IN THE SUPREME COURT OF FLORIDA

KENNETH HAROLD MOODY,
Petitioner,

vs.

STATE OF FLORIDA,
Appellee.

Case No. 90 014
DCA 96-03375

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court
of Appeal, Second District
State of Florida

Kenneth Harold Moody DC#B630782
Calhoun Correctional Institution
P.O. Box 2000 Dorm D-2133 S
Blountstown, Florida 32424-2000

TABLE OF CONTENTS

TABLE OF CITATIONS

Case Citptions **Page No.**

Other Authorities

STATEMENT OF THE CASE AND FACTS

The petitioner filed with the Circuit Court, Twelfth Judicial Circuit Court, In and For Sarasota County, Florida a motion for post conviction relief alleging his sentences to be illegal for a: exceeding the statutory maximum allowed by law; and b: for the written sentence and judgment indicating a ten year mandatory sentence of ten years when same was not reflected in the oral pronouncement. This action bore Circuit Case Number 94-571F.

The trial court entered an order denying the motion in part and granting in part. The trial court found that the sentences of ten years mandatory for third degree felonies imposed by the court were in fact, illegal sentences. However, the court found no merit to the issue of the failure of the trial court to orally pronounce the sentence of ten years mandatory.

The petitioner filed a timely notice of appeal. On December 18, 1996, the Second District Court of Appeal found that while the petitioner was correct in his assertion that the trial court erred in not orally pronouncing the mandatory ten year sentence, such error was harmless because imposition of a mandatory sentence was itself mandatory under Section 775.084(4)(b), Florida Statutes (1995). see *Moody* v. *State,* ____ so. *2d* _____*; 22 Fla.L. Weekly D196c (Flu. 2d DCA December 18, 1996).* In its opinion, the District Court acknowledged conflict on this issue among the various Districts Courts of Appeal in Florida.

On December 31, 1996, the petitioner filed a motion for rehearing pointing out with particularity the fact that the conflict among the Districts Courts of Florida notwithstanding, this issue has been decided by this Court in *Burdick v. State, 594 So.2d 267 (Flu. 1992).* On February 19, 1997, the District Court granted the rehearing, withdrawing its earlier opinion, and substituting said opinion with an opinion that was verbatim to the December 18, 1996 opinion.

With this issue already decided by this Court, and the opinion of the District Court expressly and directly conflicting with the opinion rendered by this Court, the petitioner submits this action.

SUMMARY OF THE ARGUMENT

In this case, the District Court of Appeal held that the mandatory sentencing provisions of Section 775.084(4)(b), Florida Statutes (1995) are required to be imposed upon finding that a defendant is a habitual violent offender. The decision of the court cannot be reconciled with the decision of this Court in *Burdick* ***v. State,*** ***594*** *So.2d 267 (Fla. 1992)*, wherein this Court stated in no uncertain terms "that sentencing under sections 775.084(4)(a)(1) and 775.048(4)(b)(1) is permissive, not mandatory... ." Thus, the petitioner contends that the decision of the district Court expressly and directly conflicts with a previous decision of this Court.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review **a** decision of a district court of **appeal** that **expressly** and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of **law.** Article V, § 3(b)(3), Florida Constitution. (1995); Florida Rules of Appellate Procedure 9.0309(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN *BURDICK V. STATE, 594 SO.2D 267 (FLA. 1992).*

The District Court in its opinion, affirmed the petitioner's claim that the sentence of 10 years mandatory as a habitual violent offender should be vacated as the trial court failed to orally pronounce said 10 year mandatory sentence. The District Court, citing, *Sims v. Stute, 605 So.2d 997 (Fla. 2d DCA 1992)*, found that sentencing under Section 775.084(4)(b), Fla.Stat., is mandatory, thus the failure of the trial court to orally pronounce the mandatory sentence notwithstanding, the appellant by law, must have a 10 year mandatory sentence.

The District Court recognized the split authority for its opinion within the various Florida Districts. However, the District Court overlooked this Court's clear instructions on this issue. In *Burdick: v. Stute, 594 So.2d 267 (Fla. 1992),* this Court stated in no uncertain terms "that sentencing under sections 775.084(4)(a)(1) and 775.048(4)(b)(1) is permissive, not mandatory." The appellant offers that the Florida Supreme Court's opinion in *Burdick, supra,* has not been overruled, distinguished or receded from by any subsequent decision of the Supreme Court.[1]

In general, the rule Florida in is that when a point has once been settled by judicial decision it should in the main be adhered to, for it forms a precedent to guide courts in future similar cases. see 13 *Fla.Jur.2d Section 136.* The purpose of the rule is to "preserve harmony and stability and predictability in the law". ***State v. Hayes,*** *333 So.2d 51 (Fla. 4th DCA 1976,).* Most importantly,

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[1]In fact, the ***Burdick*** opinion has been cited as recent as *Jones* v. *Stute, 680 So.2d 585 (Fla. 4th DCA 1996).*

however, a District Court of Appeal is without authority to overrule a Supreme Court precedent. While they are free to certify questions of great public interest to the Supreme Court for consideration and to state their reasons for advocating change; they are bound to follow case law set forth by the Supreme Court. see *Hoffman* ***v. Jones,*** *280 So.2d* ***431*** *(Flu. 1973)* see also *Collier* ***v.*** *Brooks, 632 So.2d 149, 157 (Flu 1st DCA 1994)*(While the Florida Supreme Court has occasionally chosen to depart from its own precedent on public policy grounds, we note that it frowns on such departurss by lower courts).

Further, the opinion of the District Court, while acknowledging conflict, overlooked the equal protection aspects of split authority decisions such as the instant one. If this Court's decision in *Burdick, supra,* is to be disregarded, then a similar situated convict in the Second District will not be similarly treated as one in the Third District, even while both are subject to the same laws of the State of Florida. Surely such disparate treatment would not withstand constitutional scrutiny. see *Amend. 14, U.S. Constitution, U.S.C.A.; and Article I,* ***Sect.*** *2, Florida Constitution,* ***F.S.A..***

Thus, for reasons of conflict both within the various Districts, and with this Court's own opinion the petitioner moves this Court to disprove the decision of the District Court of Appeal in this instance. Any failure of this Court to do so would violate the equal protection clauses of both the Florida and United States Constitutions.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the petitioner's arguments.

Kenneth Harold Moody, Petitioner, Pro-se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal has been furnished to: The Attorney General, The Capitol, Tallahassee, Florida 32399-1050 by U.S. Mail this 24th day of February 1997.

Kenneth Harold Moody DC#B630782
Calhoun Correctional Institution
P.O. Box 2000 Dorm **D-2133 S**
Blountstown, Florida 32424-2000