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FILED

SDJ. WHITE

NOV 25 1991

CLERK, SUPREME COURT.

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DENNIS BUCKHALTER,
Petitioner,
versus
STATE OF FLORIDA,
Respondent.

CASE NO. 78,983
5DCA NO. 91-479

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

✓ BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
904-252-3367

ATTORNEY FOR PETITIONER

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CASES CITED:

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OTHER AUTHORITY:

Section 775.084, Florida Statutes (1989)	3
Section 787.01(a), Florida Statutes (1989)	3
Section 787.01(2), Florida Statutes (1989)	3

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by an information filed in the Circuit Court of Orange County, Florida, with sexual battery and kidnapping. (R 284) He was tried by a jury on January 23 and 24, 1991, and found guilty of kidnapping. (R 169-170, 170-187, 310, 311) He was sentenced as an habitual offender on January 25, 1991, to spend his life in prison. (R 270, 336-337) On February 22, 1991, his motion to correct an illegal sentence was denied. (R 277-278, 341-342, 343)

The Office of the Public Defender was appointed to represent Petitioner and he timely appealed to the Fifth District Court of Appeal. (R 344, 339) On October 31, 1991, his conviction and sentence were affirmed. Buckhalter v. State, 16 F.L.W. D2772 (Fla. 5th DCA October 31, 1991). (Appendix). On November 20, 1991, he filed his notice to invoke this Honorable Court's discretionary jurisdiction.

SUMMARY OF ARGUMENT

The District Court in its opinion herein acknowledges direct and express conflict with Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990). The question raised by this appeal is also pending review by this Honorable Court in Burdick v. State, 16 F.L.W. D1963 (Fla. 1st DCA July 25, 1991); and Tucker v. State, 576 So.2d 931 (Fla. 5th DCA 1991).

ARGUMENT

THE DISTRICT COURT OF APPEAL'S
DECISION DIRECTLY AND EXPRESSLY
RECOGNIZES CONFLICT WITH THE
DECISION IN JOHNSON V. STATE, 568
So.2d 519 (Fla. 1st DCA 1990).

Appellant was convicted of kidnapping in order to facilitate the commission of a sexual battery, a first-degree felony punishable by life. ss. 787.01(a), 787.01(2), Fla.Stat. (1989). (R 169-170, 170-187, 270, 310, 311, 336-337) His motion to correct an illegal sentence, i. e., one imposed under the habitual offender statute for a first-degree felony punishable by life, was denied. (R 277-278, 341-342, 343)

In affirming Petitioner's life sentence as an habitual offender, the Fifth District Court of Appeal wrote:

We recognize conflict with
Johnson v. State, 568 So.2d 519
(Fla. 1st DCA 1990).

Buckhalter v. State, 16 F.L.W. D2772 (Fla. 5th DCA October 31, 1991). (Appendix). Johnson held that a trial court was not authorized to impose a sentence under the habitual violent offender statute for a second-degree murder conviction which had been reclassified as a life felony.

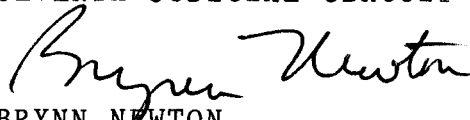
The issue of whether Section 775.084, the habitual offender statute, applies to first-degree felonies punishable by life is presently pending review by this Honorable Court in Burdick v. State, 16 F.L.W. D1963 (Fla. 1st DCA July 25, 1991) (Fla. Sup. Ct. Number 78,466); and Tucker v. State, 576 So.2d 931 (Fla. 5th DCA 1991) (Fla. Sup. Ct. Number 77,854).

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and review the District Court's decision in this cause.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32114, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Dennis Buckhalter, P. O. Box 699, Sneads, Florida 32460, this 20th day of November, 1991.



ATTORNEY

91-332
BN

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT
JULY TERM 1991

NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING MOTION, AND,
IF FILED, DISPOSED OF.

DENNIS BUCKHALTER,
Appellant,

v.

CASE NO. 91-479

STATE OF FLORIDA,
Appellee.

Opinion filed October 31, 1991

Appeal from the Circuit Court
for Orange County,
Richard F. Conrad, Judge.

James B. Gibson, Public Defender, and
Brynn Newton, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and James N. Charles,
Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM.

We recognize conflict with *Johnson v. State*, 568 So.2d 519 (Fla. 1st DCA
1990).

AFFIRMED.

COBB, SHARP, W., and HARRIS, J.J., concur.

RECEIVED

OCT 31 1991

PUBLIC DEFENDER'S OFFICE
7th CIR. APP. DIV.