IN THE SUPREME COURT OF FLORIDA

STEVEN GEOHAGEN,

Petitioner,

v. CASE NO. 82,846

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Steven Geohagen, appellant below and defendant in the trial court, will be referred to herein as "petitioner." Respondent, the State of Florida, appellee below, will be referred to herein as "the State." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the transcript of the sentencing hearing will be by the use of the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts as being generally supported by the record, subject to the addition of the following:

1. After the trial court stated that petitioner's recommended guidelines sentencing range was three and one-half to four years, the prosecutor pointed out that petitioner's permitted sentencing range was two and one-half to five and one-half years' incarceration (T 10).

2. After finding that petitioner met the requirements for sentencing under the habitual felony offender statute, the trial court stated:

> [Q]uite frankly, I can't find any basis to determine that it's not necessary for the protection of the public to sentence Mr. Geohegen [sic] as a habitual felony offender.

(T 41). The court made a similar statement after hearing testimony from petitioner and argument from defense counsel concerning the sentence it should impose:

> At this time, I'm still of the opinion and find that I cannot find any basis where it is not necessary to find that Mr. Geohegen [sic] is a habitual felony offender, under Section 775.084, and find also, to the contrary, that it is necessary for the protection of the public. [A]nd I will at this time, having made the necessary findings, order and declare that he be treated as a habitual felony offender.

(T 45-46).

SUMMARY OF ARGUMENT

The trial court in this case sentenced petitioner, a career criminal, under the habitual felony offender statute to a downward departure term of straight probation. However, when it imposed this sentence the trial court failed to follow the procedure set forth in King v. State, infra, and adopted by this Court in McKnight v. State, infra.

In King, the Second District held that a trial court may place a habitual felon on probation. However, before doing so, the court must make a finding pursuant to Section 775.084(4)(c), Fla. Stat. (1991), that imposition of an enhanced sentence is not necessary for the protection of the public. The court must then follow the procedures of the sentencing guidelines, and if probation falls below the defendant's permitted guidelines range the court must provide written departure reasons before placing the defendant on probation. It was this procedure that the Court adopted in McKnight when it held that a trial court has the discretion to place a habitual offender on probation.

The trial court in this case did not make a finding that imposition of an enhanced sentence was not necessary for the protection of the public; to the contrary, the court expressly stated that enhanced sentencing was necessary to protect the public. Hence, because petitioner's permitted guidelines range was 2 1/2 to 5 1/2 years, the court used the habitual felony offender statute to impose a downward departure sentence (i.e.,

probation) in petitioner's case. This was improper under King and McKnight.

Moreover, an examination of the statement of legislative intent provided in Section 775.0841, Fla. Stat. (1991) reveals that a trial court must impose an "enhanced sentence" when it sentences a defendant under the habitual felony offender statute, and that the imposition of a downward departure sentence under Section 775.084 is not authorized. Thus, whenever a trial court wishes to sentence a habitual felon to a downward departure sentence, the court must make the subsection 775.084(4)(c) finding that enhanced sentencing is not necessary, and it must then follow guidelines procedures and provide written downward departure reasons.

Because the trial court in this case did not follow the aforementioned procedure, the First District correctly concluded that the court's decision to place petitioner on probation was improper. This Court should approve the First District's decision and answer the certified question in the affirmative.

ARGUMENT

ISSUE/CERTIFIED QUESTION

IN ADOPTING THE "RATIONALE" OF THE EN BANC OPINION IN KING V. STATE, 597 SO. 2D 309 (FLA. 2D DCA 1992), DID THE DECISION IN McKNIGHT V. STATE, 616 SO. 2D 31 (FLA. 1993), EXPRESSLY ADOPT THAT PORTION OF THE OPINION IN KING HOLDING THAT UPON SENTENCING A HABITUAL OFFENDER TO COMMUNITY CONTROL OR PROBATION, THE TRIAL COURT MUST (1) FIND PURSUANT TO § 775.084(4)(C) THAT A SENTENCE AS A HABITUAL OFFENDER WAS NOT NECESSARY; AND (2) SENTENCE THE OFFENDER UNDER THE GUIDELINES, SETTING FORTH WRITTEN REASONS FOR DOWNWARD DEPARTURE SHOULD THE GUIDELINES RECOMMENDATION CALL FOR A SENTENCE OTHER THAN PROBATION OR COMMUNITY CONTROL?

