IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA
Petitioner,

vs. Case No. SC01-1596
LOWER TRIBUNAL CASE NO. 4D99-4339;
4D99-4340;
4D99-4341

GREGORY BYRON ORR,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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_____/

PRELIMINARY STATEMENT

Respondent, GREGORY BYRON ORR, was the defendant in the trial court below and will be referred to herein as "Respondent." Petitioner, the State of Florida, was the prosecution in the trial court below and will be referred to herein as "the State." The following symbols will be used:

Ra = Record on Appeal for lower case number 99-3201CF10A

Rb = Record on Appeal for lower case number 99-1763CF10A

SR = Supplemental Record on Appeal for Defendant's 3.800(a) motion

Ta = Transcripts from July 31, 1995

Tb = Transcripts from August 4, 1995

Tc = Transcripts from July 20, 1999

Td = Transcripts from December 13, 1999

STATEMENT OF THE CASE AND FACTS

Trial Court Case Number 94-3961CF10A

On July 31, 1995, Respondent was in court to be sentenced on several violations of probation and several new substantive offenses. (Ta 2). Respondent wanted to resolve all of his cases with an open plea to the court. (Ta 2-3). Respondent admitted that he knew that he could be sentenced to anything from probation to "major time as an habitual felony offender on each case," possibly up to seventy or ninety years as an habitual felony offender. (Ta 3). Respondent also admitted that he had no idea what sentence he would receive, that he spoke with his attorney at length about his sentencing possibilities while being held in the jail, that all of his questions were answered prior to entering the open plea, and that he knew that an open plea meant that the court would sentence as the court deemed appropriate. (Ta 3-4).

When the court asked the State the range to which he could sentence Respondent, the State replied that on case number 94-3961CF10A, the recommended sentence would be 27 to 40 years, but the permitted range was 3 to 20 years in prison. (Ta 4-5). The Court informed Respondent that in case number 94-3961CF10A, he was charged with Dealing in Stolen Property, which is punishable

by up to 15 years in prison. (Ta 7).

The court determined that Respondent understood that by entering his plea, he was giving up the right to a jury trial, the right to a violation of probation hearing, the right to remain silent, the right to confront and cross examine his accusers, the right to subpoena witnesses to testify on his behalf, and the right to appeal his conviction to an appellate court. (Ta 8-9). Respondent further told the court that he had not had any drugs or alcohol during the prior ten days, that he was able to understand what was going on, that he was not under the care of any psychiatrist or psychologist, that he was pleading freely and voluntarily, and that he was not being forced to enter his plea. (Ta 9-10). Additionally, Respondent told the court he was happy with his lawyer, discussed his case with her, and had no need to further discuss the case with her. (Ta 10).

The court found a factual basis for the plea, and made the finding that Respondent was mentally alert and in full control of his mental faculties, and understood what was occurring in court. (Ta 13). Before imposing sentence, the court considered Respondent's Motion for Downward Departure. (Ta 14-36). The State objected to the motion, arguing that he was qualified as an habitual felony offender, and that the court should impose

the maximum habitual felony offender sentence of 40 years. (Ta 15).

On August 4, 1995, the court resumed Respondent's sentencing hearing. (Tb 2). Defense counsel told the court that after discussing the sentencing possibilities with Respondent for at least two hours that morning, Respondent knew he qualified as an habitual felony offender, and that he would waive the requirement that the State prove his qualification as an habitual felony offender. (Tb 2). When defense counsel asked Respondent if counsel discussed the habitual felony offender issue with him, and whether he would waive the requirement that the State prove his qualification as an habitual felony offender, Respondent replied, "yes." (Tb 2). Furthermore, when the court asked Respondent if he was stipulating that he qualified as an habitual felony offender, Respondent responded, "yes." (Tb 3). Respondent also stated that none his prior qualifying offenses had been set aside, and that he was waiving the right to a pre-sentence investigation. (Tb 3).

The State told the court that Respondent was given notice that he was to be declared and sentenced as an habitual felony offender on April 11, 1995, and that Respondent's range for the guidelines was 27 to 40 years recommended or 22 to life permitted, but the statutory maximum was 15 years. (Tb 4). The

court then revoked his probation and sentenced Respondent to prison time for his 1992 cases, and in case number 94-3961CF10A, he adjudicated Respondent guilty of Dealing in Stolen Property, declared him an habitual felony offender, and sentenced him to five years' probation, consecutive to the prison sentences in his other cases. (Tb 8-11). The court told Respondent that he was only placing him on probation because he was declaring Respondent an habitual felony offender, and that if he violated his probation, he could be sentenced up to 30 years in prison, and would not be eligible for normal gain time credits from the Department of Corrections. (Tb 11). Respondent subsequently violated his probation, as discussed below.

