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The Supreme Court of Florida

Paul T. Newell  
Petitioner

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CLERK, SUPREME COURT  
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Chief Deputy Clerk

V.

Case No. 91, 135

State of Florida  
Respondent

Petitioner's Brief on the Merits

✓ Paul T. Newell  
Florida State Prison Work Camp  
Starke, FL 32091-0181

Table of Contents

Preliminary Statement .....I  
Table of Authorities . . . . .II  
Summary of the Argument .....III  
Argument .....1

Point One

When oral pronouncement of sentence and written sentence are not in conformity, in reference to the minimum mandatory portion of F.S.A. 775.084; oral pronouncement of sentence controls over written sentence thus requiring reversal to delete minimum mandatory, if not orally pronounced at sentencing. Minimum mandatory provisions of habitual offender statute are permissive rather than mandatory.

Conclusion ..... 2  
Certificate of Service ..... 2

Preliminary Statement

In this brief, Paul T. Newell, will also be referred to as the Petitioner/  
Defendant. The State of Florida will also be referred to as Respondent/ Prosecutor.  
The sentencing Judge will also be referred to as The Court.

Table of Authorities

Rurdick V. State, 594 So. 2d 267 (Fla. 1992)

Hill V. State, 652 So. 2d 904 (Fla. 4th DCA 1995)

Justice V. State, 674 So. 2d 123 (Fla 1996)

Moody V. State, 22 Fla. L. Weekly S623 (case #90,014) Fla. 1997

State V. Frye, 22 Fla. L. Weekly S623 (case #90, 047) Fla. 1997

State V. Hudson, 22 Fla. L. Weekly S514 (case #89, 380) Fla. 1.997

### Summary of the Argument

In the circuit court, petitioner filed a motion for post conviction relief. The motion was attacking the legality of the sentence imposed on the grounds that the written sentence did not conform to the oral pronouncement of sentence. The petitioner was sentenced pursuant the F.S.A. 775.084, where as the minimum mandatory portion was not orally pronounced; but later appeared in the subsequent written judgement of' sentence.

This motion was denied by the circuit court, in which this court acknowledged that there was conflict between the District Courts as to this issue, but stated that they were bound to follow rulings of The Fifth District.

On appeal of this Motion for Post Conviction Relief, the District Court also acknowledged the conflict in decisions, with the 3rd and 4th Districts on one accord and the 1st, 2nd and 5th stating that the minimum mandatory portion of section 775.084 was mandatory to be imposed.

The florida Supreme Court recently clarified this issue in **State V. Hudson**, in which this court gave the procedural history and intent of the Legislature that the minimum mandatory portion of the Habitual Offender Statute be only Permissive.

### Argument

During sentencing; after counsel, Judge and State Attorney discussed which section of F.S.A. 775.0134 should be applied to the defendant, the court proceeded by pronouncing 5 years as a Habitual Offender (Violent). The court stated "... I am going to sentence the defendant as a violent habitual felony offender. I'll sentence him to 5 years..." (Please see trial Transcript page 70 line 5-9). At that time the State Attorney misled the court into believing that if the defendant was sentenced as a violent habitual offender, the sentence must be at least 10 years.

After discussing the statute in a bench conference, the court changed the 5 year sentence as a violent habitual felony offender, to 10 years as a violent felony offender. The sentence was imposed as follows: Count (1) Possession of a Firearm by a Convicted Felon-10 years as a violent Felony offender, Count (2) Resisting Arrest without Violence-90 days, Count (3) Carrying a Concealed Firearm-5 years Non Habitual,

#### There was no imposition of a Minimum Mandatory portion of the sentence.

However, the written judgement of sentence reflected a 10 year minimum mandatory. When the defendant filed the appropriate motions to have the sentence corrected in conformance with Hill v. State, 652 So. 2d 1143, where the minimum mandatory portion of F.S.A. 775.084 was not orally pronounced requiring reversal and remand so that the mandatory portion was deleted; this motion was denied stating that the Fifth District Court of Appeals had decided this issue adversely to the defendant.

The conflict of this issue has been clarified by The Florida Supreme Court in State v. Hudson, 22 Fla. L. Weekly S514 (Case #89, 380), where in this court clarified their prior interpretation of Burdick v. State, 594 So. 2d 267 (Fla. 1992): stating that the provisions of F.S.A. 775.084 were permissive not mandatory. See also Moody v. State, 22 Fla. L. Weekly S623 (Case # 90, 014) and State v. Frye, 22 Fla. L. Weekly S623 (Case #90, 047).

It was error for the court to deny the motion for post conviction relief and by stating that correction of the sentence would render the sentence illegal because the minimum mandatory portion of the statute was mandatory to be imposed. This court has clarified this issue at hand, in accordance with a long history of case law that the oral pronouncement of sentence controls over the subsequent written judgement of sentence. See Justice v. State, 674 So. 2d 123 (Fla. 1996).

Conclusion

The issue presented in this case are Identical to the issues this court resolved in **Hudson, frye, and Moody**. further stating, in the respondents jurisdictional brief they requested that the petitioners case be consolidated with the **Moody** case, thus acknowledging the identical issues.

Certificate of Service

I hereby certify that I have filed with the Florida Supreme Court the Original and 7 copies of the foregoing Brief on the Merits, by United States mail this 29th day of October 1997.

Respectfully Submitted



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