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MAR 11 1992
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

JAMES F. BAKER,	:	
Petitioner,	:	
vs.	:	Case No. 79,054
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On January 3, 1990, the State Attorney for the Twelfth Judicial Circuit, Sarasota County, Florida, filed an information charging James Franklin Baker in two counts with two single-episode December 5, 1989, robberies with a firearm, first degree felonies punishable by life. (R288, 289) An amended information filed April 2, 1990, charged essentially the same offenses but redescribed the property as to one of the counts. (R295,296)

Mr. Baker faced possible habitual offender treatment. (R3,340) The trial court stated during a colloquy as to whether Mr. Baker would accept a plea "[I]f he's convicted of robbery with a firearm then I wouldn't have much choice but to give him life in prison; is that correct?" and the State assented to that statement. (R4,5) Mr. Baker went to trial and was found guilty of the lesser included offenses of robbery with a weapon, which is a first degree felony. (R252,253,307,308) Mr. Baker would have only scored 22 to 27 years under the sentencing guidelines if he had been found guilty as charged; however, apparently because the State was seeking habitual offender status, the State prepared no post-verdict scoresheet. (R3)

On April 26, 1990, Mr. Baker was habitualized and sentenced to life in prison concurrent on each count. (R259-280,343,344) At sentencing, the trial judge expressed distaste for sending people to prison and said:

> I would probably not sentence you to life, I would probably sentence you to 30 years but my interpretation of the statute is that I'm

> given no discretion if it is a first degree felony and I have made the finding that you're an habitual felony offender. Maybe another Court will tell me I'm wrong on that. So I sentence you at this time to life imprisonment. (R278,279)

Mr. Baker filed a timely notice of appeal on May 15, 1990. (R381) On September 13, 1991, the District Court of Appeal, Second District, affirmed Mr. Baker's conviction and sentence by per curiam affirmance without opinion or case citation, said decision being subsequently reported as Baker v State, 585 So2d 938 (Fla 2d DCA 1991). Mr. Baker filed a timely motion for rehearing, serving it on September 16, 1991. On November 8, 1991, the District Court of Appeal denied the motion for rehearing but for purposes of clarification withdrew the original opinion and issued a substitute opinion citing cases and noting apparent conflict with a case of this Court, as well as two cases from another District Court of Appeal. The denial of the motion for rehearing and the substitute opinion later appeared as Baker v State, 16 FLW D2824 (Fla 2d DCA Nov. 8, 1991). Mr. Baker filed a Notice to Invoke Discretionary Jurisdiction of this Court with the District Court of Appeal, serving said notice on December 3, 1991. This Court accepted jurisdiction on March 2, 1992.

SUMMARY OF THE ARGUMENT

The opinion of the district court is in conflict with this Court's decision in Burdick v. State, 17 FLW S 88 (Fla. Feb. 6, 1992). A life sentence is not mandatory when a defendant is habitualized on a first degree felony. Burdick requires reversal.

<u>ARGUMENT</u>

The trial court felt obligated to impose a life sentence when it imposed a habitualized sentence on Appellant's first degree felony conviction. The judge indicated reluctance to do so but understood the law to require a life sentence. This was not so. In <u>Burdick v. State</u>, 17 FLW S 88 (Fla. Feb. 6, 1992), this Court held that a life sentence is not mandatory when a defendant is habitualized on a first degree felony. In <u>Burdick</u>, this Court reversed and remanded for reconsideration

> because the State argued that a life sentence is mandatory...and because the trial court in this case did not indicate whether it believed it could in fact decline to impose a life sentence...

Reversal is even more compelling in the present case. The State here not only indicated that a life sentence was mandatory, the trial court agreed.

It is implicit in <u>Burdick</u> that a refusal to exercise discretion or an underestimation of its extent is automatically a reversible abuse of discretion, even in instances where the exercise of that discretion would be unreviewable or subject to the most limited review. Compare <u>Smith v. State</u>, 574 So.2d 1195 (Fla. 3d DCA 1991), approved in <u>Burdick v. State</u>, 17 FLW S 88 (Fla. Feb. 6, 1992) (erroneous belief that certain habitual violent felony offender result was mandatory); <u>Quinones v. State</u>, 448 So.2d 608 (Fla. 3d DCA 1984) (failure to recognize full extent of resentencing discretion); <u>Glosson v. Solomon</u>, 490 So.2d 94 (Fla. 3d DCA 1986); <u>Chambers v. State</u>, 491 So.2d 309 (Fla. 4th DCA 1986);

Lawyer v. Crawford, 517 So.2d 36 (Fla. 3d DCA 1987) (blanket refusal to consider bond applications for certain types of matters); Fazio v. Russell Building Movers, Inc., 469 So.2d 844 (Fla. 3d DCA 1985) (blanket refusal to consider motions for new trial unless something has happened post-verdict); Eason v. Colbath, 586 So.2d 78 (Fla 4th DCA 1991) (general statement of the principle involved). See also Fairmont Glassworks v. Cub Fork Coal Co., 287 U.S. 474, 482, 483, 53 S.Ct. 252, 77 L.Ed.2d 439, 444 (1933); Felton v. Spiro, 24 CCA 321, 78 F 576, 581-583 (U.S. 6th Cir. 1897); Davis v. Davis, 96 F.2d 512, 514 (U.S. D.C. Cir. 1938); State v. Fuller, 114 N.C. 885, 19 S.E. 797, 800 (1894); Martin v. Bank of Fayetteville, 131 N.C. 121, 42 S.E. 558 (1902); Johnson v. Shumway, 26 A 590 (Vt. 1893); Seibert v. Minneapolis and S.L. Ry, 568 Minn. 58, 64, 57 N.W. 1068, 1070 (1894); Hite v. Dell, 73 A 72 (N.J. 1909); Palliser v. Home Telephone Co., 170 Ala. 341, 54 So. 499 (1911); In Re Burke's Estate, 240 Mich. 444, 215 N.W. 413, 416 (1927). In the present case, the trial judge indicated, with obvious reluctance, that he had no choice. He did have a choice, and reversal is required.

It might well be noted that the district court itself has very recently receded from its very own cases cited in its revised opinion as its basis for affirmance. In King v. State, Case No. 91-00036 (Fla. 2d DCA Mar. 4, 1992), the district court extrapolated from Burdick, receded en banc from its prior mandatory life cases, and held that it is permissible to habitualize a defendant and then impose non-incarcerative community control or probation.

Regardless of whether _King_ itself is correct as to its specific holding, the district court itself has implicitly acknowledged that it was erroneous to affirm the sentence in the present case.

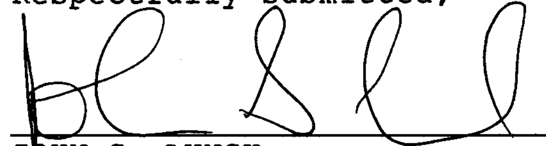
CONCLUSION

This Court should reverse due to Burdick and the foregoing argument of Appellant.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to William I. Munsey, Jr., Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 9th day of March, 1992.

Respectfully submitted,



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