Trial Court Case Numbers 99-1763CF10A and 99-3201CF10A

On July 20, 1999, Respondent appeared in court to admit to a violation of probation for case number 94-3961CF10A, and to enter pleas in case numbers 99-1763CF10A and 99-3201CF10A. (Tc 2). After being placed under oath, Respondent testified that he was represented by counsel, that he discussed all of his rights on the plea sheet with his attorney, and that understood that he was giving up all of his rights as outlined on the plea sheet. (Tc 2-4). Respondent further told the court that he was not under the influence of any drugs or alcohol, that taking the plea was in his best interest, and that he was not being forced

to enter his plea. (Tc 4). The Court informed Respondent that the statutory maximum for Dealing in Stolen Property was 15 years prison, that the statutory maximum for burglary was 5 years prison, and that the statutory maximum for petit theft was 60 days in the county jail. (Tc 6).

The Court made the factual finding that the State filed its Notice to declare Respondent an habitual felony offender, and told Respondent that if he were sentenced as an habitual felony offender, he could be sentenced up to 10 years in prison, and that he would not be eligible for gain time credits from the Department of Corrections. (Ra 8-9; Rb 7-8; Tc 6). Respondent nodded in the affirmative to indicate that he was entering his plea, and he stated that he understood that he would in all likelihood not be eligible for gain time. (Tc 6).

Respondent acknowledged to the court that by entering his plea, he was effectively telling his lawyer not to conduct any further investigation on the case, and that he discussed with his lawyer the viability of any defenses to either the substantive charges or the violation of probation. (Tc 7). Respondent told the court that by entering his plea, he knew he was giving up the right to present any defenses to the charges, that nobody made any promises or guarantees as to the sentence aside from what was discussed in open court, and that nobody

threatened him to force him to plea. (Tc 7-9). Additionally, Respondent acknowledged that if he were not a U.S. citizen, his plea could subject him to deportation, that he wanted to give up his rights to go to trial, to be presumed innocent, to make the State prove his guilt beyond a reasonable doubt, to cross examine witnesses, to call witnesses on his own behalf, to testify on his own behalf at trial, to remain silent, and to file a motion to suppress. (Tc 9-10). Finally, Respondent indicated that he discussed all of these rights, as outlined on the rights waiver form, with his attorney. (Tc 11; Ra 16-17; Rb 12).

The court told Respondent that normally, the statutory maximum for Dealing in Stolen Property would be 15 years prison, but that if he were sentenced as an habitual, he could be sentenced to 30 years. (Tc 11). Also, while the statutory maximum for burglary was generally 5 years, if he were sentenced as an habitual, he could be sentenced to 10 years. (Tc 11). Moreover, the court told Respondent that as an habitual, he would not be entitled to any gain time credit other than for the county time he served, and that he would not eligible for any special programs offered by the Department of Corrections. (Tc 12). Respondent told that court that he discussed these facts with his attorney, and that he had no questions about the rights

he was giving up in exchange for his plea or the sentences the court could impose. (Tc 11, 12).

After the court found a factual basis for the plea, Respondent waived his right to a pre-sentence investigation. (Tc 14, 15, 17-18, 23). Respondent stipulated that he was an habitual felony offender, the State entered certified copies of his prior qualifying convictions into evidence, and verbally told the court of Respondent's prior convictions. (Tc 18- 20). Respondent further told the court that none of his prior offenses had been set aside or reversed on appeal, and that he had not been pardoned. (Tc 18-19).

The State informed the court that it had negotiated a plea with Respondent which required Respondent to cooperate with the State by providing testimony in its prosecution of two individuals named Robert Boltuch and Richard Fekete. (Tc 20-24). In exchange for this valuable testimony, the State offered probation. (Tc 24-28, 34, 35; Td 95). At Respondent's subsequent violation hearing in December, 1999, the State told the court that it only offered habitual offender probation to Respondent because he was valuable to the State, given the fact that he possessed knowledge that the State needed for its prosecution of Fekete and Boltuch. (Td 95).