At the sentencing hearing below, the trial court determined that petitioner met the requirements for sentencing under the habitual felony offender statute (T 41-42). The court further stated that it could not make a finding that a habitual felony offender sentence was not necessary for the protection of the public (T 41 and 45-46). Based on the court's determination, the prosecutor asked that the court impose an enhanced sentence of eleven years' imprisonment followed by a period of probation (T 46-47). Additionally, after the trial court stated that petitioner's recommended guidelines sentencing range was three and one-half to four years, the prosecutor pointed out that petitioner's permitted sentencing range was two and one-half to five and one-half years' incarceration (T 10).[1] Nevertheless, the trial court placed petitioner on probation for a period of

[1] It appears that the guidelines scoresheet included in the record on appeal at (R 131-132) is incorrect.

five years in Case no. 92-2666, to be served consecutive to a five-year probationary term imposed in Case no. 92-2440 (T 53).[2]

The State appealed this sentence to the First District, which held that the trial court erred in placing petitioner on probation when it sentenced him under the habitual felony offender statute:

> Although the trial court conclusively found Geohagen to be a habitual felony offender, it nonetheless chose to place him on probation. However, the imposition of probation amounted to a downward departure from the guidelines permitted range of 2 1/2 to 5 1/2 years' incarceration. Therefore, it was incumbent on the court to give reasons for this departure. Additionally, we note that nowhere in the record does it appear that the court specifically determined under subsection 775.084(4)(c) that sentencing Geohagen as a habitual offender was not necessary for the protection of the public. Consequently we reverse and remand for the court to reconsider Geohagen's sentence.

Geohagen v. State, No. 92-4377, Slip op. at 3-4 (Fla. 1st DCA October 19, 1993).[3] The First District found that the issue before it was controlled by McKnight v. State, 616 So. 2d 31 (Fla. 1993), wherein this Court held that a trial judge has the

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[2] In its appeal before the First District, the State contested only the straight probationary term imposed in Case no. 92-2666. However, under the State's argument below, the probationary term imposed in Case no. 92-2440, which included a special condition that petitioner serve one year in county jail, also was an unauthorized (and thus illegal) sentence because it constituted a downward departure without written reasons.

[3] A copy of the First District's decision is attached hereto as an appendix.

discretion to place a habitual felony offender on probation. In reaching this conclusion, the McKnight Court stated:

> As the basis for our conclusion, we adopt the rationale of the en banc opinion in King v. State, [infra].

Id. at 31.

In King v. State, 597 So. 2d 309 (Fla. 2d DCA), rev. denied, 602 So. 2d 942 (Fla. 1992), the Second District determined that a trial court has the discretion to sentence a habitual felony offender to a term of probation, and the court set forth the following strict procedure pursuant to which a trial court may exercise this discretion:

> [U]nder section 775.084, absent a decision that sentencing as an habitual felony offender is not necessary, any sentence of such an habitualized defendant must be a prison sentence for a term of years not to exceed the maximum sentences allowable. In order to properly sentence a defendant found to be an habitual felony offender to probation or community control, the trial judge would first have to make a decision under section 775.084(4)(c) that a sentence as an habitual felony offender was not necessary. Having made that decision, a sentence pursuant to sentencing guidelines would then be required. If the guidelines recommended sentence called for a sentence other than probation or community control, in order to impose such a sentence, the trial judge would be required to enter an order finding proper reasons for a downward departure.

Id. at 317 (emphasis in original).

As the First District held below, it was the foregoing procedure that this Court adopted in McKnight when it determined that trial courts have the discretion to place habitual felons on

probation. Accordingly, because the trial court in this case did not follow the procedure set forth in King (and adopted by this Court in McKnight) when it placed petitioner on probation under Section 775.084, the First District correctly determined that the sentence imposed by the trial court was illegal. This Court should approve the First District's opinion and answer the certified question in the affirmative.

