IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, **CASE NO. SC04-174**

Petitioner, **LT Case No. 4D02-4985**

v.

ERICK RICHARDSON,

Respondent.

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ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, State of Florida, was the prosecution in the trial court and Appellee the Fourth District Court of Appeal. Petitioner will be referred to herein as “the Petitioner” or the “State”. Respondent, Erick Richardson, was the defendant in the trial court and Appellant in the Fourth District Court of Appeal. Respondent will be referred to as “the Respondent” or “Richardson”.

STATEMENT OF THE CASE AND FACTS

The Appellant relies upon its statement of the case and facts as presented in its initial brief.

SUMMARY ARGUMENT

The Fourth District erroneously interpreted subsections (2) and (5) of section 775.084, Florida Statutes. Subsection (2) clearly provides that the placing of a defendant on probation or community control, even without an adjudication of guilt, shall be treated as a prior conviction for purposes of habitual felony offender sentencing. However, the Fourth District's interpretation of this subsection renders it essentially meaningless and frustrates the clear intent of the Legislature.

Contrary decisions have been reached by the Second District. Certified conflict should be resolved in favor of the Second District's decision in McCall.

Recently, the Fifth and Third Districts have joined the Second District in their rejection of the Fourth District's opinion in the instant case.

ARGUMENT

THE FOURTH DISTRICT ERRONEOUSLY INTERPRETED PROVISIONS OF THE HABITUAL OFFENDER STATUTE; THE DECISION OF THE FOURTH DISTRICT IS CONTRARY TO LEGISLATIVE INTENT AND GIVES SECTION 775.084(2), FLORIDA STATUTES, NO EFFECT; CERTIFIED CONFLICT SHOULD BE RESOLVED IN FAVOR OF MCCALL

In his answer brief the Respondent argues that the Fourth District's interpretation of sections 775.084(2) and (5), Florida Statutes (2002), in the opinion under review, Richardson v. State, 884 So. 2d 950 (Fla. 4th DCA 2003),supplemented on rehearing, was correctly decided. For the reasons argued in its initial brief and below, the Petitioner respectfully disagrees.

Section 775.084(5) imposes a separate sentencing requirement on prior convictions for purposes of habitual offender sentencing:

> In order to be counted as a prior felony for purposes of sentencing under this section, the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony.

Section 775.084(5), Florida Statutes (2002). The Legislature has also provided that the placing of a defendant on probation or community control qualifies as a prior conviction for purposes of habitual offender sentencing:

> For the purposes of this section the placing

> of a person on probation or community control without an adjudication of guilt shall be treated as a prior conviction.

Section 775.084(2), Florida Statutes (2002). In the instant case, the Fourth District has held that placing a defendant on probation or community control does not satisfy the separate (or sequential) sentencing requirement since a defendant is not sentenced when he is placed on probation or community control. Richardson, 884 So. 2d at 951-952, 953-954. The Court held that the Respondent was not actually sentenced on his first prior conviction until he violated probation and was sentenced to a prison term on the violation. Id. at 952. The Petitioner respectfully submits that this holding is erroneous and gives section 775.084(2) no effect.

In the instant case, the Respondent was convicted of possession of cocaine and was placed on probation on April 14, 1993. Id. On September 23, 1993, he was convicted of grand theft and was found in violation of probation; on that same day he was sentenced on both the theft charge and the violation of probation. Id. Thereafter, the Respondent was convicted of robbery and sentenced as a habitual offender based upon the prior convictions of possession and grand theft. Id. However, the Fourth District concluded that since the Respondent was sentenced on the violation of probation and the grand theft

charges on the same day, the separate (or sequential) sentencing requirement of subsection (5) would not be satisfied unless there were separate sentencing proceedings held on that day. Id. The Court rejected the Petitioner's argument that pursuant to subsection (2) the date of sentencing on the possession charge, for purposes of habitualized sentencing, was April 14, 1993, the date that the Respondent was placed on probation for that offense. Id. at 952-953.

