IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 87,269

ROBERT DUNHAM,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Senior Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 441510
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (407) 688-7759

Counsel for Respondent

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PRELIMINARY STATEMENT

Petitioner, Robert Dunham, was the Defendant and Respondent the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State of Florida substantially accepts Petitioner's Statement of the Case and Facts as it appears at pages two (2) through four (4) of the initial brief to the extent it represents an accurate, non-argumentative recitation of the proceedings below. However in compliance with Fla. R. App. P. 9.210(c), and for a complete and fair recitation of the facts, the state hereby submits the following additions, clarifications and modification to point out areas of disagreements between Petitioner and the State as to what actually occurred below.

The correct case number for the 1989 information is 89-24360[1].

The information in 89-24360 was filed December 4, 1989 (R. 147), and the State's "Notice to Declare Defendant an Habitual Violent Felony Offender" was filed December 19, 1989 (R. 153).

Petitioner went to trial on the charges on November 4, 1991 (R. 211-214), but when the jury was unable to arrive at a verdict (R. 215), Judge Backman declared a mistrial November 4, 1991 (R. 216). On November 4, 1991, the State was prepared to show Petitioner qualified as an habitual felony offender, and that his civil rights had not been restored (R. 211; see also R. 173-4).

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[1]Appellant's brief cites the case No. as 89-21360 and 89-29360, rather than the correct No. 89-24360. See AB 2, 3 and 5.

Knowing that the State was seeking to have the trial court sentence him as an habitual felony offender, Petitioner stipulated he qualified as an habitual felony offender (R. 173-4), and agreed to enter a plea of guilty to the charges, in exchange for a non-habitual sentence of five years in prison followed by five years of probation (R. 175). However, part and parcel of the plea agreement and stipulation was that if Petitioner violated his probation, the trial court could then sentence Petitioner as an habitual felony offender upon revocation of probation (R. 173-175). Petitioner entered his pleas of guilty to the charges March 19, **1992** (SR).

At the change of plea hearing, the trial court advised Petitioner of the maximum sentences he was facing under the charges (SR 5). Petitioner agreed that the documents prepared for the change of plea included two acknowledgments of pleas and waiver of rights (R. 175, 218); the scoresheet (R. 163); and the stipulated order regarding habitual felony offender status (R. 173-174) (see SR 5). Because the understanding was that if Petitioner violated his probation, he could be sentenced as an habitual felony offender upon revocation of probation, the trial court informed Petitioner as to the maximum sentences he would face under the habitual offender statute (SR 6-7). The trial court specifically warned Petitioner:

So, if you violate the conditions of your probation, your probation could be revoked and each one of these felonies mentioned, you could be sentenced to double each of the penalties that we have mentioned.

(SR 7). Prior to the conclusion of the sentencing hearing, the trial court once again reminded Petitioner:

If you violate probation ... they can be revoked and you could be sentenced to the maximum penalties ... as an habitual felony offender, as the case may be.

(SR 11). The record then establishes that the plea agreement was Petitioner's idea (SR 12-13).

Parenthetically, the record shows that at the sentencing hearing held October 24, 1994, Petitioner took the witness stand to state that when he signed the plea agreement in March of 1992, he did not understand he was stipulating to being sentenced as an habitual felony offender (R. 118-120). Petitioner explained that when his attorney informed him the State was offering a "habitual sentence," Petitioner told his attorney: "I couldn't take habitual sentence. I'll go up the road with habitual sentence, I wouldn't be credited, I couldn't get a third off the sentence or whatever as a habitual." (R. 118). Petitioner asked his counsel "to get the armed dropped and I would cop to the five years probation, five year prison time if I couldn't go with habitual sentence." (R.

118). Petitioner stated that although he did initial the stipulated order, he did not read it (R. 119-120), and did not understand that if he violated the probation, he would be subjecting himself to being sentenced as a habitual offender (R. 121). After reviewing the transcript of the change of plea hearing held March 19, 1992, the trial court found that Petitioner is subject to habitual offender classification, and can be sentenced as an habitual felony offender (R. 128).

The sentencing guidelines scoresheet called for a recommended sentence of 22-27 years in prison, and a permitted range of between 17 and 40 years in prison (R. 163). Thus, while the State agrees with Petitioner's statement in his brief that the "five years in prison followed by five years probation" sentence was a downward departure from the recommended guidelines sentence, the State disagrees that the trial court noted as its reasons for departure "that the State had witness problems in the case, that there was a potential motion to suppress evidence, and that a jury deliberating in the case had hung." A review of the scoresheet confirms that these notations were written by the Assistant State Attorney (R. 163). These are not valid reasons for the departure. Rather they appear to be "justifications" for the State to agree to the plea agreement. It is clear that the "valid" reason for the departure

is the plea agreement itself.[2]

With reference to the evidence presented at the violation of probation hearing (IB 3-4) the State would add that Probation Officer Deborah Williams testified she was the probation officer "of the day" (R. 16) when Petitioner reported to the probation office after being released from prison on 12/3/92. Ms. Williams went over the probation order with Petitioner, and instructed him that he had to report each and every month while on probation, to be drug free, that there may be random urinalysis, and that he had to report by the 5th day of the month, and had to submit written monthly reports (R. 18). Petitioner indicated he understood by signing the sheet on Dec. 3, 1992 (R. 18).

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[2]Trial judge may depart from recommended guidelines sentence based upon legitimate and uncoerced condition of plea bargain. Quarterman v. State, 527 So. 2d 1380 (Fla. 1988). Although the plea-bargain agreement was not set forth in writing as the basis for the departure sentence, it is clearly evident from the record that this was the case *sub judice* (see SR). As a result, the departure sentence was adequately supported by the plea-bargain agreement. Jones v. State, 573 So. 2d 165 (Fla. 4th DCA), rev. denied, 589 So. 2d 291 (Fla. 1991); see also McMullen v. State, 570 So. 2d 1032 (Fla. 4th DCA 1990); Casmay v. State, 569 So. 2d 1351 (Fla. 3d DCA 1990); Smith v. State, 553 So. 2d 748 (Fla. 5th DCA 1989). In any event, because Petitioner failed to appeal from the downward departure sentence when imposed in 1992, he waived any argument on appeal from revocation of probation, see King v. State, 597 So. 2d 309, 317 (Fla. 2d DCA), review denied, 602 So. 2d 942 (Fla. 1992), rationale adopted, McKinght v. State, 616 So. 2d 31 (Fla. 1993); Thompson v. State, 591 So. 2d 1114 (Fla. 2d DCA 1992).

Ms. Williams testified that Petitioner gave his residence address as 3380 Northwest 18th Place, Ft. Lauderdale, FL (R. 18). Ms. Williams informed Petitioner that if he changed his address he had to report to probation immediately (R. 21). At that point, Petitioner said to Ms. Williams "that in a couple of weeks he would like to request transfer to Fort Myers." (R. 21) Ms. Williams told Petitioner that if he wanted to transfer his probation, he needed to contact his probation officer, that she could not give him her approval at that time (R. 21-22).