Prior to imposing sentence, the court found that Respondent

knowingly waived all of his rights, that the State had served the Respondent and his attorney with notices indicating that the State was seeking to have Respondent declared an habitual felony offender, that Respondent's prior qualifying convictions were made part of the court file and the record in open court, that none of his prior offenses were set aside in any postconviction proceedings or on appeal, that Respondent had not been pardoned, that he qualified to be sentenced as an habitual felony offender, and that Respondent waived his right to a pre-sentence investigation. (Tc 24). The court then sentenced Respondent, pursuant to the State's plea offer, as follows:

Case number 99-1763 CF10A:

> (I) Burglary: an adjudication, five years probation as an habitual felony offender, with the condition that he testify for the State in the previously mentioned cases, as well as other conditions. (Tc 24, 35). The Defendant was advised that his failure to cooperate with the State could result in a violation of probation, after which he could serve up to 30 years in prison as an habitual offender. (Tc 26).
> (II) Petit Theft: Adjudication, time served. (Tc 26).

Case number 99-3201CF10A:

> (I): Dealing in Stolen Property: Adjudication, 5 years probation as an habitual felony offender, with the condition that he testify for the State in the previously mentioned cases, as well as other conditions. (Tc 26-27, 35).
> (II): Petit Theft: Adjudication, time served.

Case number: 94-3961CF10A:

> (I) Dealing in Stolen Property: revocation of probation, adjudication, five years of probation as an habitual felony offender, with all the same conditions of probation as for the other cases. (Tc 27, 35).

> Respondent was also advised that a failure to cooperate with the State would likely result in a violation of his probation. (Tc 28).

In both case number 99-3201CF10A, and 99-1763CF10A, all of the following paperwork prepared in conjunction with the plea and sentence stated that Respondent was being sentenced as an habitual felony offender: (a) the plea sheet/rights waiver form signed by Respondent; (b) the judgment of guilt/fingerprints signed by the judge; (c) the sentencing orders signed by the judge; (d) the clerk's disposition form; and (e) the orders of supervision signed by Respondent and the judge. (Ra 16-24; Rb 12-17).

After being sentenced, the court files were sealed for Respondent's protection. (Tc 28-32). The State informed the court that the Respondent had already been listed as a Category A witness in the case against Robert Boltuch. (Tc 31). Defense counsel also told the court that Respondent was a cell mate of Boltuch, and asked the court to make sure that the Defendant would not be sent back to his cell to face Boltuch again because was receiving probation, and because the State had already sent its discovery materials to Boltuch's attorney. (Tc 32). However, the parties were not sure if the discovery materials were forwarded to Boltuch himself yet. (Tc 33).

On or about September 17, 1999, Respondent's probation

officer filed a violation of probation warrant with the court. (Ra 25; Rb 18). On December 13 and 14, 1999, the court held a hearing to determine whether Respondent in fact violated his probation in his three cases. (Td 3-111). After taking testimony from several witnesses, including Respondent, the court found that Respondent substantially and willfully violated the terms of his probation by: (1) having an open container of alcohol in his possession on August 25, 1999; (2) having a stolen Ericsson cellular telephone in his possession on August 25, 1999; and, (3) failing to file reports with his probation officer for the months of July and August, 1999. (Td 92, 93; Ra 25-26; Rb 18-19).

After the defense presented its argument with respect to sentencing, the State reminded the court of Respondent's prior criminal history, and reiterated that the State only offered Respondent probation because at that time, he had valuable testimony for the State's cases against Fekete and Boltuch. (Td 94-95). The court noted that Respondent could be sentenced under the Criminal Punishment Code to a minimum of 94.8 months, but because he was qualified as an habitual felony offender, he could be sentenced to 30 years as an habitual offender. (Td 108-109). After incorporating the court's previous declarations that Respondent was an habitual felony offender, the court

sentenced Respondent as follows:

Case number 94-3961CF10A:
Dealing in Stolen Property: Adjudication, revocation of probation, and 30 years in prison as an habitual felony offender with credit for 418 days time served.

Case number 99-1763CF10A:
Burglary of a Structure: Adjudication, revocation of probation, and 10 years in prison as an habitual felony offender with credit for 274 days time served.

Case number 99-3201CF10A:
Dealing in Stolen Property: Adjudication, revocation of probation, and 30 years in prison as an habitual felony offender with credit for 274 days time served.