It is the Petitioner's position that the decision of the Fourth District is erroneous because it gives no effect to subsection (2) and is contrary to Legislative intent. Under Richardson, a felony for which a defendant is placed on probation will not qualify as a predicate offence for habitual offender sentencing unless there is an actual violation of probation. Although subsection (2) clearly provides that "the placing of a person on probation or community control without an adjudication of guilt shall be treated as a prior conviction", the Fourth District has essentially disregarded this provision. Under Richardson, the placing of a defendant on probation is given no significance: unless a defendant violates probation on a particular felony, that felony cannot be used a qualifying offense for habitual sentencing. This holding is contrary to the plain language of subsection (2) and to the intent of the

Legislature.

In his answer brief, the Respondent correctly notes that the Fifth District has now aligned itself with the Second District and has certified conflict with Richardson (Answer Brief, page 5). In Love v. State, 886 So. 2d 276 (Fla. 5th DCA 2004), the defendant, citing Richardson, argued that his sentence as a habitual offender on his current offense was illegal because one of his prior convictions did not meet the requirements of section 775.084(5) since he was placed on probation for that offense and never actually served a sentence on that offense until he was sentenced on the current offense. Love at 277. The Fifth District discussed Richardson's reasoning that a sentence and probation are distinct concepts and that when a defendant is placed on probation the court withholds imposition of a sentence. Love at 277. The Fifth District accurately summarized the holding of Richardson "that a defendant placed on probation had never been sentenced, so that when the defendant later violated that probation and committed a new offense, the defendant was being sentenced for the first time in the probation violation case, and that conviction could not constitute a sequential conviction to the new offense." Love at 277.

The Fifth District acknowledged that there were cases that

suggest that probation is not a sentence; however, the Court stated that:

> . . . **whether or not an order of probation is or is not deemed a sentence depends on the policy to be served.** In Poore v. State, 531 So. 2d 161 (Fla. 1988), the court listed probation as a sentencing alternative. See also, Larson v. State, 572 So. 2d 1368 (Fla. 1991), which recognizes that probation, as defined in Black's Law Dictionary, is a sentence releasing a defendant into the community under supervision. In Barnes v. State, 595 So. 2d 22 (Fla. 1992), the Supreme Court explained that the justification for requiring sequential convictions is based on the philosophy that an individual who has been convicted of one offense and who subsequently commits a second conviction, has rejected the opportunity to reform.

Love at 278 (emphasis added). Citing the Second District's decision in McCall v. State, 862 So. 2d 807 (Fla. 2d DCA 2003) with approval, the Court held that the sequential sentencing requirement is met when a defendant is placed on probation for a prior felony:

> We conclude that the purpose of the statutory requirement is met by construing a probation order to be a sentence within the meaning of the statute. Clearly, the defendant has been given an opportunity to reform when he or she is placed on probation. As emphasized in McCall, probation is a sanction. **We believe the interpretation applied by the Fourth District in Richardson is hyper-technical and illogical.** Why would the legislature allow an order of probation withholding

> adjudication to be a conviction which can qualify a defendant for habitualization, but not consider the order to be a sentence when determining whether the prior convictions were sequential? We affirm and certify conflict with Richardson.

Love at 278 (emphasis added).

In McCall, the Second District correctly concluded that the sanction of probation is a "sentence" for purposes of section 775.084(5) and that placing a defendant on probation satisfies the separate sentencing requirement of the section. McCall, 862 So. 2d at 808. This conclusion, unlike the holding of Richardson, gives full effect to both subsections (2) and (5). "It is axiomatic that all parts of a statute must be read **together** in order to achieve a consistent whole. Where possible, courts must give effect to **all** statutory provisions and construe related statutory provisions in harmony with one another." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992)(emphasis in original).

In Perry v. State, 29 Fla. L. Weekly D2624 (Fla. 5th DCA Nov. 19, 2004), the Fifth District again certified conflict with Richardson, and rejected that decision's interpretation of sections 775.084(2) and 775.084(5):

> We find that the Richardson interpretation of subsections (2) and (5) is too restrictive. If the concept is accepted that a defendant is not "sentenced" when

> placed on probation or community control and if no violation occurs and the defendant successfully serves his or her probation or community control time, then those proceedings could never be used to enhance a subsequent offense because no sentence would ever be imposed. That is clearly contrary to the plain meaning of subsection (2), which makes it abundantly clear that the placing of a defendant on probation or community control **can** be used under this sentencing statute to qualify as a predicate "conviction."

29 Fla. L. Weekly at D2625 (emphasis in original). Moreover, the Court noted that when the Legislature struck the qualifying language from section 775.084(2)[1] "it signaled its intent that any prior period of probation or community control with adjudication withheld would qualify as a prior." Perry at D2625, FN 12.