Ms. Williams testified that she instructed Petitioner on 12/2/92 at 11:50 (R. 22-3). Ms. Williams also stated that at that time she told Petitioner **his** probation officer was not in, but that Petitioner needed to contact the probation officer assigned to him that afternoon, or at the latest the very next day (R. 23).

Margaret Thomas, Probation Officer, then testified that Petitioner was assigned to her December 2, 1992 (R. 33). Ms. Thomas was expecting Petitioner to report to her, but Petitioner did not report to her during the month of December (R. 33, 36); Petitioner did not report during the month of January 1993 (R. 33), nor during the month of February 1993 (R. 33, 35). Petitioner likewise failed to file a written report during the month of December 1992 (R. 36).

Regarding the allegations that Petitioner changed his residence without the approval of the probation officer, Ms. Thomas testified that on December 22, 1992, she called the telephone number supplied by Petitioner (R. 37). Ms. Thomas talked to Petitioner's mother, who stated that Petitioner did not reside there, but that he called to check in often (R. 37). Ms. Thomas left a message with the mother to tell Petitioner to call Ms. Thomas as soon as possible. But Petitioner did not call (R. 38).

On December 22, 1992, Ms. Thomas also went to the address given by Petitioner (R. 38), and found that no one was home. Ms. Thomas spoke with a person, who identified himself as "Ike", who was working on a car in the driveway to the residence. Ike said that only "Annie" [Petitioner's mother] lived at that residence (R. 39).

Ms. Thomas called the residence again December 29, 1992, and Petitioner's mother again said Petitioner did not live there (R. 40). On January 20, 1993, a girl called Ms. Thomas and said she was Petitioner's girlfriend, and that Petitioner was trying to get in contact with Ms. Thomas (R. 40-41). Ms. Thomas told the woman to tell Petitioner to call her at 8:00 a.m. on January 21, 1993 (R. 41); but Petitioner did not call (R. 41). On another date, another female also called. This woman identified herself as Petitioner's

sister (R. 41). This woman also said that Petitioner was trying to get in touch with Ms. Thomas (R. 41). Ms. Thomas, however, never received any messages that Petitioner called (R. 42).

Clinical Psychologist, Lorraine Wincor, testified on behalf of Petitioner (R. 59-76). Dr. wincor testified that she evaluated Petitioner for competency and sanity on July 15, 1993 (R. 60). Dr. Wincor reached her conclusions from the history related to her by Petitioner himself (R. 70).

As part of his history, Petitioner told Dr. Wincor that he came from a broken home (R. 62). His father was an alcoholic; there were four children in the family, and the mother was trying to work and hold the family together (R. 62). Finally the mother took the children and left for another part of the state and continued to work and tried to support her family. Petitioner was pretty much on his own and started to drink alcohol and use drugs at the age of fifteen (R. 62).

Petitioner told Dr. Wincor that at the time of his arrest, he was using six hundred to seven hundred dollars a day of crack cocaine (R. 63). About a week prior to being arrested on the warrant, Petitioner allegedly obtained nine thousand dollars worth of crack cocaine, and was using this cocaine for about a week, and sharing it with a female friend (R. 63-4). Petitioner has six

children from several women (R. 66). Petitioner dropped out of school in 11th grade and then completed his GED while in jail (R. 66).

Based on Petitioner's background, as related to her by Petitioner, Dr. Wincor concluded that with the kind of drug use at the time of his arrest on February 1, 1993 (R. 64), Petitioner could not make decisions, did not know the difference between right and wrong. "His thinking was clouded, his judgment was nonexistent and his behavior was generally bizarre." (R. 69)

Petitioner then testified in his own behalf. Petitioner stated he lived at 3380 Northwest 18th Place, Ft. Lauderdale, with his "father and mother" (R. 78), and did not move while on probation (R. 78). However, he stated occasionally he would spend days away from his house (R. 79), and go to his sister's house. Petitioner also testified that he was abusing drugs while in jail, and continued upon release (R. 84). Petitioner stated that between the time he was released from prison December 1, 1992, and his arrest on February 1, 1993, he was "smoking maybe three or four hundred dollars a day." (R. 84). It got to the point where Petitioner stopped working and was "in the streets" "using some young lady ... getting money that way, [to] support[... his habit]." (R. 84).

With reference to the allegations concerning Petitioner's failure to report, Petitioner testified that when he reported to Ms. Williams on December 2, 1992, he assumed he had reported for the month of December 1992 (R. 81). With reference to January 1993, he found a job, and if he took time off to report to probation he would have lost his job, so he did not make it in (R. 81-82). He needed the job because he has children to support (R. 82). Petitioner testified he did call Ms. Thomas, but she was not in (R. 82). Petitioner decided he would come in the following month (R. 82). Petitioner called and had his sister call as well, but he was never able to reach Ms. Thomas (R. 82). So Petitioner did not report in January, and then was arrested February 1, 1993, before he could report for the month of February 1993, although he had every intention to report (R. 83).

After listening to the evidence and argument of counsel, the trial court made findings (R. 92-95). The court found that the fact that Petitioner went to the probation officer December 2 or 3, 1992, and discussed the probation conditions, and his desire to transfer to Ft. Myers that Petitioner had "presence of mind" (R. 92-93). That Petitioner realized he was to report, but failed to do so (R. 93). The trial court also found that the probation officer went to the residence, and Petitioner was not there (R.

93). That although Petitioner testified he was not at the residence every minute, and he was not required to be there every minute; Petitioner's testimony that he stayed with his sister, and then living with a woman smoking crack, supported the conclusion that Petitioner had changed his residence (R. 93-94). The trial court then found that Petitioner committed these violations; found these two violations to be material (R. 95); and therefore revoked Petitioner's probation based on these violation either "individually or collectively" (R. 95).

On direct appeal, the District Court of Appeal, Fourth District, affirmed the judgment and sentence. With reference to the revocation of probation, the District Court held: "Although the evidence presented concerning whether he lived at his designated residence was substantially hearsay, we consider portions of his testimony to be sufficient corroboration. Therefore, we affirm the revocation order." Dunham v. State, 21 Fla. L. Weekly D89 (Fla. 4th DCA Jan. 3, 1996); Appendix.

Regarding the sentencing issue, the District Court affirmed the sentence. The District Court however acknowledged conflict with Shaw v. State, 637 So. 2d 254 (Fla. 2d DCA), rev. denied, 648 So. 2d 724 (Fla. 1994); but agreeing with the rationale in King v. State, 648 So. 2d 183, 184 (Fla. 1st DCA 1994), rev. granted, 659

So. 2d 1087 (Fla. 1995), and recognizing that King is presently pending before this Court, the District Court withheld issuing the mandate in the instant case pending the resolution of the issue by this Court.

