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IN THE SUPREME COURT OF FLORIDA

GREGORY MCKNIGHT,

Petitioner,

vs. Case No. 79,689

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
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE

On November 7, 1989, the State Attorney for the Thirteenth Judicial Circuit, Hillsborough County, Florida, filed an information against Petitioner, Gregory McKnight, charging in the first count that on June 14 or June 15, 1989, Petitioner burglarized a structure of Zeno A. Franks, in violation of Section 810.02, Florida Statutes (1989). Count II charged that at the same time Petitioner stole a stove, refrigerator, and washer and dryer, the property of Zeno A. Franks and Kim M. Anderson, in violation of Section 812.014(2)(c), Florida Statutes (1989). (R4, 5)

On January 29, 1990, Petitioner appeared before the Honorable Harry Lee Coe, III, Circuit Judge. (R52-74) Petitioner waived the right to a jury trial in exchange for a cap of probation. (R54-56)

Some testimony was taken on January 29, 1990. (R56-73) The Petitioner was then released on his own recognizance. (R73, 74) When testimony resumed the next day, Petitioner was not present. (R33) Testimony resumed without him. (R33) After the State rested, the defense moved for judgment of acquittal, which was denied. (R36) The defense presented one witness. (R36-38) The Court found Petitioner guilty. (R39)

No judgment was entered until August 28, 1990, the time at which Petitioner was sentenced. (R14, 15) Petitioner scored Any Non-State Prison Sanction on the sentencing guidelines. (R16, 17) Judge Coe sentenced him to two 5 year concurrent terms of probation. (R18) The court itself had filed a "Subsequent Felony Notice" on January 25, 1990. (R11) Although Petitioner's agreed

cap in exchange for his waiver of jury trial did not include habitualization, the court habitualized him. (R15, 19, 44) The order of probation was filed September 10, 1990. (R18, 19) A timely notice of appeal was filed on September 20, 1990. (R20, 21)

The Second District Court of Appeals reversed without addressing issues raised on appeal as to the conviction itself. The opinion appears as McKnight v. State, 595 So.2d 1059 (Fla. 2d DCA 1992). The district court held that habitualized probation is a legal sentencing alternative but that it could only be imposed against Petitioner after the submission of statutory proof and the making of statutory findings.

Petitioner sought conflict jurisdiction in this Court to resolve conflict with State v. Kendrick, 596 So.2d 1153 (Fla. 5th DCA 1992).

STATEMENT OF THE FACTS

The State presented one witness, Zeno Franks. The allegedly burgled premises were the private residence of his sister. (R3, 57) Franks' testimony is somewhat confusing; he lived there at the time of the alleged burglary, but actually no one lived there because of a fire that went through the house. (R34, 57, 58) The Petitioner McKnight, a man named Edmonds, and Franks' sister lived there before the fire. (R62, 64, 65) Franks claims that Petitioner did not live there immediately prior to the fire because he was only living there temporarily and because Petitioner did not list the address as his residence when he was arrested. (R71, 72) Petitioner was apparently not arrested until more than 4 months after the alleged offense. (R6, 7, 55) Franks gives no testimony as to when Petitioner allegedly moved out or even as to knowledge of Petitioner moving out.

After the fire, Franks locked the doors and windows. (R34) There is no testimony as to forced entry or as to whether Petitioner or Edmonds had keys. Franks was making arrangements to remove the appliances, such as his washer and dryer and certain other things, from the premises. When Franks got around to removing them, the items were gone. Edmonds told Franks that the Petitioner came with some other guys and took everything out. (R58, 59, 66) Petitioner allegedly readily admitted to Franks that he had the items, and expressed a willingness to return them. (R60, 61, 67, 68) Franks himself testified Petitioner told him he was keeping

the items for him. (R66) Unfortunately, there were scheduling problems and Petitioner never returned the items. **(R61, 68)**

Franks testified that the washer and dryer alone were worth $730. He did not **give** Petitioner permission to take the items. **(R73)**

Defense witness Arthur Heath gave somewhat confusing testimony that Edmonds cashed stolen checks, possibly using Zeno Franks' name. **(R36,** 37) He did not know who took the property. (R37) Testimony that Edmonds had approached him twice about wanting to remove the property was objected to by the State on hearsay grounds and excluded. **(R37, 38)**

SUMMARY OF THE ARGUMENT

I

The evidence was insufficient to convict Petitioner of burglarizing what was his residence. The evidence is insufficient to show a termination of consent or permission to enter or that Petitioner would believe that he did not have consent or permission. The removal of the apparently jeopardized valuables from the fire-gutted and abandoned premises by a former co-occupant is insufficient to show the criminal intent to commit a larceny.

