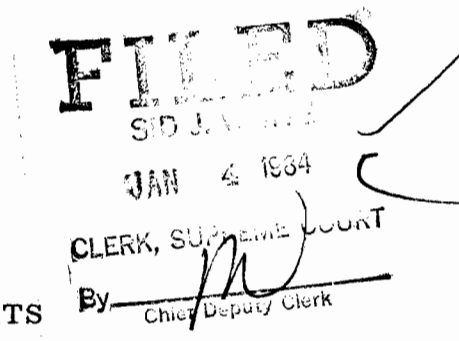
SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
Petitioner,)
vs.) CASE NO.: 64,547
IRENE YVONNE PHILLIPS,)
Respondent.)



PETITIONER'S BRIEF ON THE MERITS

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STATE OF FLORIDA,	)	
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PRELIMINARY STATEMENT

The parties in this brief will be referred to as follows: The State of Florida, the prosecution in the trial court and the Appellee in the Court of Appeal, First District, is now referred to as the Petitioner; IRENE YVONNE PHILLIPS, defendant in the trial court and Appellant in the appellate court, is now Respondent and will be referred to by name or as Respondent.

The record on appeal consists of a single record volume which will be referred to by the symbol "R" followed by the appropriate page number(s). The single volume of transcript contains the July 7, 1982 trial proceedings as well as the September 16, 1982 sentencing hearing before the Honorable Ralph D. Nimmons, Jr., then Circuit Court judge. This volume will be referred to by the symbol "T" followed by the appropriate page number(s).

Petitioner directs attention to State v. Donald, No. 64,652 currently pending review by this Court in which a similiar and related certified question is presented. (See, footnote 13, infra.).

The opinion of the Court of Appeal, First District, is appendixed hereto; however, the case is reported as follows:

Phillips v. State, No. AO-323
(Fla. 1st DCA September 14, 1983) [8 FLW 2270]
(certified on rehearing October 28, 1983).

STATEMENT OF THE CASE AND FACTS

Irene Phillips was charged by information dated February 18, 1982 with felony petit theft arising from the January 8, 1982 theft of less than one hundred dollars from the Winn Dixie Stores, Inc., in Jacksonville, Florida. (R 1). The information was captioned "FELONY PETIT THEFT" and referred in the text to a violation of Section 812.014(2)(c), Florida Statutes. Id.

Phillips was arrested at her home on March 4, 1982, pursuant to an arrest warrant (presumably based on the information). (R 2). She was released within four hours after posting a surety bond obtained through a bond agency. Id.

On March 11, 1983, Phillips was arraigned and the Public Defender appointed to provide legal representation. (R 3). The State served "Notice of Intent to Seek Felony Petit Theft Sentence" at this hearing and relied upon two prior petit theft convictions both entered on November 1, 1976. (R 4). Formal discovery motions were filed on March 15, 1982, to which the State promptly responded. (R 5-9). Discovery was on-going prior to the July 7, 1982 trial. (R 10-22).

Following jury trial,[1] Respondent was found guilty of theft. (T 151). Inasmuch as Ms. Phillips was nearing the end of her pregnancy, sentencing was extended until September 16, 1982. (T 152-153, 161).

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[1] The Statement of Facts contained in the initial brief submitted by Respondent in the District Court of Appeal contains a substantially accurate recitation of the testimony at trial. Inasmuch as this factual evidence is not germane to the legal issue certified, the State will not restate that testimony, but will defer to the record.

At the sentencing hearing, Respondent's motion for new trial was heard and denied. (T 161-163). The parties then moved to the sentencing phase of the bifurcated proceeding.[2] Defense counsel stipulated to the two prior petit larceny convictions. (T 164-165). Several clarifications were made to the pre-sentence investigation report. (T 165-166). An anticipated defense witness failed to appear. (T 166-171). Phillips continued to maintain her innocence. (T 170-172). Upon query by the court, Phillips indicated she was on federal parole for forgery and possession of United States Treasury checks. She had previously served 3½ years on this offense. (T 171). The trial court sentenced Respondent to four years imprisonment and in doing so emphasized her lengthy and persistent record for theft related offenses. (T 172-173).