SUMMARY OF THE ARGUMENT

POINT I - Petitioner entered into a valid non-coerced plea agreement with the State, by which he was to receive a downward departure sentence of five years in prison to be followed by five years of probation. The agreement specifically stated that should Petitioner violate his probation, the court upon revocation of probation could sentence Petitioner as an habitual felony offender. The State filed its notice of intent to seek habitualization in 1989. Petitioner changed his plea to guilty in 1992. At the change of plea hearing, the trial court informed Petitioner of the maximum sentence he could face if sentenced as an habitual felony offender.

Because the trial court complied with the Ashley requirements, upon violation of probation, the trial court could sentence Petitioner to any sentence available at the original sentence, including sentence as an habitual felony offender. Therefore, the District Court's opinion affirming the sentences as imposed by the trial court on the same rationale as King should be approved by this Court.

POINT II - This Court should decline jurisdiction to review this second issue as raised by Petitioner since no jurisdictional basis to review same has been argued by Petitioner.

In any event, the District Court properly affirmed the revocation of probation because the trial court based its decision on either of two grounds found sufficient to revoke Petitioner's probation. Since Petitioner only challenged the validity of one of the grounds, the revocation was properly affirmed by the District Court.

Finally, it is clear that the District Court's opinion is correct that the decision to revoke Petitioner's probation was not based on hearsay along, but that Petitioner's testimony was corroborative. As such the District Court's opinion must be approved. Hearsay is admissible in revocation proceedings; however, the well-established rule is that revocation cannot be based on hearsay alone. The officer's testimony, and Petitioner's testimony at the hearing, were non-hearsay evidence. This testimony together with the hearsay evidence support the trial court's conclusion that Petitioner violated probation by changing his residence without the prior approval of his probation officer.

ARGUMENT

PETITIONER'S PRISON SENTENCE AS AN HABITUAL FELONY OFFENDER IMPOSED UPON REVOCATION OF PROBATION AS CONTEMPLATED BY THE ORIGINAL PLEA AGREEMENT VIOLATES NEITHER FLORIDA LAW NOR THE DOUBLE JEOPARDY CLAUSE.

Petitioner's contention that the sentence imposed by the trial court on March 19, 1992, was an illegal "hybrid split sentence," as the sentences disapproved by the Second District Court in the Shaw v. State, 637 So. 2d 254 (Fla. 2d DCA 1994) / Burrell v. State, 612 So. 2d 594 (Fla. 2d DCA 1992) line of cases is without merit. Rather the sentences imposed below upon revocation of probation must be affirmed under the rationale of Snead v. State, 616 So. 2d 964 (Fla. 1993).

As borne out by the record, the information in 89-24360, charging Petitioner with I-armed kidnaping, II-armed burglary, and III-armed robbery, was filed December 4, 1989 (R. 147), and the State's "Notice to Declare Defendant an Habitual Violent Felony Offender" was filed December 19, 1989 (R. 153).

Petitioner went to trial on the information on November 4, 1991 (R. 211-214), but when the jury was unable to arrive at a verdict (R. 215), Judge Backman declared a mistrial November 4, 1991 (R. 216). On November 4, 1991, the State was prepared to show Petitioner qualified as an habitual felony offender, and that his

civil rights had not been restored (R. 211; see also R. 173-4).

Knowing that the State was seeking to have the trial court sentence him as an habitual felony offender, Petitioner stipulated he qualified as an habitual felony offender (R. 173-4), and agreed to enter a plea of guilty, if the State agreed to delete the "armed" allegations of the charges, in exchange for a non-habitual sentence of five years in prison followed by five years of probation (R. 175). However, part and parcel of the plea agreement and stipulation was that if Petitioner violated his probation, the trial court could then sentence Petitioner as an habitual felony offender upon revocation of probation (R. 173-175). Petitioner entered his pleas of guilty to the charges March 19, **1992** (SR).

At the change of plea hearing, the trial court advised Petitioner of the maximum sentences he was facing under the charges (SR 5). Petitioner agreed that the documents prepared for the change of plea included two acknowledgments of pleas and waiver of rights (R. 175, 218); the scoresheet (R. 163); and the stipulated order regarding habitual felony offender status (R. 173-174) (see SR 5). Because the understanding was that if Petitioner violated his probation, he could be sentenced as an habitual felony offender upon revocation of probation, the trial court informed Petitioner as to the maximum sentences he would face under the habitual

offender statute (SR 6-7). The trial court specifically warned Petitioner:

> So, if you violate the conditions of your probation, your probation could be revoked and each one of these felonies mentioned, you could be sentenced to double each of the penalties that we have mentioned.

(SR 7). Prior to the conclusion of the sentencing hearing, the trial court once again reminded Petitioner:

> If you violate probation ... they can be revoked and you could be sentenced to the maximum penalties ... as an habitual felony offender, as the case may be.

(SR 11).

The plea agreement (R. 175), the stipulated order (R. 173-174), the transcript of the change of plea agreement (SR), and the sentences imposed (SR 10-11 and R. 165, 168, 171, 176, 226, 229, 232) clearly show that in March 19, 1992, all the parties agreed Petitioner would **then** **not** be sentenced as an habitual felony offender. But the documents as well clearly show that everyone agreed that if Petitioner violated probation, then any sentence imposed upon violation of probation could be as an habitual felony offender (R. 173-174, 234-235). The record, as well, clearly demonstrates that the trial court abided by the plea agreement and did not sentence Petitioner as an habitual felony offender as to

either the incarcerative or probationary portion of the sentence imposed (SR 10-11 and R. 164-172, 176, 181-182, 223-224, 225-233). Therefore, contrary to Petitioner's allegations, the sentences imposed in March 19, 1992, were not "illegal hybrid split sentences" as those disapproved in Burrell, but rather were valid downward departure sentences. See Quarterman v. State, 527 So. 2d 1380 (Fla. 1988).

At the sentencing hearing held October 24, 1994, Petitioner took the witness stand to state that when he signed the plea agreement in March of 1992, he did not understand he was stipulating to being sentenced as an habitual felony offender (R. 118-120). Petitioner explained that when his attorney informed him the State was offering a "habitual sentence," Petitioner told his attorney: "I couldn't take habitual sentence. I'll go up the road with habitual sentence, I wouldn't be credited, I couldn't get a third off the sentence or whatever as a habitual." (R. 118). Petitioner asked his counsel "to get the armed dropped and I would cop to the five years probation, five year prison time if I couldn't go with habitual sentence." (R. 118). Petitioner stated that although he did initial the stipulated order, he did not read it (R. 119-120), and did not understand that if he violated the probation, he would be subjecting himself to being sentenced as a

habitual offender (R. 121). After reviewing the transcript of the change of plea hearing held March 19, 1992, the trial court found that Petitioner is subject to habitual offender classification, and can be sentenced as an habitual felony offender (R. 128). The trial court's findings and sentences must be affirmed. Cf. Fambro v. State, 581 So. 2d 199 (Fla. 4th DCA), review denied, 591 So. 2d 181 (Fla. 1991).