II

It was error to exclude testimony as to the State's hearsay declarant Edmonds' statements indicating his intent to remove the property. This testimony was admissible to show existing state of mind as to a future act or as a verbal act. Further, it was admissible to show the hearsay declarant's motive to falsely implicate Petitioner.

III

Habitualization of Petitioner violated the conditions of Petitioner's waiver of jury trial. It is improper to place a person on probation and habitualize him. The placing of Petitioner on probation constitutes a finding that habitualization is not necessary. If intended to predetermine future sentencing status, it is unfair and premature. This Court should adopt the result in State v. Kendrick and declare habitualized probation an illegal sentence.

ARGUMENT

INTRODUCTION

This case is before the Court on conflict jurisdiction to resolve conflict among the district courts of appeals in regard to the issue of habitualized probation. The conflict to be resolved is manifest in King v. State, 597 So.2d 309 (Fla. 2d DCA 1992) and State v. Kendrick, 596 So.2d 1153 (Fla. 5th DCA 1992). These cases represent the tip of the iceberg in regard to problems of reconciling the sentencing guidelines, the habitual offender statute, and probation or community control. See, for example, Burrell v. State, Case No. 91-01124 (Fla. 2d DCA Sept. 11, 1992) (illegal to impose split sentence of nonhabitualized prison followed by habitualized probation). Although this case provides an opportunity for this Court to give guidance in regard to the general sentencing issues involved, this Court's jurisdiction on certiorari, pursuant to Article V, Section 3 of the Florida Constitution, is not limited to the conflict issue. Kennedy v. State, 303 So.2d 629 (Fla. 1974). See, also State v. Smith, 573 So.2d 306 (Fla. 1990) (great public importance jurisdiction not limited to issues certified; review extended to unrelated issues).

ISSUE I

THE EVIDENCE WAS INSUFFICIENT TO CONVICT PETITIONER OF BURGLARY AND THEFT

The evidence is insufficient to exclude the reasonable hypothesis of innocence that Petitioner had consent, or reasonably

believed he had consent, to enter his residence and remove apparently jeopardized property for purposes of safe-keeping. Consent is a recognized defense to burglary. State v. Hicks, 421 So.2d 510 (Fla. 1982); Ray v. State, 522 So.2d 963 (Fla. 3d DCA 1988), rev. denied, 531 So.2d 168 (Fla. 1988). Petitioner was a resident of the premises and it is unclear whether and when his residency terminated. Further, he may have still had property of his own on the premises. Since Franks locked the doors and windows and there was no evidence of forced entry, it is not unreasonable to hypothesize that Petitioner still had a key with permission of the owner. The owner of the premises did not testify. Compare, Coleman v. State, 592 So.2d 300 (Fla. 2d DCA 1991) (evidence insufficient to convict defendant of burglary when owner of premises testified that although she did not consent to entry, but that her teenaged son might have.

The evidence is similarly insufficient as to intent to commit an offense therein or as to criminal intent at any time as to any taking. There is no evidence of stealthful entry, concealment, or use of force. Petitioner's alleged taking purportedly occurred in the presence of Edmonds, and it was the State's apparent position that Petitioner did not deny his identity as the physical taker to Franks. Where a taking occurs in the presence of others, not amounting to a robbery, and there is no concealment, an innocent taking is presumed, there is nothing from which a trier of fact may legitimately infer a felonious purpose, and a verdict against the accused cannot be sustained. Gunn v. State, 78 Fla. 599, 83 So. 511

(1919); Maddox v. State, 38 So.2d 58 (Fla. 1949). Due to the unusual circumstances of this case, there is a reasonable hypothesis of innocence that the alleged taking was done with the best of intentions. If Petitioner did indeed take the items, he merely did what Franks himself wanted to do, protect them from jeopardy in a fire-gutted, abandoned house. Franks himself testified Petitioner told him he was keeping the items for him. (R66)

The later scheduling difficulties do not exclude this. They are not even remotely relevant or probative as to intent at the time of the entry and taking. Further, they are too ambiguous.