The Perry Court also observed that under Richardson subsection (2) is denied its full effect and that application of Richardson leads to incongruous results. Perry at D2625. The remedy for such incongruities would "rel[y] on form over substance: open and close the two sentencing proceedings so that they are separated by minutes." Id. The Court then held that in order to avoid a reading of section 775.084 which would render

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[1] This section previously concluded with the qualifying phrase ". . . if the subsequent offense for which the person is to be sentenced was committed during this period of probation or community control." Perry at D2625, FN 12.

part of the statute meaningless:

> . . . subsection (2) must be read together with subsection (5) to recognize that a defendant is "sentenced" to probation or community control when "convicted" pursuant to subsection (2). Only this interpretation avoids frustrating the Legislature's intent to enhance punishment of those who commit multiple infractions of the law.

Id. Although the Respondent asserts that Perry is distinguishable (the Perry Court notes some factual distinctions[2]), the Court correctly observed that "the definitions and concepts are identical." Id.

The Third District has now joined the Second and Fifth Districts in their rejection of Richardson. In its opinion in State v. Del Castillo, 3D03-2422 (Fla. 3d DCA Dec. 22, 2004), the Court reversed the trial court's striking of the state's notice of intent to seek habitual offender enhancement where the defendant received probation and a withhold of adjudication on the predicate crime for which the state relied to support the habitual felony offender enhancement. The Court held that the prior offense could properly be treated as a predicate offense

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[2] Perry was sentenced as a habitual violent felony offender, while Richardson was sentenced as a habitual felony offender. Perry, 29 Fla. L. Weekly at D2625. However, sections 775.084(2) and (5) apply to both sentencing schemes. Furthermore, unlike, Richardson, Perry was placed back on community control after his violation. 29 Fla. L. Weekly at D2625. This distinction is inconsequential.

for habitualization:

> . . . Clearly, section 775.084(2), governs the instant matter and the predicate crime may be considered for habitualization. We disagree with the Fourth District's reading that sections 775.084(2) and 775.084(5) are inconsistent. Section two clearly intends to define, or extend, the term "prior conviction." [Section] 775.084(2), Fla. Stat. (2003). "One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless the words are defined in the statute or by the clear intent of the legislature." Green v. State, 604 So. 2d 471, 473 (Fla. 1992).

Del Castillo, Slip Opinion, pages 5-6 (emphasis in original). Consequently, three District Courts of Appeal have now found that the Fourth District's interpretation of sections 775.084(2) and (5) is contrary to Legislative intent.

The Respondent has asserted that the Petitioner failed to cite the legislative history of subsection (5)(Answer Brief, page 21). However, a review of legislative history is not required in this case since the language of subsections (2) and (5), as well as the intent of the Legislature, is clear:

> Our purpose in construing a statutory provision is to give effect to legislative intent. Legislative intent is the polestar that guides a court's statutory construction analysis . . . In attempting to discern legislative intent, we first look to the actual language used in the statute . . . If the statutory language is unclear, we apply rules of statutory construction and explore

> legislative history to determine legislative intent . . .

Bautista v. State, 863 So. 2d 1180, 1185 (Fla. 2003)(internal citations omitted). The plain language of subsection (2) provides that the placing of a defendant on probation or community control is treated as a prior conviction for purposes of habitual offender sentencing. Subsection (5) plainly imposes a separate sentencing requirement for prior felonies. By interpreting these subsections in such a way as to give subsection (2) essentially no effect, the Fourth District has frustrated the clear intent of Legislature. This is error. "It is a fundamental rule of statutory interpretation that 'courts should avoid readings that would render part of a statute meaningless.'" Perry, 29 Fla. L. Weekly at D2625, quoting, Unruh v. State, 669 So. 2d 242, 245 (Fla. 1996).

Although a review of legislative history is not required in the instant case, the Petitioner **did** note in its initial brief on page 7 that subsection (5) was added by the Legislature in 1993. The Respondent relies heavily on the argument that the decision of the Fourth District in the instant case is correct because subsection (5) was enacted in response to this Court's decision in State v. Barnes, 595 So. 2d 22 (Fla. 1992)(Answer Brief, pages 19-24). In Barnes, this Court found that the

habitual offender statute as it existed at that time did not contain a sequential conviction requirement. Id. at 24. Observing that the lack of this requirement would result in many more defendants being sentenced as habitual offenders and that it would have a substantial impact on prison population, this Court invited the Legislature to examine the possibility of imposing such a requirement. Id.