It is now settled that a trial judge has the discretion to place an habitual felony offender on probation. See McKnight v. State, 616 So. 2d 31 (Fla. 1993); King v. State, 597 So. 2d 309 (Fla. 2d DCA), review denied, 602 So. 2d 942 (Fla. 1992); see also Bell v. State, 651 So. 2d 237 (Fla. 5th DCA 1995). Therefore, the trial court did not impose an illegal sentence on March 19, 1992, when after declaring Petitioner to be an habitual felony offender (R. 173-174, 234-235), the court sentenced Petitioner to five years in prison to be followed by five years in probation (SR 10-11 and R. 164-172, 176, 181-182, 223-224, 225-233).

It is also settled law that upon violation of probation, the trial court is entitled to impose "any sentence which it [the court] might have originally imposed before placing the probationer on probation ... ." Sec. 948.06(1), Fla. Stat.; Poore v. State, 531 So. 2d 161 (Fla. 1988); King v. State, 597 So. 2d at 317.

In order for a defendant to be habitualized following a guilty or nolo plea, the defendant must be given written notice of intent to habitualize and the court must confirm that the defendant is personally aware of the possibility and reasonable consequences of habitualization. Ashley v. State, 614 So. 2d 486 (Fla. 1993). The record is clear that in the case at bar, the state filed its notice of intent to seek an enhanced habitual offender sentence December 19, 1989 (R. 153). At the time that Petitioner entered his plea of guilty March 19, 1992 (SR), the trial court informed Petitioner of the maximum sentences he would be facing, should he violate probation and be sentenced as an habitual felony offender (SR 6-7, 11). At the hearing held October 24, 1994, Petitioner **personally** acknowledged he clearly understood the consequences of habitualization (R. 118). Therefore, since the trial court complied with the Ashley requirements at the change of plea hearing, at the time of the original sentencing hearing, the trial court had the option of imposing a habitual felony offender sentence, Ashley; and, therefore, had the option of sentencing Petitioner as an habitual felony offender upon violation of probation. See, Snead v. State, 616 So. 2d at 965-966.

Before this Court, Petitioner urges this Court to follow the Second District Court of Appeal which held, in Davis v. State, 623

So. 2d 547 (Fla. 2d DCA 1993), that once a trial court finds that a defendant is a habitual offender, it may either sentence him as a habitual offender, or it may sentence him under the guidelines, but it cannot do both. Respondent respectfully disagrees with this position, and suggests that the better approach is found by the District Court below in the case at bar, as well as in Walker v. State, 661 So. 2d 954 (Fla. 4th DCA 1995), rev. granted, No. 86,962 (Fla. Feb. 12, 1996) agreeing with the rationale in the First District Court's case of King v. State, 648 So. 2d 183 (Fla. 1st DCA), rev. granted, 659 So. 2d 1087 (Fla. 1995)

It is, of course, well settled that sentencing under the habitual offender statute is permissive rather than mandatory. Geohagen v. State, 639 So. 2d 611, 612 (Fla. 1994); Burdick v. State, 594 So. 2d 267 (Fla. 1992). Thus, if a trial court finds a particular defendant to be a habitual offender but nevertheless determines that a habitual offender sentence is not necessary for the protection of the public, it may impose an ordinary guidelines sentence. State v. Rinkins, 646 So. 2d 727 (Fla. 1994).

This Court has expressed its favor of a sentencing scheme which would allow a trial court to give a defendant another chance where that is appropriate, and, at the same time, making such a chance the absolutely final last chance. Thus, the Court readily

permitted a trial court to impose a departure sentence following a violation of probation where the reasons for that sentence existed at the time of the initial sentencing. Williams v. State, 581 So. 2d 114, 146 (Fla. 1991). Similarly, in Snead v. State, 616 So. 2d 964 (Fla. 1993), this Court made it clear that if the State had sought habitualization at the time of a defendant's original sentence, *and* if the reasons for departure from the guidelines had existed at that time, a subsequent habitual offender sentence for violation of probation would be permitted.

Respondent respectfully suggests that those are the very facts which are presented in the case at bar. Here, the reasons for habitualization existed at the time of the initial sentencing; indeed, Petitioner readily acknowledged he would be sentenced as an habitual. It was in an attempt to avoid habitualization that Petitioner entered into the plea agreement which would allow him to avoid a sentence as an habitual felony offender in 1992; with the full and complete understanding that if he were to violate the probationary portion of his sentence, any sentence imposed upon revocation would be as an habitual felony offender. Therefore, the sentence imposed sub judice is proper under Snead because the trial court did make findings that Petitioner qualified as an habitual felony offender when sentencing Petitioner in 1992.

Petitioner's reliance on double jeopardy principles is equally misplaced. Petitioner contends that when a trial judge determines that a habitual offender sentence is not appropriate, that judge "has effectively *acquitted* the defendant of a habitual offender sentence" (AB 9).

In the first place, it is well settled that a defendant who knowingly enters into a plea agreement covering both the charges and the sentence waives an otherwise viable double jeopardy claim. Melving v. State, 645 So. 2d 448 (Fla. 1994). At bar, Petitioner entered into such a plea agreement, and the sentence was clearly spelled out. Hence, the claim is waived.

The facts in the case at bar are inapposite to those in Davis v. State, 587 So. 2d 580 (Fla. 1st DCA 1991) and Grimes v. State, 616 So. 2d 996 (Fla. 1st DCA 1993), the cases on which Petitioner relies, in another way as well. In Davis, the trial court did not make a proper finding at the time of the sentencing that the defendant was a habitual offender, and the issue on appeal was one of classification, not sentence. The identical facts existed in Grimes and, again, the issue on appeal was one of classification: that is, whether, once the trial court failed to classify a defendant as a habitual offender at the original sentencing, it had effectively acquitted him of that status.

At bar, Petitioner was properly classified as a habitual offender at the time of the initial sentence. The fact that the trial court chose not to impose such a sentence was merely ministerial, and, Respondent submits, did not acquit him of anything. See State v. Rucker, 613 So. 2d 460, 462 (Fla. 1993).

The First District and Fifth District Courts of Appeal have spoken to the propriety of the imposition of a habitual offender sentence following a guidelines incarceration. Each of those courts has found no error in such a sentence when the facts which constituted the basis for habitualization and the notice thereof took place prior to the time of the initial sentencing. See: King v. State, supra; Anderson v. State, 637 So. 2d 971, 972 n.1 (Fla. 5th DCA 1994). As stated by the First District, such a procedure "might well encourage a trial judge to give a defendant a second chance under appropriate circumstances, if the judge knows that when such confidence is betrayed, an habitual offence sentence can yet be imposed."

Clearly, a viable sentencing tool which has been found so useful by Florida's trial courts should not be sacrificed on the altar of rigidity. In the case at bar, the sentence imposed in 1992 was not a guidelines sentence, but was a departure sentence in accordance with a valid plea agreement. The agreement specifically

provided that Petitioner, although an habitual felony offender, would be given an opportunity; however, should Petitioner violate the probationary portion of the sentence, on revocation he would be sentenced as an habitual felony offender, in accordance with the findings made at the original sentencing hearing in 1992. Therefore the original sentence was not a guideline sentence, as alleged by Petitioner, such that on revocation of probation habitualization could not be considered. Rather a habitual sentence upon revocation of probation was part and parcel of the plea agreement; therefore, the sentence imposed in the case at bar is prohibited by neither law nor public policy, and it was properly affirmed by the Fourth District Court of Appeal below.