The convictions cannot stand if the evidence is consistent with a reasonable hypothesis of innocence. State v. Law, 559 So.2d 187 (Fla. 1989); Cox v. State, 555 So.2d 353 (Fla. 1989); McArthur v. State, 351 So.2d 972 (Fla. 1977). This rule is of particular application in regard to whether there is sufficient circumstantial evidence to support conviction of a larceny offense. Grover v. State, 581 So.2d 1379 (Fla.4th DCA 1991); Coester v. State, 573 So.2d 391 (Fla. 4th DCA 1991); Rager v. State, 587 So.2d 1366 (Fla. 2d DCA 1991). Petitioner should be discharged, retrial being prohibited by the Double Jeopardy clause. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

ISSUE II

IT WAS REVERSIBLE ERROR TO EXCLUDE EDMONDS' STATEMENTS TO HEATH

It was reversible error to exclude, on grounds of hearsay, the declarant Edmonds' repeated interest in removing appliances from the house. (R37, 38) These statements were not offered to show the

truth of a matter asserted but were rather in the nature of a verbal act and admissible as to Edmonds' state of mind in order to show a plan or intention subsequently acted upon. See, Section 90.803(3)(a), Florida Statutes (1989); Van Zant v. State, 372 So.2d 502 (Fla. 1st DCA 1979); Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed.2d 706 (1892).

Further, hearsay testimony had come before the court in which Edmonds, as a hearsay declarant, implicated Petitioner as the alleged remover of the items. (R58, 59, 66) The trial judge did not exclude or strike that testimony. A hearsay declarant may be impeached and attacked by any method applicable to a testifying witness, Section 90.806, Florida Statutes (1989). One of the most classic and recognized methods of impeaching a defendant's accuser is to show that the accusation may be motivated by a desire on the part of the accuser "to shift suspicion away from himself." Davis v. Alaska, 415 U.S. 308, 311, 94 S.Ct.1105, 1108, 30 L.Ed.2d 347, 351 (1974). In regard to this latter basis of admissibility, it matters little whether Edmonds was the actual culprit. Even if he wasn't, his miraculously prescient or coincidental statements to Heath about future removal of the items give rise to a motive for him to produce a fall guy and falsely implicate Petitioner.

Edmonds did not testify. There is some indication he had engaged in unrelated criminal conduct against Franks, which allows an inference that the only alleged eye-witness to the purported offense flew the coop for that or other reasons. Zeno Franks, motivated to recover his loss, might have fabricated admissions by

Petitioner to add additional weight to his case against Petitioner, a source of recovery that was within reach.

It was reversible error to exclude the scoundrel Edmonds' statements to defense witness Heath.

ISSUE III

IT WAS REVERSIBLE ERROR TO SENTENCE APPELLANT TO HABITUALIZED PROBATION

For numerous reasons, the trial court erred in sentencing Petitioner to habitualized probation, error that extended beyond the lack of proper findings.

A. Habitualized Probation Was In Violation Of The Conditions Pursuant To Which Petitioner Waived His Right To Trial By Jury

Petitioner exchanged his constitutional right to a jury trial for a cap of probation. The bargaining away of valuable constitutional rights, selling such trial rights as that to a jury, appointed counsel, the presumption of innocence, or the requirement of proof beyond a reasonable doubt, in exchange for a sentencing concession in the event he is found guilty, bears some resemblance to plea-bargaining, the difference being that in plea bargaining, the defendant waives all of his trial rights, while in the present setting, the defendant waives less than all, and continues to protest his innocence.