Notwithstanding the foregoing, petitioner now claims that the trial court properly placed him on probation and that the First District erred in deciding otherwise. To support this claim petitioner relies on Burdick v. State, 594 So. 2d 267 (Fla. 1992), for the proposition that a trial court has discretion to impose any sentence it wishes, including probation or community control, when it sentences a defendant pursuant to the habitual felony offender statute. However, Burdick did not address the issue before the Court in this case, i.e., the minimum sentence a court may impose under Section 775.084, Fla. Stat. (1991); rather, the question before this Court in Burdick was whether Section 775.084 required a trial court to sentence a defendant convicted of a first degree felony to the maximum term provided by the statute once the court decided to sentence the defendant as a habitual offender. The Court concluded that although Section 775.084(4)(a)1 provides that a court "shall" sentence a defendant convicted of a first degree felony "for life," the legislature intended for sentencing under the habitual offender statute to be permissive, not mandatory. Id. at 271.

Neither Section 775.084 nor Burdick should be read so broadly as to permit the use of habitual offender sentencing to impose a downward departure sentence, as petitioner here suggests, because such an interpretation is directly contrary to the legislative intent behind Section 775.084. When it enacted the current version of the habitual felony offender statute, and particularly the Section 775.084(4)(e), Fla. Stat. (1991) exemption of habitual felony offender sentences from the requirements of the sentencing guidelines, the legislature did not intend to authorize the use of habitualization to punish defendants more leniently than under the sentencing guidelines. This is evidenced by Section 775.0841, Fla. Stat. (1991),[4] which provides as follows:

> **Legislative findings and intent.**--The Legislature hereby finds that a substantial and disproportionate number of serious crimes is committed in Florida by a relatively small number of multiple and repeat felony offenders, commonly known as career criminals. The Legislature further finds that priority should be given to the investigation, apprehension, and prosecution of career criminals in the use of law enforcement resources and to the incarceration of career criminals in the use of available prison space. The Legislature intends to initiate and support increased efforts by state and local law enforcement agencies and state attorneys' offices to investigate, apprehend, and prosecute career criminals, and to incarcerate them for extended terms.

(Emphasis added). Thus, the legislature's clear intent in enacting the habitual offender provision was to protect society

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[4] This section was created by Ch. 88-131, § 3, Laws of Fla.

by insuring that career criminals sentenced pursuant to Section 775.084 would serve extended terms of incarceration.

The trial court in the case at bar did not sentence petitioner, a career criminal, to a prison term longer than (or even as long as) the sentence he would have received under the sentencing guidelines. Consequently, the trial court did not sentence petitioner to an "extended" term of incarceration as prescribed by the habitual felony offender statute.[5] Sentences such as the one at issue here, where the trial court used the habitual felony offender statute to impose a sentence even less harsh than the one petitioner would have received under the sentencing guidelines, defeat the legislature's intent in enacting the habitual felony offender statute. The legislature obviously never envisioned that career criminals, by mere virtue of their status as career criminals, would receive more lenient punishment when sentenced pursuant to Section 775.084. The use of Section 775.084 to impose "downward departure" sentences therefore does not comport with the legislature's intent in enacting the statute.

Furthermore, an interpretation of the statute which permits the imposition of downward departures under Section 775.084 will lead to the absurd result that a career criminal who commits a

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[5] Section 775.084(4)(e), Fla. Stat. (1991) provides that defendants sentenced as habitual felony offenders forfeit certain gain-time that is awarded to non-habitual felons. Thus, a habitual felony offender sentence which falls within the defendant's guidelines range would be "extended" beyond a regular guidelines sentence of the same term of years.

given offense may be punished less severely than a non-habitual offender who commits the same offense. This Court must avoid such a result. Dorsey v. State, 402 So. 2d 1178, 1183 (Fla. 1981) (citation omitted) ("In Florida it is a well-settled principle that statutes must be construed so as to avoid absurd results."); State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). The sentence imposed by the trial court in the instant case is not authorized by the habitual felony offender statute, and petitioner's argument to the contrary must fail.

The State recognizes that the Second District in King v. State, supra, stated that trial courts may use the habitual felony offender statute to punish criminal defendants less harshly than they would be punished under the sentencing guidelines. The King court acknowledged that under the pre-1988 versions of the habitual felony offender statute,

> [t]he perceived legislative intent was that an habitual felony offender should not be sentenced to a term of probation or community control or any sentence less severe than if the defendant had been sentenced without habitualization under normal sentencing guidelines or procedure.

