IN THE SUPREME COURT OF FLORIDA

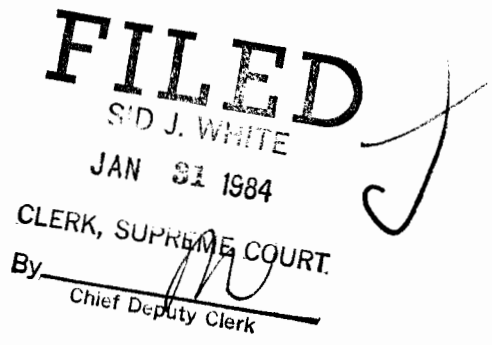
STATE OF FLORIDA,

Petitioner,

v. CASE NO. 64,652

SHELTON PENSON DONALD, JR.,

Respondent.



ANSWER BRIEF OF RESPONDENT

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ANSWER BRIEF OF RESPONDENT

I PRELIMINARY STATEMENT

Respondent will refer to the record of documents by use of the symbol "R", and to the transcript of proceedings by the symbol "TR".

This case is virtually identical to State v. Phillips, Case No. 64, 647, now pending in this court on a certified question from the First District Court of Appeal. The opinion of the District Court in Phillips is contained in an appendix which will be referred to as "APP".

II STATEMENT OF THE CASE AND FACTS

Respondent was charged by an information filed in the Circuit Court of Duval County with an offense described and alleged as follows:

STATE OF FLORIDA INFORMATION FOR

vs.

SHELTON PENSON DONALD, JR. FELONY PETIT THEFT

IN THE NAME OF AND BY AUTHORITY OF THE STATE OF FLORIDA

> ED AUSTIN, State Attorney for the Fourth Judicial Circuit of the State of Florida, in and for Duval County, charges that SHELTON PENSON DONALD, JR. on the 10th day of February, 1983, in the County of Duval and the State of Florida, did knowingly obtain or use, or endeavor to obtain or use merchandise, valued at less than One-Hundred Dollars ($100.00), the property of Division Street Grocery, with intent to appropriate the property to his use or to the use of any person not entitled thereto, contrary to the provisions of Section 812.014(2)(c), Florida Statutes.

(R-5)

In a separate document, the state gave notice of intent to seek a felony petit theft sentence, relying on respondent's two prior theft convictions. (R-12)

Respondent attacked the validity of the prior convictions to be used as enhancement by various motions, all of which were denied (R-18-49, 60, 95-97, 100-102). Respondent pled nolo contendere, reserving the right to appeal "all issues previously raised by motion in this matter" (T-24, R-103). On appeal, respondent raised for the first time the failure to allege the prior convictions in the information as a fundamental jurisdictional error.

The First District Court of Appeal reversed respondent's

conviction, relying on its earlier decision in Phillips v. State, __ So.2d __, Case No. AO-322 (Fla. 1st DCA, September 14, 1983), which, in pertinent part, held:

> Section 812.014, Florida Statutes (1981), defining and proscribing "theft," provides in subparagraph (2)(c) that "[t]heft of any property not specified in paragraph (a)" (which concerns property valued at $20,000 or more) "or paragraph (b)" (which concerns property valued at $100 to $20,000, or other property particularly described) "is petit theft and a misdemeanor of the second degree . . . ." The same subparagraph (2)(c) goes on:
>
> > Upon a second conviction for petit theft, the offender shall be guilty of a misdemeanor of the first degree . . . . Upon a third or subsequent conviction for petit theft, the offender shall be guilty of a felony of the third degree . . . .
>
> When the offense charged is "petit theft" by definition of section 812.014, therefore, the circuit court of Duval County has felony jurisdiction only if a conviction upon the charge laid in the information would be the offender's "third or subsequent conviction for petit theft." Sec. 26.012(2)(d), Fla. Stat. (1981). While the circuit court also has jurisdiction of informations charging "misdemeanors arising out of the same circumstances as a felony which is also charged," Id., this is not such a case.
>
> If the critical issue could be posed as one of notice to the accused, rather than as a jurisdictional issue, it might well be argued that Phillips was notified that a felony was charged, albeit imperfectly. Phillips was so notified both by the caption of the informations and by the state attorney's filing at arraignment of a notice of intent "to seek a felony petit theft penalty" based on the accused's two specified prior convictions of petit theft, several years earlier, in the county court. But 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.
>
> * * *

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 of else is waived.