Babitualization was not part of the bargain. Petitioner fully and irrevocably performed his part of the rights bargain by being tried before Judge Coe instead of a jury. Petitioner's rights bargain should be specifically enforced. Charatz v. State, 577

So.2d 1298 (Fla. 1991) (plea bargain may be specifically enforced if defendant has suffered irrevocable prejudice in reliance thereon). Although Petitioner made this assertion in his appeal, the Second District Court of Appeals did not address the issue. However, in Wright v. State, 599 So.2d 767 (Fla. 2d DCA 1992), a case decided by a different panel 86 days after the decision in Petitioner's case, the district court reversed on substantially similar facts. In Wrisht, the defendant waived his right to a jury trial in exchange for a cap of probation. After the same trial judge as is involved in the instant appeal convicted him, Wright was sentenced to habitualized probation without being given an opportunity to revoke his waiver. The district court reversed pursuant to Charatz. In the Second District there is a substantive difference between probation and habitualized probation: if the defendant does not appeal habitualized probation on direct appeal from the order of probation, he will not be heard to complain after his violation of probation that the sentence was illegal. King; This is so even though the Second District, in King, apparently considers the Habitual Offender Statute subject to the sentencing guidelines when probation is imposed. The fact that a defendant must appeal the original imposition indicates that there is something substantive to appeal; courts do not decide matters in the absence of a case or controversy and appellate courts do not normally issue mere declaratory judgments. It is not 100% clear what the substance is that would be appealed, because the "habitualized" aspect of the probation would appear to only be of some

future contingent prejudice; what matters is that it is of sufficient substance to the district court to require immediate appeal or perpetual waiver. Because habitualized probation was not part of the waiver, it was error not to follow the terms of the waiver of jury trial and impose regular probation.

B. The Trial Court Erred In Sentencing Petitioner To Probation As A Habitual Offender.

Petitioner's probation complied with the sentencing guidelines; his habitual offender status must be stricken. The sentencing court can use the enhanced penalties available under the statute if the court finds that the penalties are necessary for the protection of the public or disregard them if the defendant is found not to be a danger to the public. Section 775.084(4)(c) Florida Statutes (1989).

At the time of sentencing, a defendant cannot be both a danger to the public and allowed to be placed on probation to be among the public once more. The intent of the habitualization statute was to give trial courts a weapon of last resort to remove dangerous criminals from society after they had shown, by committing prior felonies from among the categories listed in the statute, that past incarceration had not deterred them from committing new crimes.

The intent of probation under Section 948.01 Florida Statutes (1987), however, is quite different. In placing a defendant on probation, a trial judge finds that

> the defendant is not likely again to engage in a criminal course of conduct and that the ends

> of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law....

Section 948.01(3), Florida Statutes (1987).

One Court has held that

> [I]t is seriously questionable whether Probation in any form can be imposed under the habitual criminal statute. In order to sentence a defendant under this statute, the trial court must find, as it did in this case, that the imposition of an enhanced sentence 'is necessary for the protection of the public from further criminal activity.' § 775.084(4)(a), Fla.Stat. (1975). ...Probation on the other hand, may only be imposed '[i]f it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law. ...' § 948.01(3), Fla.Stat. (1975). The required findings under the habitual criminal statute and the probation statute are inconsistent and mutually exclusive.

Shead v. State, 367 So.2d 264, 267 (Fla. 3d DCA 1979) (emphasis supplied). The 1988 amendment to section 775.084(4)(a), Florida Statutes eliminated the affirmative declaration that the sentence is necessary for the protection of the public. However, the trial court is still free to disregard the sentence if it finds that the appellant is not a danger to the public. Therefore, it is clear that the court must still make a determination at some subjective level and the reasoning in Shead is still valid. More recently, the Fourth District in Scott v. State, 550 So.2d 111, 112 (Fla. 4th DCA 1989), rev. dismissed, 560 So.2d 235 (Fla. 1990), stated that

imposition of probation and a sentence under the habitual offender statute are mutually exclusive.

If Petitioner commits a new felony and has a requisite prior felony other than the instant one, he can be habitualized for the new charge. However, it is absurd to suggest as, the trial court appears to, that Petitioner should be subject to a double-the-maximum habitual sentence if Petitioner subsequently renders himself "dangerous to society" by violating his probation in any way. It is implicit in the court's order that Petitioner is not dangerous enough to need incarceration, but if he were to default in costs of supervision or abscond to another state to visit a dying relative, he would not only be subject to incarceration, his exposure would precipitously rocket to twice the statutory maximum with significantly reduced rights to early release. For so little to change a person's liberty so much seems beyond the bounds of any sense of rationality or proportionality.

