IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 79,311

ROBERT ARNDT,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
FLORIDA BAR #197890
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
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ATTORNEY FOR RESPONDENT

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IN THE SUPREME COURT OF FLORIDA

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Respondent.	:	
	:	

RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

The state seeks review from the decision of the First District Court of Appeal in Arndt v. State, 17 FLW D385 (Fla. 1st DCA Jan. 31, 1992) (copy attached as an appendix).

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement as reasonably accurate.

III SUMMARY OF ARGUMENT

A summary of argument will be omitted due to the nature of this case.

IV ARGUMENT

CERTIFIED QUESTION/ISSUE PRESENTED

WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (SUPP. 1988), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF TWO OR MORE FELONIES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PREVIOUS OFFENSE?

This Court recently decided this issue in State v. Barnes, 17 FLW S119 (Fla. Feb. 20, 1992), quashed Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991), and held that prior convictions need not be sequential under the 1988 habitual offender statute. See also State v. Price, 17 FLW S130 (Fla. Feb. 20, 1992). In the companion cases of State v. Goodman, 17 FLW S131 (Fla. Feb. 20, 1992), State v. Razz, 17 FLW S131 (Fla. Feb. 20, 1992), State v. Price, 17 FLW S131 (Fla. Feb. 20, 1992), and State v. Martin, 17 FLW S130 (Fla. Feb. 20, 1992), this Court reached the same result under the 1989 habitual offender statute.

V CONCLUSION

Unless this Court is willing to alter its opinion in Barnes, the issue has been decided adversely to respondent.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
Fla. Bar No. 197890
Assistant Public Defender
Leon County Courthouse
301 S. Monroe - 4th Floor North
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(904) 488-2458

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Bradley R. Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Robert Arndt, this 16 day of April, 1992.

P. DOUGLAS BRINKMEYER

from the Fund, raised by the cross appeal.
ED IN PART, and REMANDED, with directions.
. CONCURS; KAHN, J., DISSENTS AND CON-
OPINION.)

Mary Crowder, as Trustees for James Crowder; Phillip and Trustees for Deborah Crowder; Cecil D. and Diane M. E. and Alice L. Hunt; Obe D. and Virginia K. Coleman; and Nancy Scrivner.

as a mortgage broker was suspended indefinitely on Feb- On February 4, 1987, the State filed a civil complaint in Oka- court, accusing Beeler of fraudulent practices in violation securities and Investor Protection Act (Ch. 517, Fla.Stat.) and brokerage Act (Ch. 494, Fla.Stat.), and requesting an injunction of a receiver. A Temporary Injunction and Order Appointing ed on the next day and, ultimately, affirmed on appeal. *State* So.2d 932 (Fla. 1988), *rev'g*, 513 So.2d 710 (Fla. 1st DCA 17, 1989, pursuant to a jury verdict, Beeler was convicted of cluding securities fraud, grand theft and racketeering, and of 25 years in prison. *State v. Beeler*, Case No. 88-676-CF Cty., Fla.), *aff'd mem.*, 576 So.2d 1320 (Fla. 1st DCA

amount was the sum of the following separate claims:

	$30,500.00
y Crowder for James Crowder)	$ 8,000.00
y Crowder for Deborah Crowder)	$ 4,000.00
Diane M. Youmans	$15,000.00
Alice L. Hunt	$15,000.00
Virginia K. Coleman	$10,000.00
	$25,000.00
	$15,000.00

have not sought review in this court of the denial of their we express no opinion as to the soundness of the decision claim.

concurring in part and dissenting in part.) I fully the court's resolution of the issue raised by Dampier I dissent as to the Beaty Group's cross-appeal and the final order issued by the Department, which in at least implicitly, the hearing officer's determi- Dampier's claim against the Fund was properly per- to Section 494.043, Florida Statutes.

