, 1993. *Ford v. State*, 652 So. 2d 1236, 1237 (Fla. 1st DCA 1995).

It reasonably appears the legislature enacted the specific language of section 775.084(5) as a response to the specific facts of *Barnes* I and II. That is, the defendant pled to both predicate offenses on the same day, and was subsequently sentenced for both felonies at one sentencing hearing. It seems clear the legislative intent in amending the habitual offender statute after *Barnes* II was to carry out the legal justification for the imposition of a habitual offender sentence: the philosophy that an individual who has been convicted of one offense and who, with knowledge of that conviction, subsequently commits another offense, has rejected his or her opportunity to reform and should be sentenced as a habitual offender. *Barnes* II, 595 So. 2d at 24.

In other words, "the purpose of the habitual offender sanction was to protect society from those criminals who persisted in crime after having been given opportunities to reform ... The sequential conviction requirement is a means of insuring that defendants have the chance to reform." *Id*. (quoting *Barnes* I)

3. Adjudication of Prior Felony and Probation/ Community Control Qualifies as Sequential Conviction.

A logical interpretation of the habitual offender statute's sequential conviction requirement leads to the conclusion that

the placing of a defendant on community control or probation with an adjudication of guilt qualifies as a separate sentence. As defined by Black's Law Dictionary 1202 (6th ed. 1990) probation is a sentence releasing the defendant into the community under the su- pervision of a probation officer. *Larson v. State*, 572 So. 2d 1368, 1370 (Fla. 1991). Moreover, in *Poore v. State*, 531 So. 2d 161, 164 (Fla. 1988) this Court classified probation as one of "five basic sentencing alternatives in Florida." In *Bolyea v. State*, 508 So. 2d 457, 459 (2d DCA 1987), *approved,* 520 So. 2d 562 (Fla. 1988) this Court held that a probationer, whether or not incarcerated as a condition of probation, is "in custody" for purposes of seeking post-conviction relief.

Therefore, a defendant who has been adjudicated guilty of a felony and placed on community control or probation is sentenced separately for purposes of the sequential sentencing requirement of section 775.084 (5).[3] The placing of a defendant on probation is a test. It gives a defendant an opportunity to rehabilitate. *Lan-deverde v. State*, 769 So. 2d 457, 462 (Fla.

[3]*Cf. Montgomery v. State*, 821 So. 2d 464 (Fla. 4th DCA 2002), *review granted*, 837 So. 2d 410 (Fla. 2003) (court's analysis of meaning of "conviction" as defined by guidelines consistent with legislative intent to punish offenders who demonstrate an in-ability to comply with less restrictive penalties previously imposed).

4th DCA 2000). The same logic that allows any sentence which could originally have been imposed on violation of probation, i.e., subsequent conduct demonstrating an absence of amenability to reform, *State v. Payne*, 404 So. 2d 1055, 1057 (Fla. 1981), should allow a habitual offender sentence when the revocation of probation and the new subsequent convictions as predicate offenses are sentenced at the same time or when the revocation is sentenced together with the new offense being subjected to habitual offender status.

The purpose and intent of the habitual offender statute is fulfilled – the defendant has been given the opportunity to reform and has rejected that opportunity.[4] After all, "[t]he power to avoid serving any additional time or being subjected to an in-creased sentence was entirely within the control of the defendant ...," *Williams v. Wainwright*, 493 F. Supp. 153, 154

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[4]To interpret the sequential sentencing requirement otherwise would lead to an unreasonable conclusion or to a purpose not intended by the legislature. *See Williams v. State*, 492 So. 2d 1051 (Fla. 1986), *overruled, other grounds*, 719 So. 2d 882 (Fla. 1998); *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984); *Johnson v. Presbyterian Homes of Synod of Florida, Inc*., 239 So. 2d 256 (Fla. 1970). If the intended purpose of section 775.084 (2) was to prevent recipients of withheld adjudication from utilizing the benefit if they commit subsequent offenses while under any form of government supervision, *see Overstreet v. State*, 629 So. 2d 125, 126 (Fla. 1993) (McDonald, J. dissenting), then community control/probation should not result in a windfall when a defen-dant continues in criminal activity.

(S.D. Fla. 1980), *aff'd,* 650 F. 2d 58 (5th Cir. 1981), and the state is not acting arbitrarily in seeking habitual offender treatment on a defendant's third felony conviction. Since the primary focus is on sequential convictions, *Barnes* I, a previous prior conviction and a "sentence" of probation or community control can count as pred-icates for purposes of the habitual offender statute.

The state submits the Fourth District's analysis in *Richardson* ignores the history and legislative intent as concerns habitual offender sentencing. In the context of habitual offender proceed-ings, community control or probation are a separate sentence. The offender has been given an opportunity to reform; if the offender offends society by committing further crimes, it is fitting that community control or probationary sentences be used to enhance the sentence for a third or greater substantive crime such that society may be protected from further, perhaps larger, transgressions.

The Honorable Court should approve the Second District's decision; the Fourth District's *Richardson* decision is erroneous and should not be approved.

CONCLUSION

A sentence of community control or probation with an adjudication of guilt does satisfy the sequential sentencing requirement of the habitual offender statute; community control or probation in the context of habitual offender sentencing are a "sentence" in the sense the offender has been granted the opportunity to reform.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Heather Mary Ann Gray, Heather M. Gray, P.A., P.O. Box 2668, Riverview, Florida 33568-2668 on this ___ day of January, 2005.

CERTIFICATE OF COMPLIANCE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

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OF COUNSEL FOR RESPONDENT