The State of Florida, submits that the issue was properly decided in King v. State. Therefore, the District Court's opinion affirming the sentences as imposed by the trial court on the same rationale as King should be approved by this Court.

POINT II

THE TRIAL COURT WAS CORRECT IN REVOKING APPELLANT'S PROBATION FINDING THAT APPELLANT CHANGED HIS RESIDENCE WITHOUT PRIOR APPROVAL OF HIS PROBATION OFFICER.

Jurisdiction

This Court should decline to consider this point. In Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982), this Court stated that it may, in its discretion, consider other issues "properly raised and argued before this Court." (Emphasis added.) A review of the opinion issued by the District Court in the case at bar clearly shows that the District Court certified conflict **only** as to the issue argued by the parties as issue I above. In his Jurisdictional Brief likewise, Petitioner sought this Court to accept jurisdiction over his case **only** to review the propriety of the sentence; and no attempt was made in the jurisdictional brief to ask this Court to review the second issue decided by the District Court in its opinion.

This Court accepted jurisdiction over this case solely to clarify the conflict on issue I. Since the trial court specifically stated he would revoke probation as well for the technical violation of failing to report, whether the probation was properly revoked as to "ground I" is **not** dispositive. Therefore,

this Court should decline to address this additional issue which was properly decided by the District Court.

Merits

The affidavit charging Petitioner with violation of probation accused Petitioner with violating probation in five different ways (R. 185). The order of revocation found Petitioner guilty on two (2) of those five (5) grounds (R. 199). On direct appeal to the Fourth District, and now before this Court, Petitioner **only** challenges the trial court's decision to revoke his probation on ground I of the affidavit of violation of probation "since [ ] inadmissible hearsay formed **the only** basis for the conclusion that Petitioner had moved without his probation officer's permission". (AB 9-10; IB 11-13). The State submits that the District Court's opinion on this issue must be approved.

With reference to the revocation of probation, the District Court held: "Although the evidence presented concerning whether he lived at his designated residence was substantially hearsay, we consider portions of his testimony to be sufficient corroboration. Therefore, we affirm the revocation order." Dunham v. State, 21 Fla. L. Weekly D89 (Fla. 4th DCA Jan. 3, 1996); Appendix. After reviewing the evidence, the District court stated: "We also note

that the trial court made it clear that he was revoking Appellant's probation on either of the charges in the warrant." Id. The Court thus affirmed the revocation of probation as being proper under either ground. Since Petitioner admitted to not having reported to his probation officer during the months of December or January, the revocation of probation was properly affirmed by the District Court, and should likewise be approved by this Court.

The State submits that in any event, both the trial court and the District Court were correct in their rulings on this issue. It is settled law that hearsay is admissible in revocation proceedings; however, the well-established rule is that revocation cannot be based on hearsay alone. Adams v. State, 521 So. 2d 337 (Fla. 4th DCA 1988). Thus, it is clear that the trial court did not err in allowing the hearsay comments from Petitioner's mother, and "Ike" to be presented at the violation of probation hearing below.

Additionally, in order to prove a violation of probation, the state's burden of proof is the greater weight of the evidence rather than proof beyond a reasonable doubt. McPherson v. State, 530 So. 2d 1095 (Fla. 1st DCA 1988).

The affidavit of violation of probation charged that Petitioner violated condition I-1 of the order of probation by

moving without the consent of his probation officer; and condition j-5 by failing to submit prescribed written monthly report by the fifth day of each month (R. 184).

A review of the record in the case at bar demonstrates that the revocation of probation must be affirmed. Probation Officer Deborah Williams testified she was the probation officer "of the day" (R. 16) when Petitioner reported to the probation office after being released from prison on 12/3/92. Ms. Williams went over the probation order with Petitioner, and instructed him that he had to report each and every month while on probation, to be drug free, that there may be random urinalysis, and that he had to report by the 5th day of the month, and had to submit written monthly reports (R. 18). Petitioner indicated he understood by signing the sheet on Dec. 3, 1992 (R. 18). Ms. Williams testified that Petitioner gave his residence address as 3380 Northwest 18th Place, Ft. Lauderdale, FL (R. 18). Ms. Williams informed Petitioner that if he changed his address he had to report to probation immediately (R. 21). At that point, Petitioner said to Ms. Williams "that in a couple of weeks he would like to request transfer to Fort Myers." (R. 21) Ms. Williams told Petitioner that if he wanted to transfer his probation, he needed to contact his probation officer, that she could not give him her approval at that time (R. 21-22).

Ms. Williams testified that she instructed Petitioner on 12/2/92 at 11:50 (R. 22-3). Ms. Williams also stated that at that time she told Petitioner **his** probation officer was not in, but that Petitioner needed to contact the probation officer assigned to him that afternoon, or at the latest the very next day (R. 23).

Margaret Thomas, Probation Officer, then testified that Petitioner was assigned to her December 2, 1992 (R. 33). Ms. Thomas was expecting Petitioner to report to her, but Petitioner did not report to her during the month of December (R. 33, 36); Petitioner did not report during the month of January 1993 (R. 33), nor during the month of February 1993 (R. 33, 35). Petitioner likewise failed to file a written report during the month of December 1992 (R. 36).

Regarding the allegations that Petitioner changed his residence without the approval of the probation officer, Ms. Thomas testified that on December 22, 1992, she called the telephone number supplied by Petitioner (R. 37). Ms. Thomas talked to Petitioner's mother, who stated that Petitioner did not reside there, but that he called to check in often (R. 37). Ms. Thomas left a message with the mother to tell Petitioner to call Ms. Thomas as soon as possible. But Petitioner did not call (R. 38).

On December 22, 1992, Ms. Thomas also went to the address

given by Petitioner (R. 38), and found that no one was home. Ms. Thomas spoke with a person, who identified himself as "Ike", who was working on a car in the driveway to the residence. Ike said that only "Annie" [Petitioner's mother] lived at that residence (R. 39).

Ms. Thomas called the residence again December 29, 1992, and Petitioner's mother again said Petitioner did not live there (R. 40). On January 20, 1993, a girl called Ms. Thomas and said she was Petitioner's girlfriend, and that Petitioner was trying to get in contact with Ms. Thomas (R. 40-41). Ms. Thomas told the woman to tell Petitioner to call her at 8:00 a.m. on January 21, 1993 (R. 41); but Petitioner did not call (R. 41). On another date, another female also called. This woman identified herself as Petitioner's sister (R. 41). This woman also said that Petitioner was trying to get in touch with Ms. Thomas (R. 41). Ms. Thomas, however, never received any messages that Petitioner called (R. 42).