(APP. at 2-4)

Judge Wentworth dissented, saying:

> The information in this case charged appellent with "Felony petit theft . . . . contrary to the provisions of Section 812.014-(2)(c), Florida Statutes" and contained a specific description of a single petit theft which the statute classifies as a misdemeanor except "upon a third or subsequent conviction . . . the offender shall be guilty of a felony . . . ." (e.s.). I find the information sufficient to incorporate by reference the language of the cited section defining felony petit theft and would conclude that it was the precise equivalent of a charge that appellant, in the referenced statutory language, was "guilty of a felony" based upon the described theft being "a third or subsequent conviction for petit theft . . . ." Since the parties and the court apparently so understood the information without objection to the lack of specifics on prior convictions, and as thus construed the information charges an offense cognizable in the circuit court, I find no jurisdictional problem and would affirm for lack of reversible error on other

issues presented here.

(APP. at 5)

The District Court certified the following question to this Court as one of great public importance:

> Is 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 petit theft convictions?

This case is here for resolution of that question.

III ARGUMENT

POINT ON APPEAL

WHETHER THE INFORMATION FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF FELONY PETIT THEFT AND, IF SO, WHETHER THIS DEFECT COULD BE ASSERTED INITIALLY ON APPEAL AS A FUNDAMENTAL ERROR BECAUSE IT VIOLATED DUE PROCESS AND WAS JURISDICTIONAL.

Initially, the question is whether the information was defective for omitting an essential element, the fact of prior convictions. The answer to this question is virtually self-evident from the statute[1] which created felony petit theft as an offense. It states, in part:

> Upon a third or subsequent conviction for petit theft, the offender shall be guilty of a felony of the third degree . . . (Emphasis added)

In State v. Harris, 356 So.2d 315, 317 (Fla. 1978), this Court explicitly held that prior convictions were an element of the offense, stating:

> We therefore hold that Section 812.021-(3) [identical in material respects to §812.014(2)(c)] creates a substantive offense to be tried in the circuit court when felony petit larceny is charged, without bringing to the attention of the jury the fact of prior convictions as an element of the new charge. (Emphasis added)

Earlier decisions in second offender prosecutions required the state to allege (and the jury to find guilt of) both the historical fact of prior convictions and the currently charged offense. State ex rel. Lockmiller v. Mayo, 88 Fla. 96, 101 So.

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[1] Section 812.014(2)(c), Fla. Stat.

228 (1924); Barnhill v. State, 41 So.2d 329 (Fla. 1949); Nichols v. State, 231 So.2d 526 (Fla. 2nd DCA 1970). In Harris, the Court considered whether the procedure whereby the jury was told of the prior convictions would unduly burden the constitutional presumption of innocence, especially when the prior offense was a "similar, related offense". To protect the defendant's rights to due process, the Court directed that the fact of prior convictions not be brought to the "attention of the jury" but instead be adjudicated by the trial judge using the procedures for enhanced sentences in §775.084, Fla. Stat.

The Court expressly overruled Nichols v. State, supra,[2] "to the extent it conflicts" with Shargaa v. State, 102 So.2d 809 (Fla. 1958). However, the only "conflict" disapproved in Harris was Nichols' provision that the jury be the trier of fact as to the prior convictions. The Court did not, expressly or by implication, hold that the charging document could omit the prior offenses relied upon as essential elements of the charge.

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[2] In Nichols, the Second District relied upon the Supreme Court decision in Barnhill v. State, supra, which was presumably also overruled sub silentio.

That is why Nichols was not overruled in toto.[3] It is still necessary to allege prior convictions used as support for elevating a misdemeanor offense to a felony. This principle, derived from State ex rel. Lockmiller v. Mayo, supra, 88 Fla. at

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3

Assessing the inconsistency between Shargaa and Nichols is difficult because of the different situations presented in each case. In Shargaa, the defendant was prosecuted for larceny while being simultaneously accused and tried as an habitual offender because of a prior conviction for issuing a worthless check. This Court held that this procedure unfairly infringed on the defendant's right to a fair trial on the larceny charge, of which a prior conviction was not an element. The state should have prosecuted the larceny without referring to prior offenses, and, if a conviction were obtained, then proceeded against the defendant as an habitual offender in another trial.

Nichols, on the other hand, was a prosecution for a second offense against the beverage law. Unlike Shargaa, but similar to the situation in Harris, proof of a previous conviction was an essential element of the offense being tried. The decisions of this Court upon which Nichols relied squarely held that a prior conviction was an essential element to be alleged and proved at trial. See Lockmiller, supra; Barnhill, supra. Although in Harris the Court overruled Nichols to the extent of any inconsistency with Shargaa, it did not at the same time overrule Lockmiller or Barnhill; nor had the Court in Shargaa overruled those earlier decisions.