In this case, the Petitioner was placed on probation as a habitual offender. Therefore, the court was making contradictory assumptions about the Petitioner's dangerousness to the public. The imposition of such contradictory sentences was error requiring reversal and remand by this Court for resentencing within the guidelines to probation.

In King v. State, 597 So.2d 309 (Fla. 2d DCA 1992), the district court held that habitualized probation exists and is legal; that if it is imposed it must comply with the guidelines;

and that if a defendant does not appeal its original imposition, he waives the right to complain if his probation is violated.

On the other hand, in State v. Kendrick, 596 So.2d 1153 (Fla. 5th DCA 1992), the Fifth District Court of Appeals held that a defendant cannot be placed on straight probation when habitualized. The district court concluded that the "term of years" language in the Habitual Offender Statute mandated at least some incarceration in prison. The court further reasoned that by the very terms of the probation statute, Section 948.01(2), Florida Statutes (1989), probation is not a sentence; therefore, placing a defendant on probation violated the terms of the statute stating that "The court...shall sentence the Habitual Felony Offender..." Section 775.084(4)(a), Florida Statutes (1989). Ironically, the State's basis for appellate jurisdiction rested on the concept that the probation was an illegal "sentence"; there may be some equivocation or seeming inconsistency at times in determining whether something is a sentence. Further, the Attorney General appears to argue in the intermediate courts that a type of sentence that is illegal per se in one district is legal in another district, resulting in disparate treatment of defendants, establishment of a sort of anarchy, and abolition of the State of Florida as a legal unit. The Kendrick court did not rely on the argument that the defendant's sentence was a downward guidelines departure; however, for purposes of clarity, Petitioner would note that probation was a guidelines permissible sentence in his case, the illegality

consisting of the inconsistent determination of habitual offender status.

Statutory language beyond that referred to in Kendrick shows the Legislative intent that probation not be an option under the statute. Section 775.084(4)(d), Florida Statutes (1989) states:

> A sentence imposed under this section shall not be increased after such imposition.

This would suggest that probation is not a permissible sentence when a defendant is habitualized, in that the above provision would appear to anticipate imposition of sanction on a one-time-only per offense basis. After all,

> When the language of a penal statue is clear, plain and without ambiguity, effect must be given to it accordingly. Where the language used in a statute has a definite and precise meaning, the courts are without power to restrict or extend that meaning.

Graham V. State, 472 So.2d 464, 465 (Fla. 1985). ***See also***, Perkins V. State, 576 So.2d 1310 (Fla. 1991); State v. Barnes, 595 So.2d 22, 24 (Fla. 1992). To create an unapparent ambiguity in the plain meaning of the statute and construe it against a criminal defendant offends both the plain meaning rule and the rule of lenity in regard to penal statutes; further, it is particularly offensive to do so in connection with a subsection that is clearly intended to protect criminal defendants.

Reconciling the above-cited sub-section's increase prohibition with permissibility of probation as a sentence under the Habitual Offender Statute would appear to only lead to an absurd result, that if a defendant were placed upon habitualized probation, he

could never be sent to prison for violation of said probation, or, if he could, that said sentence could only be as a nonhabitual offender. Because of these considerations, it would appear that the Legislature never intended probation as an option under the Habitual Offender Statute. But see Hicks v. State, 595 So.2d 976 (Fla. 1st DCA 1992). Hicks holds that an habitualized defendant, originally sentenced to prison, can be sent to prison if he violates that probation. It should be noted that the Hicks court specifically stated it would not address the issue of whether probation, straight or as part of a split sentence, was permissible under the statute. Hicks concluded that the purpose of the 1971 amendment which added the provision in question was to provide habitual offenders with protection against additional or vindictive sentencing beyond the protection provided by North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Essentially, the Hicks court reasons that the purpose of the statute is to treat recidivists more harshly and that this can be accomplished by allowing habitual offenders to engage in post-sentencing misconduct with impunity in connection with the reimposition of sentence after appellate reversal. In other words, we can treat habitual offenders more harshly than non-habitual offenders by treating the habitual offenders more leniently. The court's construction is not only contrary to the plain meaning rule, it is strained and absurd. If the Legislature desired to ensure vindictiveness and necessary extensive findings as to subsequent conduct play no role in re-sentencing, it could easily

have amended Chapter 775 to extend this protection to all offenders being re-sentenced after appellate reversal. Hicks fails to explain why the Legislature would choose to treat habitual offenders with the sort of impunity from sanction likely to encourage subsequent misconduct.