At no time in the circuit court was the information or jurisdiction challenged. As stated, counsel stipulated to the prior petit larceny convictions. (T 164-165).

On appeal, Respondent filed an initial brief raising two issues,[3] neither of which were addressed by the Court of Appeal, First District. Phillips v. State at 2271. On March 28, 1983, the State filed an answer brief in response to the two legal arguments

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2 State v. Harris, 356 So.2d 315, 317 (Fla. 1978).

3 Phillips claimed an inadequate Richardson hearing had been conducted after a prosecution witness testified to an undisclosed inculpatory statement made by Respondent. Richardson v. State, 246 So.2d 771 (Fla. 1971). The second appellate point concerned error in the denial of a mistrial motion predicated upon improper prosecutorial closing argument.

presented. However on March 7, 1983, the State[4] served its intitial brief in the case of State v. Clark,[5] et. al., No. AP-316 (Fla. 1st DCA November 1, 1983) [8 FLW 2670] (suggestion for certification denied December 1, 1983). These cases challenged the jurisdiction of the circuit court to hear the felony petit theft case when the information did not contain specific information as to the prior convictions relied upon by the State. Yet, each of these seven defendants had challenged the charging document in the circuit court pursuant to a motion to dismiss. Rule 3.190, F.R.Crim.P.

On March 31, 1983, Respondents' appellate counsel sought leave to file a supplemental brief challenging the jurisdiction of the circuit court. The State opposed the filing of such a brief. On April 26, 1983, the Court of Appeal denied the request to file a supplemental brief.

On April 29, 1983, Phillips filed a "Response to Order Denying Motion to File Supplemental Initial Brief". The State moved to strike. On May 23, 1983, the District Court vacated its previous order of denial and permitted the filing of a supplemental brief. In this same order, the motion to strike was denied. On June 31, 1983, the State filed a supplemental brief.

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4 Both parties are respected by the same attorneys of record as the corresponding parties in the other felony petit theft cases arising from the First District Court of Appeal.

5 State v. Clark was consolidated in the Court of Appeal with four other state appeals and with Pickelsimer v. State, No. AR-155 and Daniels v. State, No. AS-368. A consolidated opinion was issued with Pickelsimer as the named Appellant.

The Court of Appeal issued its opinion reversing on September 14, 1983. The dissenting opinion of Judge Wentworth supports the State's position. Phillips v. State at 2271.

The State moved for rehearing and rehearing en banc. Filed contemporaneously was a suggestion to certify to this Court. On October 28, 1983, rehearing was denied, but the question presented herein was certified as one of great public importance.

Notice to invoke discretionary jurisdiction pursuant to Rules 9.030(a)(2)(v) and 9.120, F.R.App.P. was filed on November 17, 1983. On November 9, 1983, the mandate was stayed by Order of this Court.

QUESTION CERTIFIED

The Court of Appeal, First District, certified the following as a question of great public importance pursuant to Rules 9.030(a)(2)(v) and 9.120 F.R.App.P.

> Whether absent objection or motion to dismiss in the circuit court, the defect found in the charging instrument should be noticed on appeal as jurisdictional.

(See Exhibit B).

STATUTE INVOLVED

The statute involved in the instant appeal is Florida's Felony Petit Theft Statute which states:

> Theft of any property not specified in paragraph (a) or paragraph (b) is petit theft and a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. Upon a second conviction for petit theft, the offender shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Upon a third or subsequent conviction for petit theft, the offender shall be guilty of a felony of the third degree, punishable as provided in ss. 775.082, 775.083, and 775.084.

Section 812.014(2)(c), Florida Statutes.