Id., 597 So. 2d at 313 (citations omitted). Nevertheless, in dicta which was not pertinent to this Court's decision in McKnight, the Second District in King concluded

> that recent amendments to section 775.084 particularly those effected by chapter 88-131, section 6, Laws of Florida, recent supreme court decisions, notably *Burdick v. State,* 594 So. 2d 267 (Fla. 1992) and *Williams v. State,* 581 So. 2d 144 (Fla. 1991), and our closer examination of section 775.084, make clear a trial judge's discretion to exercise

leniency even after determining a defendant to be an habitual offender.

Id. at 313.

In reaching the above conclusion, the court analyzed the statute in pertinent part as follows:

> [A] trial judge retains the discretion to exercise leniency in regard to habitual felony offenders in two ways. First, using subsection 775.084(4)(c), the trial judge may simply decide not to sentence the defendant as an habitual felony offender. Second, having determined to sentence the defendant *as* an habitual felony offender, the trial judge has the discretion to sentence an habitual felony offender to any term of years up to the maximum sentence provided in subsection 775.084(4)(a)(1), (2) and (3), or as an habitual violent felony offender to any term of years not less than the minimum mandatory nor more than the maximum sentence provided in subsections 775.084(4)(b)(1), (2) and (3). This conclusion is clearly supported by chapter 88-131, section 5, Laws of Florida, wherein policies to be followed in career criminal cases are enumerated. Chapter 88-131, section 5(2)(d), states: "All reasonable prosecutorial efforts shall be made to persuade the court to impose the *most* severe sanction authorized upon a person convicted after prosecution as a career criminal."
>
> Clearly, if the trial judge is not required but is subject to being "persuaded" to impose the maximum sentence authorized, the trial judge must obviously also be subject to being "unpersuaded" and thereby have the discretion to impose a lesser than maximum or even the minimum sentence authorized.
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> * * *
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> It, therefore, appears that the thrust of the habitual offender statute has been redirected. Prior to the 1988 amendments, the trial judge was required to make findings that it was necessary for the protection of the public in order to determine a person *to*

> *be* an habitual felony offender *and* to impose an enhanced sentence pursuant to the statute. Since the 1988 amendments, once it appears to the trial judge that a person *is* an habitual felony offender, after proper notice to the defendant, such a determination shall be made without the necessity of any findings except that the defendant qualifies by reason of the requisite prior convictions for habitualization. Then, without any findings other than the defendant *is* an habitual felony offender, any sentence as provided in the statute may be imposed *unless* the trial judge decides that a sentence *as* an habitual felony offender is *not* necessary for the protection of the public.

Id. at 314-315 (emphasis in original).

The King court further relied on the 1988 addition to the habitual felony offender statute of Section 775.084(4)(e), which provides that "[a] sentence imposed under this section shall not be subject to the provisions of s. 921.001." The Second District noted that

> [t]he operative words of the first sentence of that subsection are "*a sentence imposed.*" It is not, therefore, merely the determination that a person *is* an habitual felony offender that makes inapplicable the sentencing guidelines procedures established by section 921.001. It is the decision *to sentence* the defendant *as* an habitual felony offender, pursuant to section 775.084, *after* the determination of habitual offender status, that makes the sentencing guidelines (section 921.001) inapplicable to such a sentence. Should the trial judge decide, pursuant to subsection 775.084(4)(c), not to sentence a person as an habitual felony offender, even though that person qualifies as an habitual offender, any sentence then imposed must comport with sentencing guidelines or departure rules and any failure to do so

> would be the proper subject of appeal by the state as well as the defendant.

Id. at 315-316 (emphasis in original; citation omitted). The court then observed

> that any sentence as an habitual felony offender or an habitual violent felony offender for a term of years or for life is further enhanced because such a sentence imposed under section 775.084 is not subject to chapter 947, nor is the defendant eligible for regular gain-time. *See* § 775.084(4)(e). There are enhancement justifications, therefore, for utilizing habitualization in sentencing a defendant, even though the sentence actually imposed is the same as or even less in term of years as would have been imposed without habitualization.

