

047
FILED

SID J. WHITE

MAY 26 1992

CLERK, SUPREME COURT.

By  Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CHARLES ANDREW WALSHINGHAM, :

Petitioner, :

vs. :

Case No. 79,399

STATE OF FLORIDA, :

Respondent. :

_____ :

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

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT D. ROSEN
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FLORIDA BAR NUMBER 0826065

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ATTORNEYS FOR PETITIONER

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ARGUMENT

ISSUE

THE INSTANT DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH THE OPINION OF THIS COURT IN BURDICK V. STATE, 17 F.L.W. S88 (Fla. February 6, 1992).

The Appellee argues that the Appellant's life sentence as a habitual offender be affirmed because such a sentence was an "appropriate" punishment. The Appellant asserts it is the trial court's function to determine what sentence is appropriate, not the state's. While a life sentence may have been lawful, the trial court only imposed it after the Second District held the original sentence of 25 years be withdrawn in favor of a life sentence or a guidelines sentence. See Walsingham v. State, 576 So.2d 365 (Fla. 2d DCA 1991). At the resentencing hearing, the trial judge concluded a life sentence was more appropriate than a guidelines sentence, but he expressed his preference for the original sentence.

In Burdick v. State, 17 F.L.W. S88 (Fla. 1992), this court held that sentencing under section 775.084(4)(a)1, Florida Statutes (1989), was permissive, not mandatory. The trial court had originally imposed a life sentence. Such a sentence was legal but this court remanded the case "because the trial court [in Burdick] did not indicate whether it believed it could in fact decline to impose a life sentence." Id. at S89.

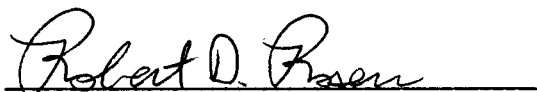
In the present case, the judge only imposed a life sentence after the Second District told him he could not decline to

do so once he decided to sentence the Appellant as a habitual offender. However, Burdick holds that the Appellant's original sentence was lawful. Therefore, the trial judge must be given the opportunity to impose what he considered to be the appropriate sentence.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Michele Taylor, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 21st day of May, 1992.

Respectfully submitted,



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