The Respondent correctly states that subsection (5) was enacted after the Barnes decision. However, that enactment did not repeal or diminish the effect of subsection (2). That subsection has existed in a form close the current version since 1974. In that year, the subsection read: "For the purposes of this section, the placing of a person on probation without an adjudication of guilt shall be treated as a prior conviction if the felony for which he is to be sentenced was committed during the probationary period." Chapter 74-188, section 6, Laws of Florida (1974). In 1996, the language was amended so as to be gender-neutral. Chapter 96-388, section 44, Laws of Florida (1996). Community control was specifically included in 1998. Chapter 98-204, section 11, Laws of Florida (1998). In 1999, six years after the enactment of subsection (5), subsection (2) was expanded by the Legislature and the requirement that the subsequent offense for which the person is

to be sentenced had to be committed during the period of probation or community control was eliminated. Chapter 99-188, section 3, Laws of Florida (1999)[3]. This legislative history demonstrates a clear and consistent intention that the placing of defendant on probation or community control shall be treated as a prior conviction for habitual offender sentencing. The decision of the Fourth District in the instant case is contrary to this intent and is therefore in error. "Legislative intent is the polestar that guides a court's statutory construction analysis." Bautista, 863 So. 2d at 1185.

The Respondent also argues that the distinction between probation and a prison sentence in section 948.01(2), Florida Statutes (2002), supports the decision of the Fourth District (Answer Brief, pages 12-13). However, this argument cannot prevail in the face of the clear legislative intent to treat the placing of a defendant on probation as a prior conviction for habitual sentencing. See Perry, 29 Fla. L. Weekly at D2625 ("Each statute should be given individual interpretation based on its intent and scheme.")

The Respondent also argues that the decision of the Fourth

[3] As the Petitioner has previously stated, the Respondent committed his second offense while still on probation for the first offense and therefore qualifies for habitual sentencing under the pre-1999 statute (Initial Brief, pages 9-10, n. 3).

District is correct based upon the rule of lenity (Answer Brief, pages 20-21). However, that rule of construction is not applicable to the instant case since the subsections at issue are not "susceptible of differing constructions" as provided by section 775.021(1), Florida Statutes (2002). Moreover, this Court has stated that "the rule of lenity does not apply where legislative intent as to punishment is clear." Bautista, 863 So. 2d at 1188 FN4. Here, the intent of the Legislature is clear. The Fourth District has erroneously frustrated this intent.

Finally, the Respondent raises several issues which are beyond the scope of the certified conflict issue (Answer Brief, pages 24-28). Since these issues were not addressed by the Fourth District in the instant opinion, this Court should decline to accept the Respondent's invitation for briefing and review of these issues. See e.g., Raford v. State, 828 So. 2d 1012, 1021 FN12 (Fla. 2002)(Court declines to review issues beyond the scope of certified conflict in the case). See also, Bautista, 863 So. 2d at 1188 (Court generally declines to review issues outside the scope of certified question). "As a case travels up the judicial ladder, review should consistently become narrower, not broader." Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

In the instant case, the Fourth District has interpreted

sections 775.084(2) and (5) contrary to the plain language of those sections and given section 775.084(2) no effect. The Second, Third, and Fifth Districts have correctly rejected the holding of the Fourth District. The Petitioner respectfully submits that the instant decision is clearly erroneous and requests that this Court reverse that decision.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the PETITIONER respectfully requests this Honorable Court reverse the decision of the Fourth District Court of Appeal and resolve the certified conflict in favor of McCall.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished by U.S. mail to Joseph Hagedorn Lang, Jr., Carlton Fields, P.A., P.O. Box 3239, Tampa, FL 33601-3239, Christine R. Dean, Charlton Fields, P.A., P.O. Box 190, Tallahassee, FL 32302-0190, and John R. Blue, Charlton Fields, P.A., P.O. Box 2861, St. Petersburg, FL 33731, Counsel for Respondent, on January 18, 2005.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Courier New 12 point type and complies with the font requirements of

Rule 9.210.

_____
Of Counsel