IN THE SUPREME COURT OF FLORIDA

STEVEN GEOHAGEN, :

Petitioner, :

v. : CASE NO. 82,846

STATE OF FLORIDA, :

Respondent. :

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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REBUTTAL ARGUMENT

Respondent recognizes in footnote 6 of its brief the narrow grounds for decision in King v. State, 597 So. 2d 309 (Fla. 2d DCA 1992). That is, King failed to appeal his original community control sentence and the court would not go back in time and declare it to be an illegal sentence. Respondent argues that the King court set forth a strict procedure, that this Court in turn adopted in McKnight v. State, 616 So. 2d 31 (Fla. 1993). The strict procedure sets out how a trial judge may exercise his or her discretion in habitual offender sentencing. Respondent excerpts a passage from King and argues that it sets out the strict procedure. In making this argument, respondent suggests that the "strict procedure" was necessary to the King court's decision since it characterizes what it does not like in that court's opinion as dicta and urges this Court to reject it. In fact, the "strict procedure" along with

all other discussion of the habitual offender statute is dicta since it was not necessary for decision on the narrow grounds respondent has identified.

In McKnight, this court adopted the King court's rationale. Petitioner has argued that in doing so, this Court appears to have created a conflict with its decision in Burdick v. State, 594 So. 2d 267 (Fla. 1992). Respondent finds Burdick inapposite because it did not address the minimum sentence acceptable in habitual offender sentencing. This ignores the express language contained in Burdick. In Burdick, this Court stated that trial judges have discretion in imposing habitual offender sentences "anywhere" up to the maximum. 594 So. 2d 267. Citing Burdick, this Court recently approved of a straight probationary habitual offender sentence. State v. Tito, 616 So. 2d 39 (Fla. 1993).

Further, respondent wholly fails to rebut petitioner's argument that complete discretion is required in order to avoid an absurd result. That is, respondent has not answered the argument that if the reasoning in Burdick (that "shall" means "may"), is not extended to second and third degree felonies, then a trial judge sentencing under section 775.084(a), could impose a probationary sentence for a first degree felony, but would be required to impose a "term of years for second and third degree felonies.

Instead, respondent's brief is mainly a critique of King, the opinion it claims was properly used to deny petitioner relief below. Respondent's argument focuses on the legislature's

intent in creating the habitual offender statute. Petitioner has no quarrel with respondent's argument that the legislature intended to "enhance" the sentence of career criminals when it created the habitual offender statute. However, respondent defines an enhanced sentence by reference to a particular defendant's sentencing guidelines permitted range. According to respondent, an enhanced sentence, at a minimum, must be no less than the lower end of the permitted sentencing guidelines range.

Respondent resorts to legislative intent in order to rewrite what the habitual offender statute unambiguously states. In 1988, the legislature added section 775.084(4)(e), which states: "A sentence imposed under this section shall not be subject to the provisions of s. 921.001", the sentencing guidelines statute. Thus it is clear from the plain meaning of these words that habitual offender sentences would not be subject to sentencing guidelines procedures. The legislature's drafting was precise, the words it chose were clear. There is no need to resort to legislative intent to change what the legislature has stated clearly, since no absurd result is created by effecting the plain meaning of these words. See, St. Petersburg Bank v. Hamm, 414 So. 2d 1071 (Fla. 1982). As stated in King, the the trial judge's decision to sentence the defendant as an habitual offender makes the sentencing guidelines inapplicable to such a sentence. In Burdick, this court made clear that after this amendment there was "no longer a limitation on habitual offender sentencing, regardless of the

sentence imposed." 594 So. 2d 270 (emphasis supplied). Respondent has shown no reason why this court should recede from this holding and now require activation of guidelines procedures during habitual offender sentencing.