POINT ON APPEAL

THE INFORMATION PROPERLY CHARGED THE OFFENSE OF FELONY PETIT THEFT AND THE CIRCUIT COURT PROPERLY ACQUIRED JURISDICTION OVER THE CAUSE

ARGUMENT

In this cause the charging document cited the Felony Petit Theft statute[6] and the information was captioned "Felony Petit Theft". (R 1, 17). However, the text of the charging paragraph alleged value of the property at less than $100.00 and did not specify the prior convictions. Id. Phillips argued that these omissions meant that only a misdemeanor was charged; thus, the circuit court never acquired jurisdiction to hear the case. She relied upon State v. Harris, 356 So.2d 315 (Fla. 1978) and Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981) and argued that the verdict, judgment and ensuing sentence were void. This argument was advanced for the first time in the appellate court. Phillips maintained the defect was jurisdictional and could be noted even though no objection or motion to dismiss the information was made in the circuit court. Judge Robert Smith, writing the majority opinion for the Court of Appeal, First District, regretfully agreed. Phillips v. State at 2270.

The Court of Appeal reasoned that the circuit court had felony jurisdiction over a "petit theft" "only if a conviction upon the charge laid in the information would be the offender's 'third or subsequent conviction for petit theft'". Phillips v. State at 2270. The majority opinion emphasized that notice of the nature of the charges had been

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6 Section 812.014(2)(c), Florida Statutes.

provided to the accused, albeit imperfectly, by the caption of the information and filing of the Notice of Intent[7] to Seek a Felony Petit Theft Penalty based upon two prior petit theft convictions.[8] The pertinent portion of the district court's opinion is as follows:

> . . . the charging part of the information simply alleged a petit theft violation of section 812.014(2)(c) in that Phillips on a certain date, in Duval County,
>
> > did knowingly obtain or use, or endeavor to obtain or use merchandise, valued at less than One-Hundred Dollars ($100.00), the property of Winn Dixie Stores, Incorporated, a corportion [sic], with intent to appropriate the property to her use or to the use of any person not entitled thereto, contrary to the provisions of Section 812.014(2)(c), Florida Statutes.
>
> Omitting reference in the information to Phillips' two prior convictions for petit theft, the state attorney obviously interpreted State v. Harris, 356 So.2d 315 (Fla. 1978), as authorizing or requiring that omission from the charging language in order to avoid the prejudice of revealing the allegation or fact of prior convictions to the trial jury. But Harris appears not to license that omission from the charging document, but only to require a separate post-verdict determination of prior convictions by the circuit judge.
>
> To omit the historical fact of prior convictions from the charging language of an information such as this is to charge only a petit theft, and is said to be a jurisdictional defect, not merely an imperfection in a felony charge that must be challenged by proper motion or else is waived.

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[7] The State emphasizes that in addition to these two factors, the text of the information cited a violation of Section 812.014(2)(c), Florida Statutes, which pertains to Felony Petit Theft.

[8] Notice of the prior offenses was provided on the day of arraignment. (R 4). Phillips subsequently stipulated to the validity of those convictions. (T 164-165). They were never contested. See, Pugh v. State, 423 So.2d 398, 399 (Fla. 1st DCA 1982).

> Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981) [information captioned "Grand Theft" under §812.014(2)(c)]; Brehm v. State, ____ So.2d ____ (Fla. 3d DCA 1983) [8 FLW 805] [information charging § 877.08 violation without alleging prior conviction for same offense]; see also State v. Black, 385 So.2d 1372 (Fla. 1980) [venue]; Pope v. State, 268 So.2d 173 (Fla. 2d DCA 1972), cert. denied, 283 So.2d 99 (Fla. 1973); Page v. State, 376 So.2d 901 (Fla. 2d DCA 1979); Waters v. State, 354 So.2d 1277 (Fla. 2d DCA 1978); Dicaprio v. State, 352 So.2d 78 (Fla. 4th DCA 1977), cert. denied, 353 So.2d 679 (Fla. 1977); Boley v. State, 273 So.2d 109 (Fla. 4th DCA 1973), cert. denied, 287 So.2d 668 (Fla. 1973); but cf. Peek v. Wainwright, 393 So.2d 1175 (Fla. 3d DCA 1981).

Phillips at 2271.