The prison time in all cases was to run concurrent to the other. (Td 110). Additionally, the sentencing scoresheet, sentencing paperwork committing Respondent to the custody of the Department of Corrections, and the clerk's disposition sheet indicated that Respondent was being sentenced as an habitual felony offender. (Ra 27-36; Rb 23-31).

In all three cases, defense counsel filed a notice of appeal. (Ra 37; Rb 32). Subsequently, the Public Defender was appointed for Respondent's appeal. (Ra 38-39; Rb 33-34). On January 11, 2000, the Public Defender consolidated all three of Respondent's cases for purposes of appeal. (Ra 42-44; Rb 37-39).

On March 3, 2000, while represented by counsel, and while his direct appeal was pending, Respondent filed a pro se "Motion

to Correct Illegal Sentence" pursuant to Rule 3.800. (SR 5-11).[1] The State's response indicated that the court should summarily deny Respondent's motion because he failed to allege that his sentence was in excess of the statutory maximum, because his direct appeal was pending, and because he was validly sentenced to prison as an habitual because he was on habitual felony offender probation. (SR 13-19). The court summarily denied Respondent's motion for the reasons contained in the State's response. (SR 20).[2]

On June 27, 2001, the Fourth District Court of Appeal reversed Respondent's sentence. See, Orr v. State, 793 So. 2d 48, 50 (Fla. 4th DCA 2001). The court found the following facts:

> Gregory Orr (Appellant) was charged with one count of dealing in stolen property in case number 94-3961. On July 31, 1995, he pled guilty to the charge. He was sentenced on August 4, 1995. At sentencing he agreed that he qualified as a habitual offender. The trial court adjudicated him guilty, declared him a habitual offender and sentenced him to five years probation. The probation was to begin when he completed a guideline prison

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[1] While the clerk did not number the pages for the Supplemental Record on Appeal, the State refers to them in numerical order.

[2] Respondent appealed the trial court's order, and the Fourth District affirmed. See, Orr v. State, 776 So. 2d 986 (Fla. 4th DCA 2001).

sentence on other charges.

> On July 20, 1999, Appellant appeared before the court on charges of violation of probation on case number 94-3961, burglary of a structure in case number 99-1763, and dealing in stolen property in case number 99-3201. Appellant pled guilty to all charges. The trial court accepted a negotiated plea, whereby Appellant pled guilty and agreed to testify in two pending cases on behalf of the State and Appellant would receive a five year sentence of probation. On case number 94-3961, the trial court revoked his probation and sentenced him to five years probation as a habitual offender. On case number 99-1763 and case number 99-3201, the trial court sentenced him to five years probation as a habitual offender.
>
> Appellant was then charged with violating probation on all three cases. Following a revocation hearing, on December 14, 1999, the trial court found Appellant had violated his probations. The trial court revoked his probations and sentenced him to thirty years in prison as a habitual felony offender in case number 94-3961, to ten years in prison as a habitual felony offender in case number 99-1763, and to 30 years in prison as a habitual felony offender in case number 99-320. The trial court denied Appellant's motion to correct illegal sentence.

Orr, 793 So. 2d at 49. In reversing Respondent's sentence of incarceration as an habitual felony offender, the court agreed with Respondent:

> This court addressed this issue in McFadden v. State, 773 So. 2d 1237 (Fla. 4th DCA 2000), wherein this court applied

the decision in King v. State, 681 So. 2d 1136 (Fla.1996). In McFadden, appellant was sentenced to two years probation and designated a habitual offender in exchange for his guilty plea to the charge of robbery. The sentence was within the range permitted by the sentencing guidelines and did not constitute a habitual offender sentence. The trial court then sentenced appellant as a habitual offender to thirty years in prison, following a revocation of probation. Id. at 1237.

This court stated, "in order to be sentenced as an habitual offender upon revocation of probation, a probationer must have received an habitual offender sentence at the original sentencing hearing." Id. at 1238. This court reasoned that because appellant was initially sentenced to only two years probation, his original sentence fell short of a habitual offender term. Id. Thus, this court concluded that appellant could not be sentenced as a habitual offender upon revocation of probation, notwithstanding his plea agreement to be sentenced as a habitual offender. Id. Accord Coleman v. State, 777 So. 2d 1132 (Fla. 4th DCA 2001); Yashus v. State, 745 So. 2d 504 (Fla. 2d DCA 1999).

