IN THE SUPREME COURT OF FLORIDA

KENNETH HAROLD MOODY,

Petitioner,

v. FSC NO. 90,014

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The decision of the Second District below denying the petitioner's Motion For Post-Conviction Relief should be affirmed. The decisions of the Third and Fourth District Courts of Appeal, upon which the petitioner relies, are based upon an overly broad interpretation of *Burdick* v. *State*, infra. The correct analysis is set out in *White* v. *State*, infra, and the state requests that the Court affirm the Second District based upon that court's reasoning.

ARGUMENT

THE HONORABLE COURT SHOULD AFFIRM THE DECISION OF THE SECOND DISTRICT BELOW BECAUSE THIS COURT'S DECISION IN *BURDICK* DID NOT CONSIDER WHETHER THE MINIMUM MANDATORY PROVISIONS OF THE HABITUAL VIOLENT FELONY OFFENDER STATUTE WERE MANDATORY OR PERMISSIVE *AND* THE INTERPRETATION OF THESE SENTENCES AS MANDATORY IS CONSISTENT WITH THE LEQISLATIVE INTENT TO IMPOSE HARSHER PUNISHMENT ON VIOLENT HABITUAL FELONY OFFENDERS.

The instant case is before the Court based upon direct and express conflict among the five District Courts of Appeal. The First, Second, and Fifth Districts maintain that the imposition of the minimum mandatory terms of the habitual violent felony offender statute is mandatory, not permissive.[1] However, the Third and Fourth Districts maintain that the imposition of the minimum mandatory provisions of the habitual violent felony offender statute is permissive, not mandatory.[2]

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[1] *See White* **v. *State,*** 618 So. 2d 354 (Fla. 1st DCA **1993); *Simms* v.** *State,* **605 So.** 2d **997** (Fla. **2d** DCA **1992);** Lowe v. State, 605 So. 2d 505 (Fla. 5th DCA 1992).

[2] ***See Frye* v. *State,*** 22 Fla. L. Weekly D511c (Fla. 3d **DCA,** Feb. 26, 1997); ***State v. Morales, 678*** **So.2d 510 (Fla. 3d DCA 1996);** ***Zequeira* v. *State,* 671 So.** 2d **279** (Fla. **3d DCA** 1996); ***Hill*** v. *State,* 652 So. 2d **904** (Fla. 4th DCA **1995);** Green v. *State,* **615** So. 2d 823 (Fla. 4th DCA **1993).**

The rationale of the Third and Fourth Districts, that the imposition of the minimum mandatory provisions of the habitual violent felony offender statute is permissive, appears to be premised on an overly broad interpretation of the holding in ***Burdick*** v. ***State***, 594 So. 2d 267, 271 (Fla. 1992) that sentencing under sections 775.084(4)(a)(1) and 775.084(4)(b)(1) is permissive, not mandatory.[3]

Burdick, however, was not dispositive of the precise issue before the Court in the instant case. The First District's analysis in *White* v. ***State***, 618 So. 2d 354 (Fla. 1st DCA 1993) is dispositive:

> The state correctly points out that the question certified in ***Burdick*** was expressly limited to whether the maximum sentence of life for a non-violent felon is mandatory or permissive. It does not necessarily follow from ***Burdick*** that the minimum sentence for a defendant sentenced pursuant to the habitual violent felony offender statute is permissive, and we have not so held. See *Knickerbocker*, 604 ***So.*** 2d at **878**; see *also King*, 597 So. 2d at 316. In ***Knickerbocker***, the charges against the defendant, a habitual violent felony offender, included two felonies of the first degree (kidnapping and

[3]The Third and Fourth Districts also **appear** to rely on *Walsingham* v. ***State***, 602 ***So.*** 2d 1297 (Fla. 1992) and ***State v.*** *Eason*, 592 So. 2d 676 (Fla. 1992) as authority for their view that the imposition of the minimum mandatory sentence is permissive rather than mandatory.

armed burglary). The applicable provision of section 775,084(4), Florida Statutes (Supp. 1988) stated:

(b) The court, in conformity with the procedure established in subsection (3), may sentence the habitual violent felony offender as follows:

1. In the case of a felony of the first degree, for life, and such offender shall not be eligible for release for 15 years.

In our directions for Knickerbocker's resentencing, we held as follows:

[S]hould the trial court again decide to sentence appellant as an habitual violent felony offender for the burglary and kidnapping convictions, it is obliged to impose fifteen year mandatory minimum sentences.

604 So. 2d at 878. (Emphasis added.) The Second District's decision in *King* is consistent with our interpretation that the trial court, having determined to sentence Appellant as a habitual violent felony offender, has the discretion to impose a sentence of "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)." 597 So. 2d at 315. (Emphasis added.) See *Simms* v. *State*, 605 So. 2d 997 (Fla. 2d DCA 1992)(where a trial court decides to sentence defendant as habitual violent felony offender, minimum mandatory sentence must be included in sentence); *Lowe*, 605 So. 2d at 507 (relying on *King* in holding that habitual violent felony offender's sentence must include minimum mandatory term); *Brousseau v. State*, 590 So. 2d 997 (Fla. 5th DCA 1991).

> *Contra* ***Green*** *v. State,* **615 So. 2d 823** (Fla. 4th DCA 1993)(finding habitual felony offender sentencing is discretionary, so that imposition of minimum mandatory term is not required).... Noting the lack of minimum mandatory provisions in the habitual felony offender provisions in section **775.084 (4)**(a)**(1)**-(3), we believe our interpretation of the minimum mandatory provisions in the habitual violent felony offender statute, section **775.084 (4)**(b) **(1)** through **(4)**(b)(3), as being, in fact, mandatory, is consistent with the legislative intent to distinguish habitual offenders from habitual violent offenders and to further enhance the latter's sentences, (emphasis in original)

618 So. 2d at **359**. Thus, under the provisions of the habitual violent felony offender statute, the imposition of the minimum mandatory terms provided for is a requirement; however, under ***Burdick,*** the trial court retains the discretion to impose any term of years not less than the minimurn mandatory nor more than the maximum sentence. ***King*** v. *State,* **597 So. 2d 309,315** (2d DCA), (en banc), **review** *denied,* 602 So. 2d 942 (Fla. 1992).

Since the minimum mandatory provisions of the habitual violent felony offender statute are, in fact, mandatory, the trial court was not required to orally pronounce the minimum mandatory term at sentencing. The state respectfully requests that the Honorable Court adopt the reasoning of *White* and affirm the sentences under review.

CONCLUSION

In light of the foregoing facts, arguments, and authorities the Second District's opinion affirming the trial court's denial of post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Kenneth Harold Moody **DC** # B630782, Calhoun Correctional Institution, P.O. **Box** 2000 **Dorm** D-2133S, Blountstown, Florida **32424-2000** on this 3rd day of June, 1997.

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