State v. Harris, addressed Section 812.014(2)(c), Florida Statutes, and declared it a "substantive offense". Id. at 316. This Court stated:

> Section 812.021(3) provides in pertinent part, that upon the third or subsequent conviction for petit larceny, the offender shall be guilty of a felony in the third degree (rather than a misdemeanor in the second degree). This statute creates a substantive offense and is thus distinguishable from Section 775.084, the habitual criminal offender statute.

Id. at 316. This Court further concluded that the Florida Legislature had the right to create the substantive offense of "felony petit larceny", but the judiciary possessed the right to "dictate the procedure to be employed in the courts to implement it." Id. at 317 citing Article V, Section 2, Florida Constitution.

State v. Harris, specifically disavows the procedure advanced on appeal by Respondent and mandated by the district court in its opinion, whereby specific information concerning the prior convictions is contained within the charging document.

> We therefore hold that Section 812.021(3) creates a substantive offense to be tried in the circuit court when felony petit theft is charged, without bringing to the attention of the jury the fact of prior convictions as an element of the new charge. Upon conviction of the third petit larceny, the Court shall, in a separate proceeding,
>
> determine the historical fact of prior convictions, and questions regarding identity in accord with general principles of law, and by following the procedure now employed under Section 775.084.

State v. Harris at 317 (emphasis added).

The procedure set forth by this Court is that the fact of prior convictions will not be brought to the jury's attention during trial, but developed in a subsequent, separate hearing. A separate proceeding is necessary so as not to destroy the presumption of innocence in favor of the defendant. Pugh v. State, 423 So.2d 398 (Fla. 1st DCA 1982); State v. Harris at 317. The viability of this logic is readily apparent from the instant case. Here Phillips obviously knew the nature of the charges against her and was not hampered in any manner in her preparation for trial. The district court acknowledged the instant charging document satisfies the requirement of "notice" of the charges against the accused. Phillips at 2270. However, the majority concluded the information was inadequate to confer jurisdiction in the circuit court. We disagree as did Judge Wentworth. (See dissenting opinion in Phillips at 2271).

Proper jurisdictional allegations are as essential in an accusatory document as are those allegations relating to material elements of a crime. State v. Black, 385 So.2d 1372, 1375 (Fla. 1980). Florida caselaw holds that questions concerning subject matter jurisdiction involve a claim of fundamental error and can be raised at any

time - even for the first time on appeal. Christopher v. State at 407; Waters v. State, 354 So.2d 1277 (Fla. 2d DCA 1978); Dicaprio v. State, 352 So.2d 78, 79 (Fla. 4th DCA 1977) cert. denied 353 So.2d 679 (Fla. 1977); Solomon v. State, 341 So.2d 537 (Fla. 2d DCA 1977); Pope v. State, 268 So.2d 173 (Fla. 2d DCA 1972) rehearing denied. It is the State's position that the information in this case, which tracked the appropriate language, was captioned and cited the "Felony Petit Theft" and cited the controlling statute, Section 812.014(2)(c), Florida Statutes, was sufficient to confer jurisdiction in the circuit court. By citing the Felony Petit Theft Statute and using that caption on the information, the State has incorporated by reference[9] the language of the cited section defining felony petit theft. (See dissenting opinion, J. Wentworth, Phillips at 2271).

In Jones v. State, 415 So.2d 852 (Fla. 5th DCA 1982), the Fifth District held that if the information recites the appropriate statute alleged to be violated, and if the statute clearly includes the omitted words, it cannot be said that the imperfection of the information prejudiced the defendant in his defense. Id. at 853, see also authority cited therein. Hence Respondent Phillips and the circuit court were on notice that the theft described in the information was the "third or subsequent conviction for petit theft". Section 812.014(2)(c), Florida Statutes. The information need not include the specific prior convictions. State v. Harris. Respondent obviously

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9 Where an information tracks the language of the statute and refers to a statute, it is generally held sufficient. State v. DiGuillio, 413 So.2d 478, 479 (Fla. 2d DCA 1982); Martinez v. State, 368 So.2d 338 (Fla. 1979); State v. Pajon, 374 So.2d 1070 (Fla. 3d DCA 1979).

understood the nature of the charge against her and recognized the jurisdictional sufficiency of the information as she did not raise a pretrial challenge to the charging document pursuant to Rule 3.190(c)(4), Florida Statutes. Further, the trial court did not note, sua sponte, a jurisdictional defect and the dissenting opinion of Judge Wentworth fails to detect a "jurisdictional problem". The State also emphasizes that Phillips stipulated to her prior convictions which in itself satisfies the jurisdictional requirement of "third or subsequent conviction for petit theft." Pugh v. State at 399.