Id. at 316 (emphasis added). The King court thus concluded, again in dicta, that a trial court could use habitualization to sentence a criminal defendant to a prison term greater or less than that permitted by the sentencing guidelines. Id. at 317.

While at first blush the King analysis might appear to represent a logical and well-reasoned interpretation of Section 775.084, a close examination of the various components of the analysis the Second District engaged in to reach its conclusion reveals that the court's interpretation is anything but logical.[6] First, in deciding that downward departure sentences are authorized under the habitual felony offender statute, the Second District wholly failed to take into account the Section 775.0841 declaration of the legislature's intent in enacting the statute.

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[6] King was correctly decided. Stripped of its dicta, the correct, and narrow, ground for the decision was that King accepted the benefit of the original sentence of community control, which neither party appealed, and King could not be heard to complain after violating community control.

As set forth above, the legislature expressly stated that it had enacted the statute in order to insure that "career criminals" receive extended periods of incarceration. Obviously, if the King court wished to determine whether the legislature intended to authorize trial courts to invoke Section 775.084 as a means of punishing habitual felons less harshly than they would otherwise be punished under the sentencing guidelines, the best source for guidance in making that determination would have been the statement of legislative intent contained in Section 775.0841. However, the King opinion contains no mention whatsoever of Section 775.0841. The Second District therefore completely overlooked the legislature's express statement that its intent in enacting Section 775.084 was directly contrary to the court's conclusion in King that the statute could be used to punish habitual felons less severely than do the sentencing guidelines. This failure alone renders the King analysis highly suspect.

Next, the King court erred in determining that any sentence imposed under the habitual felony offender statute is an "enhanced" sentence, regardless of whether that sentence is the same as or less than the sentence the defendant would have received under the sentencing guidelines, due to the loss of certain gain-time under Section 775.084. One simply cannot look at any sentence imposed and say that it is intrinsically "enhanced" (i.e., enhanced as compared against itself). Rather, in order to determine whether a sentence constitutes an enhanced penalty, one must compare it against an outside standard which represents the sentence the defendant would have received but for

the fact that he or she was habitualized. Clearly, because the sentencing guidelines penalties are considered to be the norm in sentencing, it is the guidelines penalties which must serve as the standard against which an "enhanced" sentence must be measured in order to determine whether the sentence is in fact enhanced. A habitual felony offender sentence which falls below the defendant's permitted guidelines range cannot be viewed as an "enhanced" penalty simply because the habitual felon forfeits a portion of the gain-time he or she would receive as a non-habitual felon. Thus, in order to sentence a habitual felon to an enhanced term of incarceration in accordance with the legislative purpose behind Section 775.084, a trial court must at the very least sentence the defendant to the minimum term of imprisonment provided by the defendant's permitted guidelines range. The Second District's contrary interpretation in King is incorrect and this Court should reject it.

The Second District further erred in relying on the Section 775.084(4)(e) exemption of habitual felony offender sentences from the strictures of the sentencing guidelines to support its conclusion that the legislature intended to allow for more lenient sentencing under Section 775.084. The Second District correctly noted in King that Section 775.084(4)(e) was enacted to supersede the holding in State v. Brown, 530 So. 2d 51 (Fla. 1988). However, the difficulty caused by the Brown decision was that it required trial courts to provide valid reasons for upward departure before sentencing defendants to extended terms of imprisonment even when sentencing them under the habitual felony

offender statute. It was precisely because the legislature intended for habitual felons to be sentenced to extended periods of incarceration without the need for valid departure reasons that it enacted the Section 775.084(4)(e) exemption of habitual felony offender sentencing from the guidelines requirements. The enactment of subsection (4)(e) thus does not support the King court's conclusion that "downward departures" without written reasons are authorized under Section 775.084.

The fourth error in the Second District's analysis in King was its determination that a trial court may be "unpersuaded" that the maximum term of imprisonment is necessary, and may therefore sentence the habitual felony offender to the minimum sentence authorized. The fact that the judge is to be persuaded "to impose the most severe sanction authorized upon a person convicted after prosecution as a career criminal," see Section 775.0843(2)(d), Fla. Stat. (1991), does not support the conclusion that the judge may impose a lesser sentence than that the defendant would receive under the guidelines. Rather, the language of Section 775.0843(2)(d) means only that the State should seek the most severe penalty allowed under the habitual offender statute, but that the judge may be "unpersuaded" to the extent that he or she may impose less than the most severe penalty, so long as that penalty is one that is authorized by Section 775.084 (i.e., an "extended" term of incarceration as defined above). The "persuasion" language of Section 775.0843(2)(d) thus does not support the Second District's interpretation of the statute in King.