Petitioner testified in his own behalf. Petitioner stated he lived at 3380 Northwest 18th Place, Ft. Lauderdale, with his "father and mother" (R. 78), and did not move while on probation (R. 78). However, he stated occasionally he would spend days away from his house (R. 79), and go to his sister's house. Petitioner also testified that he was abusing drugs while in jail, and

continued upon release (R. 84). Petitioner stated that between the time he was released from prison December 1, 1992, and his arrest on February 1, 1993, he was "smoking maybe three or four hundred dollars a day." (R. 84). It got to the point where Petitioner stopped working and was "in the streets" "using some young lady ... getting money that way, [to] support[... his habit]." (R. 84).

With reference to the allegations concerning Petitioner's failure to report, Petitioner testified that when he reported to Ms. Williams on December 2, 1992, he assumed he had reported for the month of December 1992 (R. 81). With reference to January 1993, he found a job, and if he took time off to report to probation he would have lost his job, so he did not make it in (R. 81-82). He needed the job because he has children to support (R. 82). Petitioner testified he did call Ms. Thomas, but she was not in (R. 82). Petitioner decided he would come in the following month (R. 82). Petitioner called and had his sister call as well, but he was never able to reach Ms. Thomas (R. 82). So Petitioner did not report in January, and then was arrested February 1, 1993, before he could report for the month of February 1993, although he had every intention to report (R. 83).

After listening to the evidence and argument of counsel, the trial court made findings (R. 92-95). The court found that the

fact that Petitioner went to the probation officer December 2 or 3, 1992, and discussed the probation conditions, and his desire to transfer to Ft. Myers that Petitioner had "presence of mind" (R. 92-93). That Petitioner realized he was to report, but failed to do so (R. 93). The trial court also found that the probation officer went to the residence, and Petitioner was not there (R. 93). That although Petitioner testified he was not at the residence every minute, and he was not required to be there every minute; Petitioner's testimony that he stayed with his sister, and then living with a woman smoking crack, supported the conclusion that Petitioner had changed his residence (R. 93-94). The trial court then found that Petitioner committed these violations; found these two violations to be material (R. 95); and therefore revoked Petitioner's probation based on these violation either "individually or collectively" (R. 95).

Probation Officer Thomas testified she went to Petitioner's residence and did not find him there. This was not hearsay evidence, and was sufficient additional evidence to support the trial court's findings. See McPherson v. State, 530 So. 2d 1095, 1097 (Fla. 1st DCA 1988); McNealy v. State, 479 So. 2d 138, 139 (Fla. 2d DCA 1985). Further, Petitioner took the stand and testified that he lived at that residence with his "father and

mother" (R. 78). However, Petitioner's own account of events was that his mother had left Petitioner's father a long time ago (R. 62) and Petitioner had to raise himself (R. 62). Further, when questioned by the trial court, Petitioner stated in January 1993 he lost his job and was involved in using seven hundred dollars worth of cocaine **a day** that he was living out in the street, "using some young lady" to support his habit (R. 84).

This evidence clearly shows that in the case at bar there was sufficient non-hearsay and hearsay evidence to prove that Petitioner violated his probation by moving from his approved residence without the permission of his probation officer. See McPherson v. State, 530 So. 2d at 1097 (The hearsay statement of Petitioner's mother that Petitioner had moved, taken in conjunction with [probation officer's] statement that she had made several trips to Petitioner's residence and he wasn't there, and Petitioner's statement that "he had gone to Alabama" were sufficient to prove that Petitioner violated his probation by moving from his approved residence without the permission of his probation officer); McNealy v. State, 479 So. 2d at 139 (Probation officer's testimony that she went to Petitioner's residence on several occasions and could never find him; plus the brother's hearsay statement that the defendant no longer lived there;

together with Petitioner's response when asked where he was living, that he had been "messing around in Lakeland" and living "just in Lakeland" were sufficient to support revocation of probation since it was not based solely on hearsay). Here the trial court specifically found that the probation officer's visit to Petitioner's residence, plus his testimony that during the month of January he was just using crack out in "the street" were sufficient non-hearsay evidence that Petitioner changed his residence without the prior approval of his probation officer (R. 93-94). This ruling must be affirmed.

In any event, Petitioner was also found to have violated condition j-5 of the order of probation by failing to submit written monthly reports (R. 199, 255). This violation was clearly established by the record and was not contested by Petitioner on direct appeal, nor before this Court. This is a material violation that supports revocation of probation on its own. McPherson v. State, 530 So. 2d at 1098 (failure to file monthly reports is a substantial violation of probation sufficient by itself to support revocation of probation); Merchan v. State, 495 So. 2d 855, 856 (Fla. 4th DCA 1986) (failure to file reports constitute substantial violation of the probationary scheme set up to supervise Petitioner's activities); Jackson v. State, 546 So. 2d 745 (Fla. 2d

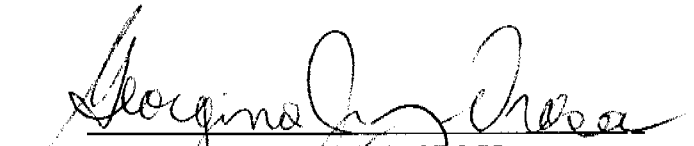
DCA 1989). The trial court below specifically held he was revoking Petitioner's probation based on both grounds charged either "individually or collectively" (R. 95). Therefore, District Court was correct in affirming the revocation of probation without further consideration. Reynolds v. State, 498 So. 2d 607 (Fla. 2d DCA 1986); McPherson v. State, 530 So. 2d at 1099. The District Court's opinion must be approved.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully submits that the decision of the district court should be **APPROVED** and the judgment and sentence imposed by the trial court should be **AFFIRMED.**

Respectfully submitted,

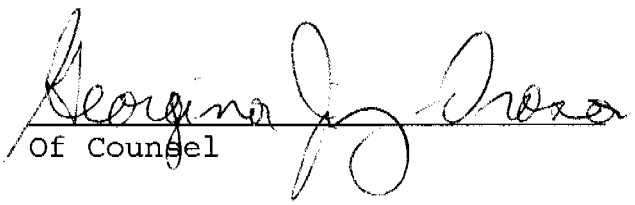
ROBERT A. BUTTERWORTH
Attorney General



GEORGINA JIMENEZ-OROSA
Assistant Attorney General
Florida Bar No. 441510
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Courier to: TATJANA OSTAPOFF, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 10th day of June, 1996.



Of Counsel

IN THE SUPREME COURT OF FLORIDA

ROBERT DUNHAM,

Petitioner,

vs. CASE NO. 87,269

STATE OF FLORIDA,

Respondent.
_____/

APPENDIX TO
RESPONDENT'S BRIEF ON THE MERITS

1. DUNHAM v. STATE
21 Fla. L. Weekly D89 (Fla. 4th DCA Jan. 3, 1996)

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Senior Assistant Attorney General
Bureau Chief
Florida Bar No. 441510
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

Counsel for Respondent

certified conflict with this court's decision in *Kamins*, in *State v. Riley*, 625 So. 2d 1261 (Fla. 5th DCA 1993), and the Florida Supreme Court approved *Riley*, and disapproved *Kamins*. *Riley*, 638 So. 2d 507.