Reliance upon Christopher v. State, is misplaced. In Christopher, the defendant was charged by an information labeled "Grand Theft" but which charged the theft of merchandise of a value less than one hundred dollars. Subsequently, the State filed notice to prosecute as a subsequent offender pursuant to Section 812.014(2)(c), Florida Statute (1979). The defendant negotiated a plea to attempted grand theft and challenged the circuit court's jurisdiction on appeal. The instant facts are not analogous.

In Christopher, the title of the information read "Grand Theft", not Felony Petit Theft. The text of the charging document alleged a theft of less than $100.00. Thus, the caption (grand theft) was negated by the specific allegation of the amount involved. There was nothing else within the charging document which served to reference the enhancement provisions of the statute defining a felony based on other convictions. Phillips at 2271 (J. Wentworth, dissenting). Furthermore on appeal in Christopher, the State argued the use of the word less was a typographical error; the State intended to charge the defendant with theft or more than $100.00. The Court of Appeal,

Fifth District, held the mistake to be fundamental. Accord, Phillips at 2271 (J. Wentworth). The information charged only a misdemeanor. However, the Fifth District opined that "if the proper procedure is followed, a felony petit charge is sufficient to vest jurisdiction in the circuit court". Id. at 407.

Judge Upchurch, writing for the District Court in Christopher advised of the proper procedure for the State to pursue:

> Had the State moved to amend the information as it should have done, the substantive offense of felony petit theft would have vested jurisdiction in the circuit court. Not only did the State fail to amend the information, but the proceedings were lacking the safeguards that Harris mandates.

Id. at 407. The State interprets this instruction to require the amendment of the information to allege "Felony Petit Theft" rather than "Grand Theft". No mention is made of adding factual information which would identify the prior convictions. Such action would still be inadequate to divest jurisdiction unless the "Grand Theft" caption was also altered.

The First District's reliance on Brehm v. State, 427 So.2d 825 (Fla. 3d DCA 1983) is also unsound. There the charging document failed to allege the specific statutory provision under which Defendant Brehm was charged. It appeared Brehm was charged and convicted of ten counts of violating Section 877.08(2) and (3), Florida Statutes (1981), Tampering with a Parking Meter, which is ordinarily a misdemeanor offense. Brehm at 826. However, subsection (4) provides for enhancement to a third degree felony upon prior conviction for the same offense. It was under this subsection that the State intended to charge Brehm in circuit court. However, the information filed did not specify the subsection and referred only to

the general statutory provision. Nothing in the charging instrument could be construed to incorporate by reference the provisions of the statute necessary to confer jurisdiction in the circuit court. See Phillips at 2271, f.n.1. These are not the facts of this cause and application of the Christopher - Brehm holding is inappropriate. The holding in Brehm would apply in Respondent's case only if the State had charged violation of Section 812.014. However, the instant information specified a violation of subsection (2)(c) and carried a "Felony Petit Theft" caption.