Respondent suggests that an absurd result is created when judges use the habitual offender sentencing to sentence a defendant to probation, community control, or an incarceration sentence below the permitted sentencing guidelines range. As a practical matter, petitioner seriously doubts that lenient habitual offender sentence will become commonplace. Judges across this state will not now be cutting loose habitual felons. As a legal matter, this result was foreshadowed in Burdick,[1] and expressly discussed in King. Subsequent to these decisions, the legislature has amended the habitual offender section. See ch.93-406, Laws of Florida. "It is a well-established rule of statutory construction that when a statute is reenacted, the judicial construction previously placed on the statue is presumed to have been adopted in the reenactment." Burdick at 271 (citation omitted). Consequently, the legislature has at least tacitly approved of the anomaly respondent identifies.

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[1]In footnote 8, this Court stated: " . . . by simply classifying a defendant as a habitual offender, the trial judge regains all the discretion the sentencing guidelines were intended to reduce." (emphasis added). This court concluded: "Accordingly, we can do no more than point out what appears to us to be a serious inconsistency between the two statutory sentencing schemes." 594 So. 2d at 270.

Respondent argues that section 775.084(4)(e), is meant to allow upward departures without the need for written reasons, but does not allow for downward departures, without written reasons. There is simply no basis for such a double standard and, (as stated above), such a reading is contrary to the rules of statutory construction. As well, this reasoning ignores that even a habitual offender incarceration sentence below the permitted range could result in longer incarceration because sentencing under the habitual offender statute denies a defendant gain-time. § 775.084(4)(e), Fla. Stat (1993).

Respondent suggests that comparison to guidelines incarceration is the only way to determine whether an habitual offender sentence is an enhancement. As discussed above, this ignores the command of section 775.084(4)(e), which takes the sentencing guidelines out of the equation. If trial judges were required to compare habitual offender sentences with guidelines sentences and were required to factor in the differing gain time rules, this would present an accounting nightmare. The state's argument assumes that a shorter period of incarceration or probation or community control as an habitual offender is more lenient. This ignores the collateral effects of being sentenced as an habitual offender. For example, the court in King, approved of a 10 year habitual offender sentence upon revocation of King's community control. Compared to the guidelines, King's ultimate sentence was an upward departure exceeding the one-cell bump up rule. 597 So. 2d at 318.

Respondent concludes by distinguishing this court's decision in State v. Tito, 616 So. 2d 39 (Fla. 1993). Respondent argues that a straight probationary term as an habitual offender in one case was proper in Tito because the trial court ran that probationary term consecutive to two other cases where it imposed upward departure sentences under the guidelines. However, the only case in which Tito was sentenced as an habitual offender was the one in which the trial court imposed a straight probationary sentence. This court approved of this sentence, citing to Burdick and McKnight. In doing so, it is clear this court held the probationary sentence proper, independent of the other guidelines sentences. Contrary to the state's suggestion, there is no authority for finding an otherwise illegal sentence to be legal by piggybacking it on to the other sentences imposed. This court approved of Tito's habitual offender sentence because, as petitioner urges, a trial judge may exercise his discretion to do anything when sentencing under the habitual offender statute, including imposing a straight probationary term. 616 So. 2d 39.

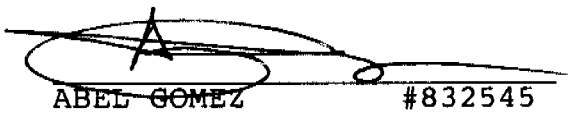
This court should quash the decision of the district court. It should disapprove of King to the extent that it suggests that habitual offender sentences require downward departure reasons for imposition of straight probationary sentences.

CONCLUSION

Based on the foregoing and on petitioner's merit initial brief, this court should quash the district court's opinion.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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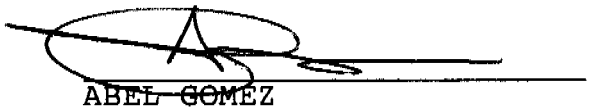
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief on the Merits has been furnished by delivery to Ms. Amelia Beisner, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to petitioner, Mr. Steven Geohagen, on this 15th day of March, 1994.



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