In the meantime, however, after the supreme court denied review of his case, Kamins pled guilty and received a five year sentence. After the supreme court's decision in *Riley*, he filed a motion to vacate his guilty plea which the trial court treated as a 3.850 motion. Kamins argued that but for the erroneous decision of this court he would not have pled guilty. The trial court concluded that *Riley* was retroactive and vacated the conviction, from which the state has appealed.

Whether a change in the law is to be retroactively applied to provide post-conviction relief depends on whether the change satisfies the three-prong test set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), *cert. denied*, 449 U.S. 1067, 101 S. Ct. 796, 66 L.Ed. 2d 612 (1980). Under *Witt* a new rule will not be retroactive unless it (1) originates in the United States Supreme Court or the Florida Supreme Court; (2) is constitutional in nature; and (3) has fundamental significance. *Witt*, 378 So. 2d at 929, 930.

Although *Riley* passes the first-prong, it does not pass the second, which requires the change to be constitutional in nature. The change in law here was merely the resolution of conflicting opinions on whether a driver must give a turn signal in the absence of other motorists. There is nothing constitutional about that decision.

Kamins of course argues that the search violated the Fourth Amendment; however, in *Witt* our supreme court adopted a decision of the United States Supreme Court, *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965), for determining retroactivity on collateral review of convictions.[1] *Linkletter* involved the issue of whether *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), would be retroactively applied on collateral review of convictions, and the Court held that it would not. If a decision as significant as *Mapp*, which involved the issue of whether the Fourth Amendment exclusionary rule applied to the states, was not the type of constitutional change which would be retroactive on collateral review, then clearly *Riley* would not be retroactive.

We therefore reverse. (GLICKSTEIN and GROSS, JJ., concur.)

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[1]The United States Supreme Court no longer uses the *Linkletter* test for determining retroactivity on collateral review, but rather has adopted a more stringent test. *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed 2d 334 (1989). Florida, however, continues to follow *Linkletter*. *State v. Callaway*, 658 So. 2d 983 (Fla. 1995).

* * *

Criminal law—Sentencing—Probation revocation—Where defendant qualified as habitual offender at time of original sentencing, and a separate order was entered, by agreement, classifying defendant as an habitual offender and reserving the right to sentence him as such should he violate probation, trial court could impose habitual offender sentence upon revocation of probation even though original sentence was not habitualized—Conflict acknowledged—Finding that defendant violated probation by moving his residence without permission was not based solely on hearsay testimony of family members and neighbors, but was established through defendant's own testimony

ROBERT DUNHAM, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-3460. L.T. Case No. 89-24360CF10A and 90-21805CF10A. Opinion filed January 3, 1996. Appeal from the Circuit Court for Broward County; Robert W. Tyson, Jr., Judge. Counsel: Richard L. Jorandby, Public Defender, and Tanja Ostapoff, Assistant Attorney General, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, for appellee.

(STONE, J.) The judgment and sentence are affirmed. Appellant's probation was revoked, as violated by his moving his residence without permission and by failing to report for several months. Although the evidence presented concerning whether he lived at his designated residence was substantially hearsay, we consider portions of his testimony to be sufficient corroboration. Therefore, we affirm the revocation order.

Appellant's probation officer testified that she went to a residence address furnished by Appellant. Nobody was home, but the officer was told by a third party that Appellant's mother lived there alone. She spoke to Appellant's mother on two occasions and was advised that Appellant did not actually reside at the mother's house, but called to check in often. Appellant testified, insisting that he did reside at his mother's house, but that he also lived in "the streets" and stayed with his sister or other women who he used to support his drug habit.

In *Brown v. State*, 659 So. 2d 1260 (Fla. 4th DCA 1995), this court determined that a probation violation for changing a residence without consent may not be predicated simply on hearsay statements made to a probation officer/witness by residents at the given residence address, even if family members, that the probationer does not live at that residence. We do not further address *Brown*, as here there is the factor, apparently not present in *Brown*, of Appellant's own testimony. *See McPherson v. State*, 530 So. 2d 1095 (Fla. 1st DCA 1988); *McNealy v. State*, 479 So. 2d 138 (Fla. 2d DCA 1985). We also note that the trial court made it clear that he was revoking Appellant's probation on either of the charges in the warrant.

Appellant was sentenced, as a habitual offender, to life in prison for kidnapping and to concurrent 30 year sentences for robbery, burglary, and possession of a firearm by a felon. The probation was initially imposed as a split sentence, pursuant to a negotiated plea of 5 years in prison followed by 5 years probation. That sentence was well below the sentencing guidelines. Incident to his initial plea, Appellant acknowledged that in the event of a subsequent violation, he could be sentenced as a habitual offender. Although the prison sentence imposed at that time did not indicate it was a habitual offender sentence, by agreement, a separate order was entered classifying him as a habitual offender and reserving the right to sentence him as such should he violate probation.

We acknowledge conflict with *Shaw v. State*, 637 So. 2d 254 (Fla. 2d DCA), *rev. denied*, 648 So. 2d 724 (Fla. 1994). In *Shaw*, the defendant was also given a split sentence incident to a plea and, as here, subsequently violated probation and was sentenced upon revocation as a habitual offender. In *Shaw*, the trial court initially specifically imposed the habitual offender sentence only on the probationary portion of the sentence. The court, in *Shaw*, deemed this an improper "hybrid" sentence because the burden of habitual status was not imposed on the imprisonment portion of the split sentence. *See also Pankhurst v. State*, 632 So. 2d 142 (Fla. 2d DCA 1994); *Davis v. State*, 623 So. 2d 547 (Fla. 2d DCA 1993); *Burrell v. State*, 610 So. 2d 594 (Fla. 2d DCA 1992). However, we can discern no reason for precluding a defendant from agreeing to the type of split sentence condition imposed here, notwithstanding its "hybrid" characteristics. This issue has been resolved adversely to Appellant in *King v. State*, 648 So. 2d 183, 184 (Fla. 1st DCA 1994), *rev. granted*, 659 So. 2d 1087 (Fla. 1995); *See also Anderson v. State*, 637 So. 2d 971, 972 n.1 (Fla. 5th DCA 1994).[1] This court followed *King* in *Walker v. State*, 661 So. 2d 954 (Fla. 4th DCA 1995).