This case is on all fours with McFadden. Although the trial court initially designated Appellant a habitual offender in case numbers 94-3961, 99-1763 and 99-3201, the trial court sentenced him to five years probation in each case. The sentences are within the range permitted by the sentencing guidelines and do not constitute habitual offender sentences. Accordingly, pursuant to this court's decision in McFadden, the trial court erred when it sentenced Appellant to habitual offender sentences upon the revocation of his probation. We reverse and remand the

> cases with instructions that Appellant be sentenced according to the sentencing guidelines.

Orr, 793 So. 2d at 50.

After mandate issued from the Fourth District, the State filed a Motion to Recall and Stay Mandate Pending Review, wherein the State notified the District Court that it had filed its Notice of Intent to Invoke Discretionary Jurisdiction with this Court. The District Court of Appeal granted the State's motion, and Justice Klein concurred specially with the following opinion:

> We have granted the state's motion to recall and stay the mandate because the state has advised us that the Florida Supreme Court has granted review in Terry v. State, 778 So. 2d 435 (Fla. 5th DCA 2001), a case in which the fifth district certified conflict with this court's decision in McFadden v. State, 773 So. 2d 1237 (Fla. 4th DCA 2000). In the present case, this court followed McFadden. I am writing separately to explain that, as a member of the panel in McFadden and this case, Orr v. State, 793 So. 2d at 50 (Fla. 4th DCA 2001), I now believe that the fifth district was correct in Terry and our opinions are incorrect.
>
> The mistake I think we made in McFadden was in concluding that it was controlled by our opinion in Welling v. State, 748 So. 2d 314 (Fla. 4th DCA 1999), rev. denied, 770 So. 2d 163 (Fla.2000). There is a distinction in that Welling involved a conviction and McFadden involved a plea.

> Welling clarified that in order to be sentenced as an habitual offender, upon revocation of probation, the probationer must have received an habitual offender sentence at the original sentencing hearing. By that we meant that the total number of years (incarceration or probation) imposed on the original sentence had to exceed the guidelines. Id. at 316.
>
> In Welling we were interpreting King v. State, 681 So. 2d 1136 (Fla.1996). In Terry, Judge Orfinger, writing for the fifth district, pointed out that our supreme court in King distinguished the sentence in King, which was based on a conviction, and a sentence where the defendant enters a plea agreeing to habitualization. Terry, 778 So. 2d at 436, 437. Prior to Terry, Judge Fulmer, in her dissenting opinion in Yashus v. State, 745 So. 2d 504 (Fla. 2d DCA 1999), had pointed out that King made a distinction between negotiated pleas and sentences imposed following convictions. Yashus, 745 So. 2d at 507 (Fulmer, J., dissenting). McFadden and this case, which involve pleas, are thus distinguishable from Welling, according to King.

Orr, 793 So. 2d at 50-51.

On or about August 1, 2001, the State filed its "Petitioner's Amended Brief on Jurisdiction." On or about January 30, 2002, the State filed a Notice of Supplemental Authority, listing this Court's opinion in Terry v. State, 27 Fla. L. Weekly S89 (Fla. January 24, 2002). On February 5, 2002, this Court issued its written order accepting jurisdiction and dispensing with oral argument. The instant

brief follows.

SUMMARY OF THE ARGUMENT

The trial court properly sentenced Respondent to imprisonment as an habitual felony offender upon revoking Respondent's probation. The record shows that Respondent entered a valid plea agreement that provided for a guidelines term of probation as an habitual offender, and Respondent agreed that if he violated the terms of his probation, he could be sentenced to prison time as an habitual felony offender. The district court's opinion, which relied on its own previous decision of McFadden v. State, 773 So. 2d 1237 (Fla. 2000), must be reversed because this Court recently, in Terry v. State, 27 Fla. L. Weekly S89 (Fla. January 24, 2002), confronted the exact same issue, specifically disapproved of McFadden, and held that a trial court may sentence a defendant to probation as an habitual offender as part of a valid plea agreement, and upon revocation of probation, sentence the defendant to imprisonment as an habitual felony offender.

