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CLERK, SUPREME COURT.

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STEVE ALAN BAMBERG, :
 :
 Petitioner, :
 :
 vs. :
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 :
 _____ :

Case No. 80019

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JENNIFER Y. FOGLE
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 628204

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ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, STEVE ALAN BAMBERG, was the Appellant in the Second District Court of Appeal and the Defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The Appendix to this brief contains a copy of the decision rendered by the Second District Court of Appeal on June 5, 1992.

STATEMENT OF THE CASE AND FACTS

On March 22, 1991, the State Attorney of the Tenth Judicial Circuit in and for Polk County, Florida, charged the Petitioner, STEVE ALAN BAMBERG, with burglary in violation of Fla. Stat.

§ 810.02, and grand theft in violation of Fla. Stat. § 812.014(2)-(c). The offenses allegedly occurred on December 5, 1990. Previously on February 15, 1991, the State filed notice of intent to seek an extended prison sentence as a habitual felony offender.

On July 16, 1991, the Petitioner entered a plea of guilty as charged. On August 30, 1991, the trial court found the Petitioner to be a habitual felony offender based on prior convictions occurring in December 1986, January 1988, and May 1988. The trial court sentenced Mr. Bamberg to fifteen years in prison as a habitual felony offender on the charge of burglary. On the charge of grand theft, a third degree felony, the trial court imposed a sanction of ten years on probation.

On appeal Petitioner urged that the sanction of "habitualized probation" imposed by the trial court on the charge of grand theft was an illegal sentence. On June 5, 1992, the Second District Court of Appeal issued an opinion based on King v. State, 17. F.L.W. D662 (Fla. 2d DCA Mar. 4, 1992), petition for review pending, (Florida Supreme Court, No. 79,805), which held that a trial court may impose probation when the court has made a finding that the defendant is a habitual offender. In its opinion, the Second District Court of Appeal acknowledged that the Fifth

District Court of Appeal has held to the contrary in State v. Kendrick, 17 F.L.W. D812 (Fla. 5th DCA March 27, 1992).

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal's decision that "habitualized probation" is legal is in express and direct conflict with the holding of Fifth District Court of Appeal.

ARGUMENT

ISSUE

THE INSTANT DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL IN STATE V. KENDRICK, 17 F.L.W. D812 (Fla. 5th DCA Mar. 27, 1992).

In the instant case, the Petitioner was placed on ten years of probation as a habitual felony offender for the third degree felony of grand theft. On appeal to the Second District Court of Appeal, Petitioner argued that "habitualized probation" constituted an illegal sentence. Based on King v. State, 17 F.L.W. D662 (Fla. 2d DCA Mar. 4, 1992) petition for review pending, (Florida Supreme Court, No. 79,805), which held that habitualized community control is not an inherently illegal sentence, the appellate court affirmed Petitioner's sentence in the instant case.

The Second District Court of Appeal noted that its decision conflicts with the holding of the Fifth District Court of Appeal in State v. Kendrick, 17 F.L.W. D812 (Fla. 5th DCA Mar. 27, 1992). There the court held that a sentence of "habitualized probation" is illegal and unauthorized.

Because the Second and Fifth District Courts of Appeal are in express and direct conflict on the issue in question, this Court should accept jurisdiction of the cause.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Petitioner has demonstrated that conflict does exist with the instant decision and the decision of another District Court of Appeal so as to invoke discretionary review of this Honorable Court.

APPENDIX

PAGE NO.

1. Decision of The Second District Court of Appeal
filed June 5, 1992. A1

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STEVE ALAN BAMBERG,
Appellant,

v.

Case No. 91-03267

STATE OF FLORIDA,
Appellee.

Opinion filed June 5, 1992.

Appeal from the Circuit
Court for Polk County;
E. Randolph Bentley, Judge.

James Marion Moorman, Public
Defender, and Jennifer Y.
Fogle, Assistant Public
Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and Davis
G. Anderson, Jr., Assistant
Attorney General, Tampa, for
Appellee.

PER CURIAM.

Appellant Bamberg pled guilty to various charges
including burglary and grand theft. He was sentenced as a
habitual offender to a prison term for the burglary, but on
the grand theft charge he was given 10 years probation only.

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Appellant contends that the 10 years probation was improper in light of the habitual offender finding, relying on the concurring opinion in Steiner v. State, 591 So.2d 1070 (Fla. 2d DCA 1991). However, this court has since held in an en banc opinion that the trial court may impose probation even when the court has made a finding that the defendant is a habitual offender. King v. State, 17 F.L.W. D662 (Fla. 2d DCA Mar. 4, 1992). We note that the Fifth District Court of Appeal has recently held to the contrary in State v. Kendrick, 17 F.L.W. D812 (Fla. 5th DCA Mar. 27, 1992).

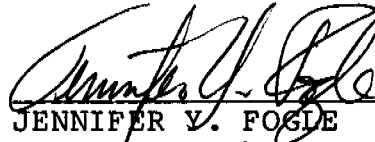
Affirmed.

SCHOONOVER, C.J., LEHAN and FRANK, JJ., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Davis G. Anderson, Jr., Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 8th day of June, 1992.

Respectfully submitted,



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