In *King*, the First District recognized that by restricting the trial court's ability to impose this type of split sentencing scheme, courts will be less willing to impose the more lenient sentence than might otherwise be imposed, thereby depriving defendants of the benefit of a substantially shorter prison sentence and the second chance represented by the probation option. The court, in *King*, recognized that this sentencing issue was likely to arise under one of four ways, saying:

> The first is when the trial judge entirely fails to address the issue of habitual offender status at the initial sentencing. . . . The second situation occurs when the trial judge addresses the issue

of habitual offender status but, because of some deficiency, determines that a defendant does not qualify for an habitual offender sentence. The third situation occurs when the trial judge validly finds a defendant to be an habitual felony offender but elects, within his discretion, to impose a sentence other than that provided by the habitual felony offender statute. The fourth situation occurs when the trial judge, after proper notice and proof of an adequate factual basis, makes a finding that the defendant is an habitual felon, and imposes an habitual felony offender sentence.

Id. at 185. Regarding the third situation, the court, in *King*, recognized that no sound reasoning exists for foreclosing a trial judge's sentencing options under these circumstances. Additionally, we note that even if a "hybrid" sentence might be improper initially, Appellant may waive such a claim where the sentence imposed is incident to a negotiated plea bargain. *See Brown v. State*. *See also Novaton v. State*, 634 So. 2d 607 (Fla. 1994); *Melvin v. State*, 645 So. 2d 448 (Fla. 1994). Recognizing that the habitual offender sentencing issue is presently before the supreme court on a certified question in *King*, we withhold issuing the mandate in this appeal pending resolution of the issue by the supreme court. (POLEN and SHAHOOD, JJ., concur.)

[1]Although Appellant did not appeal the illegal provision when initially announced, he is not precluded from raising it at this time. *See Shaw*; *Watkins v. State*, 622 So. 2d 1148 (Fla. 1st DCA 1993); *Perkins v. State*, 616 So. 2d 580 (Fla. 2d DCA 1993); *Davis*.

* * *

Dissolution of marriage—Equitable distribution—Trial court erred in concluding that increase in value of husband's interest in family business was not marital asset where increased value was in part attributable to husband's efforts as president and operations manager—Asset appreciation constitutes a marital asset subject to equitable distribution where marital labor contributes to its value, notwithstanding that increased value is primarily created passively by inflation, market conditions, or the conduct of others—Husband not entitled to offset the amount by which he was allegedly overpaid against his interest in the appreciated value of the business—Alimony—No abuse of discretion in provision reducing rehabilitative alimony from $2000 per month to $1000 per month after first three years—Prohibition against automatic future reduction of permanent alimony in absence of identifiable future event does not apply to rehabilitative alimony—Trial court was free to reject expert testimony that stress resulting from return to work force might cause return of wife's depression where there was conflicting evidence, including wife's statement that she was able to work and the testimony of others concerning wife's ability to deal with stress of managing a household and parenting

CINDY PAGANO, Appellant/Cross-appellee, v. DOMINIC PAGANO, Appellee/Cross-appellant. 4th District. Case Nos. 94-1031 and 94-2150. L.T. Case No. CD 92-3553FY. Opinion filed January 3, 1996. Consolidated appeals and cross-appeal from the Circuit Court for Palm Beach County; John D. Wessel, Judge. Counsel: Ronald Sales of Ronald Sales, P.A. (withdrawn after filing briefs) and Kevin F. Richardson of Clyatt & Richardson, P.A., West Palm Beach, for appellant. Terrence P. O'Connor of Morgan, Carratt and O'Connor, P.A., Fort Lauderdale, for appellee.

(STONE, J.) The amended final judgment of dissolution of marriage is reversed. The trial court failed to recognize any increase in value, during the marriage, of the husband's interest in his family's business as a marital asset. We note that the trial court did not have the benefit of our subsequently issued opinion in *Robbie v. Robbie*, 654 So. 2d 616 (Fla. 4th DCA 1995), which we deem controlling.

We summarize the facts most favorably to the court's findings. The parties were married for 12 years and have three minor children. The husband is the president and operations manager of the family wholesale plumbing supply business. His father is the majority shareholder and retains financial control of the company. Although the husband's annual income in recent years of $111,000 is below what it was in a few past peak years, it had been artificially inflated in those instances to allow the husband to contribute the maximum allowable to the company's pension plan. The husband's accountant testified that the value of the appreciation of the husband's interest as a shareholder in the business during the marriage was $107,314. Although the wife suffers from depression and there is testimony that this might be impacted by the stress of employment, the illness, exacerbated by the use of alcohol, is currently under control through medication, does not affect her ability to function, and she previously acknowledged that she is physically and mentally able to work.

The trial court concluded that the husband's appreciated interest in the business was not a marital asset, in part because its present increased value was influenced by economic factors rather than being traced to his specific labor. The court also took into consideration its conclusion that the husband had been overcompensated for his position because he was the owner's son, and that there had been an erosion in the success of the business in recent years. The trial court determined that the value of the appreciation in the husband's share of the business was $19,634. However, the husband acknowledges that this figure is not supported in the record. Taking the evidence most favorably to the husband, its value is at least $107,314.

The trial court equitably divided the balance of the parties' property, and, in addition to child support and permanent alimony, awarded rehabilitative alimony of $2,000 per month for three years to be reduced to $1,000 per month for an additional three years. The court also noted that there simply was not enough money to go around out of the husband's net income, as the parties lived well beyond their means.

As the situation presented by the instant case is analogous to our decision in *Robbie*, we believe it was error not to treat the appreciated portion of the husband's interest in the business as a marital asset. In *Robbie*, Michael Robbie owned 9.5% of a corporation which, among other investments, owned the Miami Dolphins franchise. He was also employed full-time by the corporation as a general manager and executive vice-president. The evidence reflected that Michael Robbie's authority involved carrying out, rather than making, the decisions for the organization and that financial control and the authority to make significant decisions rested with his father, the majority owner. In concluding that his interest constituted a marital asset, we said:

> [s]ection 61.075(5)(a)2, Florida Statutes (1993), should not be construed so narrowly as to preclude an interest in a closely held family corporation from being considered a marital asset, where the spouse is employed full-time in its endeavors but is not the key decision-maker. If Michael, as general manager, contributed by carrying out the decisions made by others, then his marital labor was used to enhance the value of the corporation.

Id. at 617.

We need not determine whether our opinion otherwise conflicts with *Macaluso v. Macaluso*, 523 So. 2d 615 (Fla. 2d DCA), *rev. denied*, 531 So. 2d 1354 (Fla. 1988), as in that case the husband, although named as an officer in his family's corporation, did not occupy a position involving a significant management role, a distinction we consider significant. We recognize that purely passive increases in the value of a pre-marital asset caused by inflation are not subject to division. *See generally Stefanowitz v. Stefanowitz*, 586 So. 2d 460 (Fla. 1st DCA 1991). However, asset appreciation constitutes a marital asset subject to equitable distribution where marital labor contributes to its value, notwithstanding that the increased value is primarily created passively by inflation, market conditions, or the conduct of others. *See Robbie*; *Turner v. Turner*, 529 So. 2d 1138 (Fla. 1st DCA 1988). We reject the husband's contention that the fact that he may have been overpaid in some prior years, for whatever reason, somehow constitutes a credit offset from the value of his interest in the appreciated value of the business. It is not asserted that any such prior overpayment constitutes a debt.