In holding the alleged defect to be fundamental thereby permitting the issue to be raised for the first time on appeal, the District Court overlooked the holding of this Court in State v. King, 426 So.2d 12 (Fla. 1982) as well as its own opinions in State v. Cadieu, 353 So.2d 150 (Fla. 1st DCA 1977) and Pickelsimer, et al v. State, No. AR-155, et seq. (Fla. 1st DCA November 9, 1983) [8 FLW 2670] (suggestion for certification denied December 1, 1983).[10]

In State v. King, a juvenile prosecuted as an adult pursuant to Section 39.031, et seq. Florida Statutes, but not charged with a life or death offense was charged by indictment rather than by information. The juvenile was deemed to have waived the substantive right to be treated as a juvenile, which is jurisdictional by means of the charging device, if the issue was not raised in a timely manner before the trial court. Id. at 14. In setting forth its ruling in King, this Court reasoned that the accused should not be permitted

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[10] Admittedly Pickelsimer was entered subsequent to the opinion and rehearing order in this case. However the two opinions are contradictory. See infra.

to subject himself to a court's jurisdiction and defend his cause in the hope of an acquittal, and then if convicted, challenge the court's jurisdiction on the basis of a defect that could have been remedied if brought to the trial court's attention in a timely manner. Id. at 15. Thus a "jurisdictional" defect may be waived. The circumstances of Respondent Phillips are nearly identical.

In State v. Cadieu, the Court of Appeal, First District, noting the same concerns voiced in State v. King, held that a more liberal standard of review must be utilized when a timely challenge is not made. Id. at 151; see also, Fountain v. State, 92 Fla. 262, 109 So. 463 (1926). Judge Smith, writing the majority opinion, stated:

> The information is cast in the statutory language. Though it is imperfect because it does not descend from statutory generalities to essential particulars, the information is not so defective that it is vulnerable to initial post-trial attack. When confronted with an information that is defective only in failing to charge particulars within a generic statutory description of proscribed conduct, the accused must either challenge the information by motion, thus providing opportunity for a new and curative information or be satisfied with resolving his doubts by discovery and a motion for statement of particulars. The law does not favor a strategy of withholding attack on the information until the defendant is in jeopardy, then moving to bar the prosecution entirely. Sinclair v. State, 46 So.2d 453 (Fla. 1950).

Id.

As the foregoing quote indicates, State v. Cadieu comports with Judge Wentworth's dissenting opinion in this cause. Accord, Pickelminer et. al. The instant information is cast in "statutory language"; it "does not descend from statutory generalities to

essential particularities"; it "is defective only in failing to charge particulars within a generic statutory description of proscribed conduct. . . ." Id. at 151. The holding in State v. Cadieu, is directly applicable here. Inasmuch as Respondent Phillips did not challenge the information pretrial, she has waived the right to do so.

The same concept was addressed by the Third District Court of Appeal in Peek v. Wainwright, 393 So.2d 1176 (Fla. 3d DCA 1981). There, the defendant challenged his conviction by petition for habeas corpus filed in the state courts. His specific allegation was that he had been sentenced and was serving time for a crime for which he was never charged or convicted. Peek had never been charged in circuit court with felony petit theft,[11] but was ultimately sentenced for that offense. Admittedly jurisdiction in the circuit court was acquired in his case due to other felony charges. The District court in Phillips specifically notes that jurisdiction cannot be similarly conferred here. 8 FLW at 2270. See, Section 26.012(2)(d), Florida Statutes (1981). What is of importance to this case however is the attempt by the Third District Court of Appeal to extend due deference to the intent of the Florida Legislature when enacting the Felony Petit Theft Statute and of this Court's interpretation of that statute in State v. Harris. The opinion of the First District in Phillips overlooks the express intent of the Florida Legislature to

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[11] Interestingly the charging document in Peek failed to allege any of the defendant's prior convictions. Information on the prior offenses was provided by a pretrial notification of enhancement pursuant to Section 775.084, Florida Statutes. Peek was convicted of petit theft rather than robbery. Subsequently the state served notice to enhance pursuant to Section 812.014(2)(c), Florida Statutes and he was so sentenced.

punish three time offenders of petit theft. It is also inconsistent with State v. Harris. The considerations set forth in Peek v. Wainwright should apply here.