Finally, the King court noted as follows the anomaly created by its interpretation of Section 775.084:

> In concluding our analysis of the sentencing alternatives possible under section 775.084, we must reveal a concern raised by our interpretation of the statute. We have followed the precedent we have determined to be most applicable and yet we perceive that there is within the legislative plan adopted in section 775.084 something of an anomaly that may be inadvertent. Section 775.084 does not *require* that it only be utilized when a trial judge desires to *enhance* a sentence so as to be more *severe* than a sentence within the applicable guidelines would be. We, therefore, have concluded from a literal reading of the statute that a trial judge may sentence a qualifying defendant as an habitual felony offender to a sentence either above or below the recommended guidelines sentence and without regard to any guidelines limitations. Subsection 775.084(4)(e) simply provides that a sentence imposed under section 775.084 shall not be subject to the provisions of section 921.001. Since, as we have observed, an habitual felony offender may be sentenced to a term of years anywhere from in excess of one year up to life, depending on the degree of the felony, a trial judge *could* use habitualization as a method to sentence upward *or* downward from a recommended guidelines sentence without any right of appeal by the state or the defendant in regard to the length of or the reasons for the sentence term.

Id. at 316-317 (emphasis in original). Intuitively, then, the Second District realized that its interpretation would lead to an "inadvertent" and absurd result not intended by the legislature.[7]

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[7] The Fifth District also noted this anomaly in State v. Manning, 605 So. 2d 508 (Fla. 5th DCA 1992), where it stated:

> Certainly, the logic behind having a habitual offender classification in order to enhance punishment is totally frustrated if the court has the discretion to sentence such offender

However, if it had been cognizant of the Section 775.0841 statement of legislative intent, the court would have known that Section 775.084 does not authorize "downward departure" sentences for career criminals sentenced as such. As set forth above, this Court must interpret the statute so as to avoid absurd results, Dorsey v. State, supra, particularly when it is clear that those results are not intended by the legislature.

Again, it is the State's position that the "minimum sentence[] provided in section 775.084," see King, 597 So. 2d at 316, is that provided by a defendant's permitted sentencing guidelines range. The "opt-out" procedure set forth in King must be followed any time a trial court decides to sentence a habitual felon below his or her permitted guidelines range. Hence, when a trial court decides to impose such a sentence, it must make a finding under Section 775.084(4)(c) that habitual felony offender sentencing is not necessary for the protection of the public, and it must then sentence the defendant in accordance with the

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> under its provisions to probation. . . .
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> This would mean that a judge could downward depart without reason (thus avoiding the guideline requirements) by merely declaring the defendant to be a habitual offender. We do not see this result as having been intended by the legislature.

Id. at 510. Notwithstanding its determination that the legislature did not intend to authorize downward departure sentences without written reasons under the habitual offender statute, the Manning court nevertheless determined that any sentence (including, apparently, a downward departure) consisting of a "term of years" is permissible under Section 775.084. Accord State v. Kendrick, 596 So. 2d 1153 (Fla. 5th DCA 1992).

sentencing guidelines and provide valid, written reasons if the sentence imposed is a downward departure.

The trial court in the instant case did not follow this procedure. Not only did the court fail to find that habitual felony offender sentencing was not necessary for the protection of the public; the court twice affirmatively stated that it could not make such a finding, and that it was necessary to habitualize petitioner for the protection of the public (T 41 and 45-46). Thus, under the procedure set forth in King and adopted by this Court in McKnight, the trial court did not have discretion to sentence petitioner below his guidelines range. The sentence imposed by the trial court in the case at bar is not authorized by Section 775.084 and, as a consequence, it is illegal. This Court should approve the decision of the First District below and answer the certified question in the affirmative.