Further, the question of whether straight habitualized probation is permissible calls into question the purpose of the Habitual Offender Statute itself, which describes an "Habitual felony offender" as "a defendant for whom the court *may* impose an extended term of imprisonment." Section 775.084(1)(a), Florida Statutes. Punishment under the penal law can be viewed as serving various preventive, deterrent, rehabilitative, and retributive functions. Habitualized probation would seem to only protect the public to the extent that it might arguably achieve a deterrent effect against prospective violations of probation by the habitual felony offender. The problem with this highly speculative hypothesis would appear to be that it assumes that habitual offenders, that is persons with at least two prior felonies facing sentencing for additional felonies, would be significantly deterred from future wrongdoing by probation and the extra warning of possibly doubled sentencing exposure. The whole idea of the statute appears to be that its targets are people who do not listen to legislative and judicial warnings, contritely or wisely heed them, and mend their ways. Assuming that probation can achieve what appears to be the purpose of the statute seems so conjectural as to be beyond the scope of any arguable legislative intent.

Placing Petitioner on probation is inconsistent with habitualization. Inconsistencies are to be resolved in favor of the defendant. Mahaun v. State, 377 So.2d 1158 (Fla. 1979); Redondo v. State, 403 So.2d 954 (Fla. 1981). The inconsistency of habitualized status should be stricken from both Petitioner's probation and the law of Florida.

B. Habitualization Of Petitioner Unfairly and Prematurely Ties The Hands Of The Judiciary.

If Petitioner should violate his probation, it is unfair and premature to tie the hands of his future sentencing judge as to the issue of whether imposition of a habitualized sentence is necessary for protection of the public. Section 775.084(4)(c), Florida Statutes (1988 Supp.). Such a violation of probation, many years later, could be a mere technical violation such as failure to pay costs of supervision. Petitioner could be living out of state, serving a lengthy prison sentence as a result of a prison sentence (perhaps for violation of probation) in another case, or a harmless quadriplegic in a wheel-chair at that point. Judge Coe's present action attempts to predetermine what a future just result would be if Petitioner were to violate. This premature decision could mean that a convicted rapist, kidnapper or murderer would have to be released upon the public in order to make room for Petitioner. None of us can predict the future, and cases should be judged on an individual basis. The decision as to whether or not habitualized incarceration is necessary for the protection of society is an adjudicatory bridge that should not be crossed until a court properly comes to it. At such time, and only at such time, should

the decision be made, in light of what Petitioner's status is at the time, the nature of the probation violation, and the relative needs of society for protection from the Petitioner. To presume that the statutory sanctions are to be imposed in the future in the event of a violation is to jump the gun and judicially legislate the judiciary out of the court system.

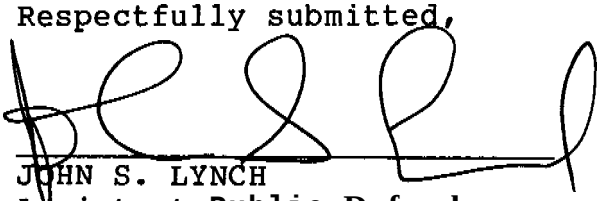
CONCLUSION

Based on the foregoing argument and citation of authority, this Court should resolve the conflict between the district courts, reverse the district court and declare habitualized probation an illegal sentence. Further, this Court to should declare the evidence insufficient to support Petitioner's convictions and order proceedings to discharge him. In the alternative, he should receive a new trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed *to* Elaine L. Thompson, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 18th day of September, 1992.

Respectfully submitted,



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