

**ORIGINAL**

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

JUL 2 1997

CLERK, SUPREME COURT

By   
Chief Deputy Clerk

KENNETH HAROLD MOODY,

Petitioner,

v.

FSC CASE NO. 90,014

2nd DCA CASE NO. 96-03375

STATE OF FLORIDA,

Respondent.

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PETITIONER'S REPLY BRIEF

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### SUMMARY OF THE ARGUMENT

This court's ruling in Burdick v. State, *infra*, was clear and concise and correctly interpreted by the Third and Fourth District Courts of Appeal. The legislative intent to impose harsher punishment on violent habitual felony offenders, if such is the case, is still available to sentencing courts through their discretionary powers to impose the permissive mandatory minimum provisions of the HVO statute. Petitioner respectfully prays that the court will clarify it's position re: Burdick and instruct the remaining District Courts that they must conform to the holding in effect.

## ARGUMENT

PETITIONER'S SENTENCE SHOULD BE REVERSED AND REMANDED TO THE TRIAL COURT FOR RESENTENCING BASED ON THIS HONORABLE COURT'S PREVIOUS HOLDING IN BURDICK WHICH CLEARLY INSTRUCTED THAT THE MANDATORY MINIMUM PROVISIONS OF THE HABITUAL VIOLENT FELONY OFFENDER STATUTE WAS PERMISSIVE.

The nature of the argument before the Court in the instant case, while complex and of serious consequence, can also be simplified to its lowest common denominator: Did this court mean what it said when it held that sentencing under section 775.084 (4)(b)(1) is permissive and not mandatory, Burdick v. State, 594 So.2d 267 (Fla.1992), or may certain District Courts arbitrarily interpret that holding differently, White v. State, 618 So.2d 354 (Fla. 1st DCA 1993); King v. State, 597 So.2d 309 (Fla. 2nd DCA 1992), review denied 602 So.2d 942 (Fla.1992)?

The State suggests that the Third and Fourth Districts follow this court's holding in Burdick, *supra*, based on an overly broad interpretation, Petitioner maintains this is not the case. There was no ambiguity in the Burdick holding. The court clearly and affirmatively stated that, "We also hold that sentencing under sections 775.084 (4)(a)(1) and 775.084 (4)(b)(1) is permissive, not mandatory. Burdick, 594 So.2d at 271.

The basis for the permissive holding in Burdick was formed following a discussion of the "may" versus "shall" debated settled

in State v. Brown, 530 So.2d 51 (Fla.1988). Great weight was given to the Brown holding that the legislature's intentional use of the word "may" expressed an unequivocal intent that the life sentence should be permissive, not mandatory. ~~Moreover, no prior or subsequent legislature contained in the Laws of Florida has purported to change the word "may" to "shall."~~ Burdick v. State, 594 So.2d at 269 (citing Brown, supra) (emphasis added). This court in Burdick specifically noted that: "since the enactment of the statute in 1975, the legislature has never taken the opportunity to correct the obviously inconsistent language in subsections (4)(a) and (4)(b)." Burdi'ck 594 So.2d at 271.

The State argues that legislative intent to impose harsher punishment on violent habitual felony offenders should serve to convince this court that the sentencing is mandatory. White v. Ftate, 618 So.2d 354 (Fla. 1st DCA 1993). Yet the legislature has had ample opportunity to amend section 775.084(4)(a) and (4)(b) since 1975 and only finally did so during the 1996 session. But rather than amend (4)(b), which reads "may" to conform with (4)(a), which reads "shall," the legislature amended it in the reverse. Ch. 96-388 § 44 Laws of Florida. They both now read "may," further strengthening the argument that imposition of mandatory minimum provisions are in fact permissive.

Petitioner suggests that to recede from Burdick now would

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violate the equal protection rights of all similarly situated convicted felons who were or will be sentenced before a sentencing court that is not aware of **its** discretionary powers to not impose the mandatory minimum provision. Defendant Burdick's equal protection claim was rejected by this court only because this court held that the sentencing was permissive. Burdick, 594 So.2d at 268 (footnote #2).

Contrary to the State's position, Burdick is dispositive of this issue before the Court in the instant case and it is the White and King courts that have receded from this Honorable Court's holding. Petitioner now respectfully prays that this Court will correct the errors in his sentencing by reaffirming its Burdick holding and commending the Third and Fourth District Courts of Appeal for recognizing and following its precedent.

**CONCLUSION**

WHEREFORE, in light of the foregoing facts, arguments and authorities, Petitioner's sentence should be reversed and remanded back to the trial court for resentencing consistent with this Court's holding in Burdick v. State, 594 So.2d 267 (Fla.1992).

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF has been furnished to: Dale E. Tarpley, Assistant Attorney General, Westwood Center, Suite 700, 2002 North Lois Avenue, Tampa, Florida 33607, by U.S. Mail this 30 day of June, 1997.

  
Kenneth Harold Moody