Finally, to support his claim that the trial court had the discretion to place him on probation when it sentenced him under the habitual offender statute, petitioner relies on this Court's decision in State v. Tito, 616 So. 2d 39 (Fla. 1993). Petitioner claims that Tito mandates reversal of the First District's decision here because this Court in Tito, citing Burdick v. State, supra, held that the trial court did not abuse its discretion in placing Tito on ten years' probation as a habitual offender. Critically, however, the trial court in Tito did not sentence the defendant solely to a term of probation; rather, the court sentenced Tito simultaneously in three different cases, and

it imposed the following sentences:

> [C]ase 1) five-year upward departure sentence; case 2) consecutive five-year upward departure sentence; case 3) habitual offender sentence of ten years' probation, consecutive to the sentence in case 2.

Tito, 616 So. 2d at 40. Hence, the court imposed the habitual offender probationary term consecutive to two upward departure sentences. It was this fact which led the Court to find "no abuse of discretion in placing Tito on ten years' probation after completing his prior sentence." Id. (emphasis added, citation omitted). Tito thus does not support petitioner's claim that a trial court may impose a straight probationary term under Section 775.084. Indeed, because the trial court in Tito imposed both an upward departure sentence and a probationary term, the sentence in Tito was proper under the State's analysis of Section 775.084, as set forth herein.[8]

To summarize, pursuant to Section 775.0841, a trial court must impose an "enhanced sentence" once it decides to sentence a career criminal under the habitual felony offender statute. The minimum "enhanced sentence" a court may impose under Section 775.084 is the minimum term permitted by the defendant's guidelines range. If the court decides that it does not want to impose an enhanced sentence, it must make a determination under subsection 775.084(4)(c) that imposition of an enhanced sentence is not necessary for the protection of the public. The court

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[8] In other words, the total sentence imposed by the trial court in Tito was greater than the "minimum sentence" required by Section 775.084.

then must follow the procedures set forth in the sentencing guidelines and provide written reasons if it decides to impose a downward departure sentence.

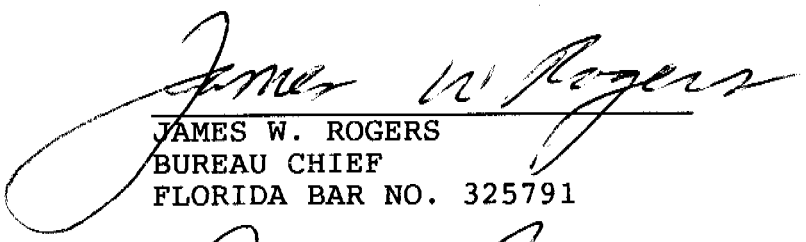
Because the First District's decision below is consistent with the foregoing analysis, this Court should affirm the First District's decision and answer the certified question in the affirmative. Additionally, in order to avoid further confusion on this matter, this Court should state unambiguously that the only portion of the King rationale it "adopted" in McKnight was that portion relating to use of the "opt-out" provision of Section 775.084(4)(c) to place habitual offenders on probation, and that the Court does not approve of the dicta in King which appears to permit trial courts to punish career criminals more leniently under Section 775.084 than they would be punished under the sentencing guidelines.

CONCLUSION

For the reasons set forth herein, the State respectfully requests that this Court answer the certified question in the affirmative and approve the First District's decision below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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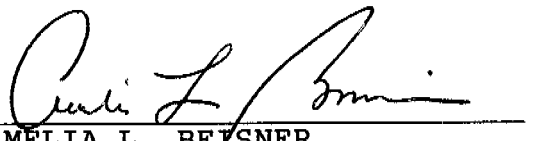

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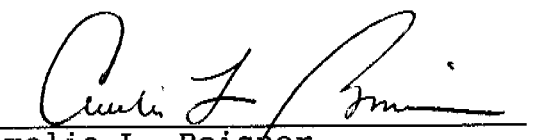
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to John R. Dixon, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 18th day of February, 1994.



Amelia L. Beisner
Assistant Attorney General

APPENDIX

(Copy of First District's opinion in Geohagen v. State, No. 92-4377 (Fla. 1st DCA October 19, 1993)

92-1128652 PG

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

v.

CASE NO. 92-4377

STEVEN GEOHAGEN,

Appellee.