043 provides two alternative means for perfecting the Fund. The first method, the one followed by is considerably more burdensome than the sec- Under subsection (2) of the statute, where the de- or registrant has sought relief in bankruptcy ant need only file a proof of claim in the bank- ngs and notify the Department of such claim in the conditions precedent for recovery. I would a claimant has fully complied with subsection (1) the further step of obtaining relief from the bank- before proceeding to final judgment, the conditions the statute are satisfied, and to require the claimant, creditor, to proceed further in bankruptcy court peal and would afford no further protection to the would suggest that such a result is also supported nguage of Section 494.044(2), Florida Statutes: shall assign his right, title, and interest *in the* the extent of his recovery from the fund, to the De- shall record, at his own expense, the assignment of every county where the judgment is recorded" gislature has required, therefore, that anyone per- recovery under Section 494.043(1) must fully partment by an assignment of all rights in a claim- My review of Chapter 494 reveals no parallel ng upon claimants proceeding under the bank- ve provided in Section 494.043(2).[1] Reading the tandem, I would conclude that the bankruptcy ly available to the claimant, but failure to follow ll not bar a claimant who has already faithfully complied with Section 494.043(1). Only a claimant entirely barred by the automatic bankruptcy stay from proceeding to judgment should be held exclusively to an application of Section 494.043(2).

By rejecting the objections of the Beaty Group, the Department has, in effect, agreed that strict adherence to Section 494.043(2) will not be required in cases where the Department's interests have been fully protected by the claimant through the means afforded in the first subsection of the statute. As pointed out by the majority, the Department of Banking and Finance is charged with administering Chapter 494 and is due considerable deference in its construction of statutes contained in that chapter. This maxim is all the more true with regard to Section 494.043, since this statute was apparently intended to afford at least a modicum of protection to the Department in cases where the Mortgage Brokerage Guaranty Fund is required to make payment.

I respectfully dissent as to the remand for further proceedings.

[1]Since it is implicit in the statutory language here construed by the court that the Department will step into the shoes of the claimant, it would appear significant to me to make a determination as to what claims survive the bankruptcy. Neither party has addressed this issue, and the record contains scanty information with regard to Beeler's bankruptcy proceeding. It is clear, however, that Dampier's underlying claim against Beeler sounds in fraud or misrepresentation. A discharge in bankruptcy does not discharge an individual debtor from any debt for money obtained by false pretenses, a false representation, or actual fraud. 11 U.S.C. § 523(a)(2)(A). See, In Re Powell, 95 B.R. 236 (S.D. Fla. 1989) (judgment debt arising out of debtor's willful misstatements in connection with purchase of securities was excepted from discharge as debt arising out of debtor's "actual fraud").

* * *

Criminal law—Sentencing—Habitual offender—Question certified whether Section 775.084(1)(a)1, Florida Statutes (Supp. 1988), which defines habitual felony offenders as those who have "previously been convicted of two or more felonies," requires that each of the felonies be committed after conviction for the immediately previous offense

ROBERT ARNDT, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 91-2633. Opinion filed January 31, 1992. Appeal from an order of the Circuit Court for Escambia County, Judge Frank Bell. P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for appellant. Bradley Bischoff, Assistant Attorney General, Tallahassee, for appellee.

(PER CURIAM.) Appellee concedes that the issue in this case is controlled by *Barnes v. State*, 576 So.2d 758 (Fla. 1st DCA 1991). Accordingly, we reverse appellant's habitual offender sentence and remand for resentencing. As in *Barnes*, we certify the following question as one of great public importance:

> WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (SUPP. 1988), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF TWO OR MORE FELONIES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PREVIOUS OFFENSE?

REVERSED and REMANDED for resentencing. (BOOTH, SHIVERS, and WEBSTER, JJ., CONCUR.)

* * *

Criminal law—Sentencing—Correction of illegal sentence—Habitual offender—Error to impose habitual offender sentence without making requisite findings of fact

PAUL DANIELS, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 91-1470. Opinion filed January 31, 1992. An Appeal from the Circuit Court for Escambia County. Joseph Tarbuck, Judge. Appellant Pro Se. Robert A. Butterworth, Attorney General; Gypsy Bailey, Assistant Attorney General, for Appellee.

(PER CURIAM.) Appellant seeks review of the trial court's order denying his "Motion to Correct an Illegal Sentence." We reverse and remand.

In March 1988, appellant was adjudicated guilty of a felony petit theft which had been committed in September 1985. The