The logic of the First District was undermined by the susequent opinion of the samd court in Pickelsimer et al v. State. Identical jurisdictional arguments were submitted by each of the seven defendants represented in that consolidated opinion. Jurisdiction was raised in the circuit court pursuant to a pretrial motion to dismiss the information and served as the basis for appeal. Yet the First District did not address the jurisdictional aspect. The court refused to "speculate" as to the outcome if the defendants had not filed motions to dismiss. With due respect to the First District, the issue presented is either jurisdictional or it is not. If it is, the circuit court is without authority to hear or to rule upon the motion to dismiss the information. The entire proceeding is a nullity. The court cannot choose to reach the "asserted jurisdictional nature of the omissions here in question". Id. Jurisdiction the key issue. It is not "speculation" unless the issue is viewed from the dissenting opinion in Phillips.[12] Of course if the rationale of State v. King and State v. Cadieu is applied so that a more liberal standard of review is utilized for jurisdictional issues, then the opinion in Pickelsimer is proper. However in that event, the holding of King and Cadieu would apply equally well in the instant cause. Under such application it is apparent that Respondent Phillips waived whatever nonfundamental

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[12] Judge Wentworth wrote the majority opinion in Pickelsimer, the dissenting opinion in Phillips.

jurisdictional defect that may have existed. The Pickelsimer and Phillips opinions cannot be reconciled by any other reasoning. Accord, State v. Gray, 435 So.2d 816, 818 (Fla. 1983).

In conclusion, the State submits the instant information was sufficient to incorporate by reference the language of the cited statutory provision defining felony petit theft so as to inform the accused that she was charged with a third or subsequent conviction for petit theft and to confer jurisdiction in the circuit court. Jones v. State; State v. Gray, at 818; Phillips v. State at 2271 (J. Wentworth, dissenting). This is particularly evident in the instant cause where the parties and the trial court so understood the information without objection to the lack of specifics and ultimate stipulation to, the prior convictions. The State submits the circuit court is not deprived of subject matter jurisdiction when the caption of the charging document charges felony petit theft and the body of the information refers to the proper statutory provision but the text alleges the value of the property to be less than $100 and does not specify the substantive elements of two prior petit theft convictions pursuant to the dictates of State v. Harris. We urge this Court to

answer the certified question[13] in the negative thereby reversing the decision of the Court of Appeal, First District.

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[13] The instant certified question is substantially more narrow than the related question certified to this court in Donald v. State, No. AT-362 (Fla. 1st DCA November 21, 1983) [8 FLW 2757]):

> In a circuit court deprived of subject-matter jurisdiction when the caption of the charging document charges the defendant[s] with felony petit theft and the body thereof cites the proper Florida Statute, § 812.014(2)(c), but the text of the charge alleges the value of the property to be less than $100 and does not specify the substantive elements of two prior theft convictions?

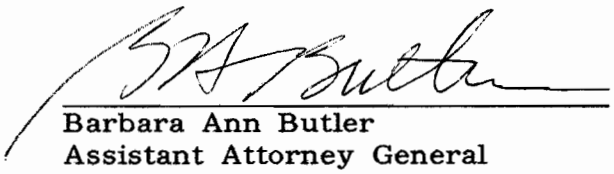
Id. State v. Donald, No. 64,652 is currently pending review by this Court. The State submits that the broader question presented in State v. Donald must also be answered in the negative.

CONCLUSION

Based on the foregoing argument, supported by the circumstances and authorities cited herein, Petitioner respectfully maintains that the issue presented herein is not jurisdictional in nature and therefore must be timely raised in the trial court in order to preserve review of the legal issue on appeal. The certified question should be answered in the negative. Petitioner requests that this Court reverse the decision of the Court of Appeal thereby affirming the judgment and sentence of the trial court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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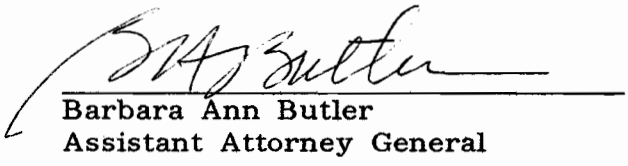
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Gwendolyn Spivey, Esquire, Assistant Public Defender, P. O. Box 671, Tallahassee, Florida 32301, this 3rd day of ~~December~~ January, ~~1983~~ 1984.



Barbara Ann Butler
Assistant Attorney General

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