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CORRECTED COPY

Docketed

11-3-93

Florida Attorney General

Opinion filed October 19, 1993.

An appeal from the circuit court for ~~Escambia~~ Leon County. ~~William Anderson~~ N. Sanders, Sauls, Judge.

Robert A. Butterworth, Attorney General, and Charlie McCoy, Assistant Attorney General, Tallahassee, for Appellant.

Nancy A. Daniels, Public Defender, and Kathleen Stover, Assistant Public Defender, Tallahassee, for Appellee.

FILED

NOV 03 1993

DEPUTY CLERK

PER CURIAM.

The state appeals the trial court's sentencing of Steven Geohagen to straight probation despite the explicit finding that Geohagen qualified as a habitual felony offender. The issue raised by the state is whether section 775.084, Florida Statutes, authorizes sentences of straight probation. We find this issue controlled by the supreme court's decision in McKnight v. State,

616 So. 2d 31 (Fla. 1993), expressly adopting the rationale of the en banc opinion in King v. State, 597 So. 2d 309 (Fla. 2d DCA), review denied, 602 So. 2d 942 (Fla. 1992). Accordingly, we reverse.

McKnight simply holds that a trial judge "has the discretion to place an habitual felony offender on probation." 616 So. 2d at 31. This holding would appear to compel affirmance; however, in adopting the rationale of King, the McKnight decision belies its simplicity, for King, in reality, does not stand for an affirmative answer to the issue raised by the state. Rather, a careful reading of King leads to the conclusion that section 775.084, by its terms, does not authorize sentences of straight probation. To the contrary, according to the King rationale, section 775.084 affords a trial court a number of options. For example, a trial court may apply the statutory criteria and determine a person to be qualified as a habitual felony offender, but the court is not required thereafter to sentence the person as such if the court decides pursuant to subsection 775.084(4)(c) that a habitual offender sentence is not necessary for the protection of the public. However, once the court makes the latter determination, even though the person qualifies as a habitual offender, King holds that "any sentence then imposed must comport with sentencing guidelines or departure rules and any failure to do so would be the proper subject of appeal by the state as well as the defendant." 597 So. 2d at 315-16. As King explained:

> It does seem clear that under section 775.084, absent a decision that sentencing as an habitual felony offender is not necessary, any sentence of such an habitualized defendant must be a prison sentence for a term of years not to exceed the maximum sentences allowable. In order to properly sentence a defendant found to be an habitual felony offender to probation or community control, the trial judge would first have to make a decision under subsection 775.084(4)(c) that a sentence as an habitual felony offender was not necessary. Having made that decision, a sentence pursuant to sentencing guidelines would then be required. If the guidelines recommended sentence called for a sentence other than probation or community control, in order to impose such a sentence, the trial judge would be required to enter an order finding proper reasons for a downward departure.

Id. at 317 (emphasis in original).

Applying the above rationale to the facts of the instant case requires reversal. Although the trial court conclusively found Geohagen to be a habitual felony offender, it nonetheless chose to place him on probation.[1] However, the imposition of probation amounted to a downward departure from the guidelines permitted range of 2½ to 5½ years' incarceration. Therefore, it was incumbent on the court to give reasons for this departure. Additionally, we note that nowhere in the record does it appear that the court specifically determined under subsection 775.084(4)(c) that sentencing Geohagen as a habitual offender was

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[1] In actuality, Geohagen received two probationary sentences: in case number 92-2440 (burglary), Geohagen was placed on probation for five years, with one condition being a year in county jail; in case number 92-2666 (fraudulent use of a credit card and grand theft), Geohagen was placed on probation for five years, to run consecutively to the probation in case number 92-2440. The state argues only the latter sentence is illegal.

not necessary for the protection of the public. Consequently we reverse and remand for the court to reconsider Geohagen's sentence. As there is no indication on the record that the court intended to impose a departure sentence, the court may re-impose a departure sentence if it files appropriate written reasons. See Henderson v. State, 577 So. 2d 653 (Fla. 1st DCA), review denied, 589 So. 2d 291 (Fla. 1991).

REVERSED and REMANDED for further proceedings.

ZEHMER, C.J., BARFIELD and ALLEN, JJ., CONCUR.