ARGUMENT

THE TRIAL COURT PROPERLY SENTENCED RESPONDENT TO IMPRISONMENT AS AN HABITUAL FELONY OFFENDER UPON REVOKING RESPONDENT'S PROBATION, WHERE RESPONDENT VOLUNTARILY ENTERED A PLEA TO PROBATION AS AN HABITUAL FELONY OFFENDER, AND CLEARLY ACKNOWLEDGED THAT UPON A SUBSEQUENT VIOLATION OF PROBATION, THE COURT COULD SENTENCE HIM TO IMPRISONMENT AS AN HABITUAL FELONY OFFENDER; THE DISTRICT COURT'S OPINION MUST BE REVERSED IN LIGHT OF THIS COURT'S OPINION IN TERRY V. STATE, 27 Fla. L. Weekly S89 (Fla. January 24, 2002).

Because the issue presented by the instant case concerns whether the Fourth District properly applied this Court's opinion of King v. State, 681 So. 2d 1136 (Fla. 1996), a pure question of law, this Court should review the decision below pursuant to the de novo standard of review. See, Bose Corporation v. Consumers Union of U. S. Inc., 466 U.S. 485 (1984); Pullman-Standard v. Swint, 456 U.S. 273 (1982); Holland v. Gross, 89 So. 2d 255 (Fla. 1956); Walter v. Walter, 464 So. 2d 538 (Fla. 1985). See also, Philip J. Padovano, Standards of Review, § 9.4 (West 2001-2002).

On appeal to the district court, Respondent argued, and the district court agreed, that Respondent was improperly sentenced to incarceration as an habitual felony offender upon the revocation of his probation because although he was declared an habitual offender when he entered his pleas, he

was not given an habitual offender sentence. See, Orr v. State, 793 So. 2d 48, 49-50 (Fla. 4th DCA 2001). In support of its finding that Respondent was not actually sentenced as an habitual felony offender at original sentencing, the district court relied on its previous decision of McFadden v. State, 773 So. 2d 1237 (Fla. 4th DCA 2000), wherein the district court reasoned,

> because appellant [McFadden] was initially sentenced to only two years probation, his original sentence fell short of an habitual offender term. . . Thus, this court concluded that appellant [McFadden] could not be sentenced as an habitual offender upon revocation of probation, notwithstanding his plea agreement to be sentenced as an habitual offender.

Orr, 793 So. 2d at 50. The district court further explained that although the trial court declared Respondent to be an habitual offender in each of Respondent's cases, the court only sentenced Respondent to five years' probation in each case, a sentence within the permitted guidelines range. Therefore, the district court concluded that Respondent was not sentenced as an habitual offender, and the trial court erroneously sentenced Respondent to imprisonment as an habitual offender upon revocation of Respondent's probation. See, Id.

In Terry v. State, 27 Fla. L. Weekly S89 (Fla. January 24, 2002), this Court considered a certified conflict between

the Fourth District's McFadden, and the Fifth District's Terry v. State, 778 So. 2d 435 (Fla. 5th DCA 2001). In Terry, the defendant pled guilty to aggravated battery and two allegations of violating his probation pursuant to a negotiated plea with the State. See, Terry, 27 Fla. L. Weekly S89. Pursuant to the plea agreement, the defendant agreed to a "[c]ap of midrange of the guidelines DOC on all three cases concurrent. Court may sentence defendant as a habitual offender on the aggravated battery, term of probation to follow in the Court's discretion. No probation to follow on the VOP cases." Id. The court accepted the defendant's plea, and, at a deferred sentencing hearing, sentenced the defendant to 54 months' imprisonment, followed by 60 months' probation. The trial court declared the defendant an habitual offender both orally and in writing. See, Id. After completing the imprisonment portion of his sentence, the defendant violated his probation. The defendant admitted the violation, and the court sentenced the defendant to imprisonment as an habitual felony offender. See, Id.

On appeal, this Court stated that the issue on which conflict was certified was

> . . . whether it is proper to sentence a defendant as an habitual offender following violation of probation when the defendant's original sentence was within the sentencing guidelines range, but where

> the defendant's plea agreement contemplated habitual offender treatment and the defendant was declared to be an habitual offender at the time of the original sentencing.

Terry, 27 Fla. L. Weekly S89. The defendant argued to the Fifth District, as Respondent here argued to the Fourth, that because he was sentenced within the guidelines range, "it did not have the legal effect of an enhanced sentence," and that the trial court therefore erroneously sentenced him to imprisonment as an habitual offender upon revoking his probation. See, Id. In response, the State argued that the defendant's sentence was proper pursuant to this Court's opinions of King v. State, 681 So. 2d 1136 (Fla. 4th DCA 1996); Walker v. State, 682 So. 2d 555 (Fla.1996); and, Dunham v. State, 686 So. 2d 1356 (Fla.1997).

Agreeing with the State, this Court first noted that King concluded that **"a hybrid split sentence of incarceration under the guidelines followed by probation as an habitual offender, although not authorized by statute or rule, is not an illegal sentence unless the total sentence imposed exceeds the statutory maximum for the particular offense at issue."** Id.(citing King v. State, 682 So. 2d at 1138)(*emphasis added*). Rather, this Court noted in Terry that pursuant to King, such a hybrid split sentence is indeed **" . . . permissible as long**

as the defendant has a valid plea agreement to this effect and as long as the negotiated sentence does not exceed the statutory maximum for the particular offense involved." Id. (*emphasis added*). Furthermore, after a brief discussion of Walker and Dunham, wherein this Court followed the above-stated King principle, this Court stated,

> The law from King, Walker, and Dunham is clear; if a defendant agrees to a hybrid split sentence as part of an otherwise valid plea agreement and the negotiated sentence does not exceed the statutory maximum for the particular offense involved, the court may impose incarceration under the guidelines followed by probation as an habitual offender.

Id.

Applying the foregoing, this Court found that Terry's sentence to imprisonment as an habitual offender upon revoking his probation was proper because the negotiated plea gave the trial court the discretion to sentence Terry as an habitual offender at VOP, and the court did so. The plea agreement also provided that the prison term would be capped at mid-range , and indeed it was. Thus, although the defendant was sentenced to a guidelines prison term, he nonetheless agreed to let the trial court decide whether to subsequently impose an habitual offender sentence. This Court also noted that despite the fact that the defendant's split sentence differed

factually from the split sentence involved in King, King nevertheless approved of the defendant's type of split sentence because the sentence was imposed pursuant to a plea agreement, and specifically allowed the trial court to impose habitual offender status at the time of original sentencing, which the trial court did. See, Id.

This Court then addressed the Fourth District's opinion in McFadden, 773 So. 2d 1237, and specifically disapproved of the Fourth District's holding that McFadden was improperly sentenced to imprisonment as an habitual offender after his probation was revoked. See, Id. In support of its disapproval, this Court pointed out that in McFadden, at original sentencing, the defendant was designated an habitual offender pursuant to a valid plea agreement in exchange for his guilty plea. Thus, this Court reversed the Fourth's decision in McFadden because King specifically approved of such hybrid split sentences. See, Id.

This Court's opinions in Terry and King require this Court to reverse the decision below. Just as in McFadden and Terry, here, Respondent entered a plea wherein he agreed that he would be given a guidelines sentence of probation as an habitual felony offender, and that if he violated the terms of his probation, he could be sentenced to prison as an habitual

offender. What is more, here, Respondent so agreed, not merely once, but twice. First, in 1995, when Respondent entered an open plea to the court, he agreed that his criminal history qualified him as an habitual offender, and he also agreed to be sentenced to only five years' habitual offender probation, well within his guidelines permitted range. Respondent also explicitly acknowledged on the record his clear understanding that should he violate his probation, he could be sentenced to imprisonment as an habitual offender. Next, in 1999, Respondent appeared in court after violating his probation, and again admitted that he qualified as an habitual offender, and negotiated a plea with the State that provided that he would be sentenced to a guidelines term of probation as an habitual offender, with the understanding that if he violated the terms of his probation, he could be sentenced to imprisonment as an habitual offender. In sum, here, Respondent was given, pursuant to a valid plea agreement, a hybrid split sentence of probation under the guidelines, as an habitual offender, with the understanding that if he violated his probation, he could be imprisoned as an habitual offender. The record is also clear that Respondent's negotiated sentence did **not** exceed the statutory maximum for the offenses charged. King and Terry explicitly

permit such split hybrid sentences. Therefore, this Court must reverse the decision of the district court below.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests this Court to REVERSE the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Initial Brief of Petitioner" has been furnished by United States Mail to: Ellen Griffin, Esq., Assistant Public

Defender, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 on this _____ day of March, 2002.

_____
CELIA A. TERENZIO
Assistant Attorney General
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_____
DONNA L. ENG
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

In accordance with the Administrative Order of this Court dated July 13, 1998, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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CELIA A. TERENZIO
Assistant Attorney General
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