The question that remains is whether a defendant may be deprived of the right to a jury trial on the element of prior convictions. Lockmiller holds that the defendant has a right to a jury determination on the historical fact of prior convictions which are elements of the crime. Cf. Barton v. State, 291 So.2d 586 (Fla. 1974). In the analogous situation of possession of a firearm by a convicted felon, the Court has held that the prior conviction is a substantive element to be alleged and that proof of the conviction may be offered to the jury unless its probative value is substantially outweighed by the danger of unfair prejudice. Parker v. State, 408 So.2d 1037 (Fla. 1982); State v. Vazquez, 419 So.2d 1088 (Fla. 1982).

Since in Harris the Court found it inevitable that unfair prejudice would result from disclosure of the prior similar offenses, a procedure was mandated for a determination of the historical fact of prior convictions in a separate, non-jury proceeding. As an alternative, the defendant might be given the option of waiving jury trial on the prior convictions. Without this option, the defendant is deprived of the right to have a jury determine all the issues of guilt, unless, of course, the statute is inherently unconstitutional.

98, 99, and quoted below, was not impaired or altered by Harris:

> Under Section 5486, supra, a first offense was declared to be a misdemeanor and a second offense against the provisions of the article was declared to be a felony. Whether the Section sought to prescribe merely an increased punishment for habitual offenders or create a new offense, a felony, for a second violation of the Act, the allegation of prior conviction was a necessary element in the so-called felony. (Emphasis added).

With this as a background to Harris, it is an unwarranted supposition for the state to argue, as it does on p.11 of its brief, that Harris "specifically disavows the procedure . . . whereby specific information concerning prior convictions is contained within the charging document." The state incorrectly equates the prohibition against prejudicial disclosures to the jury with the persisting requirement that the information contain all the essential elements of the offense.[4] Harris does not, as claimed here by the state, specifically disavow that prior offenses are elements of the offense which must be alleged. Rather, it is clear that Harris adopted the state's argument there that the prior offenses are elements which "must be specifically alleged." Id., at 315.

The state's argument continues by urging that in any event felony petit theft was sufficiently alleged because (1) the caption labeled the count "felony petit theft"; (2) the text of the

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[4] The Court in Harris was implying the exact result reached by the First District in Donaldson v. State, 356 So.2d 351 (Fla. 1st DCA 1978), which held that Fla.R.Cr.P. 3.400 authorizes but does not require the jury to take a copy of the information to the jury room. In a felony petit theft prosecution, the jury would not be given a copy of the information, thereby harmonizing the requirement of alleging the essential element of prior convictions with maintaining the defendant's right to a fair trial.

information cited Section 812.014(2)(c) which "pertains" to felony petit theft; and (3) the "imperfect" information was bolstered by the Notice of Intent to Seek Felony Petit Theft Penalty based upon two prior theft convictions.

The "caption" and "notice" arguments are both refuted by State v. Black, 385 So.2d 1372 (Fla. 1980), where the Court held an indictment fatally deficient when it failed to allege the place the crime occurred even though the caption named the Circuit Court for Hernando County. This Court said the caption notwithstanding the "body of the indictment did not contain a statement as to the place of the alleged crime." Id., at 1374. Nor was this deficiency sufficiently ameliorated by the bill of particulars giving "an exact address in Hernando County" or by repeating that address in a demand for notice of alibi. Ibid. Those documents, analogous to the notice relied on here by the state and by Judge Wentworth in dissent, did not overcome the requirement that all essential elements be alleged in the body of the charging document. The Court said:

> It is true that the availability of a statement of particulars and Florida's liberal discovery rules allow an accused more leeway to prepare a defense than did the common law 'four corners of the indictment' rule; but it is equally certain that a statement of particulars cannot cure fundamental defects in an indictment.
>
> 385 So.2d 1375.

As for citing the statute to cure the lack of pleading the prior offenses, the state's own argument confesses its weakness. Section 812.014(2)(c) does not invariably charge felony petit theft. Perhaps that is why the state says the statute "pertains"

to felony petit theft. True, but it also "pertains" to garden-variety, second-degree misdemeanor petit theft, and to second-conviction, first-degree misdemeanor petit theft. So while the statute pertains to felony petit theft, it does not do so exclusively, thereby nullifying any argument that citing to or by reference incorporating the statute cures the absence of essential elements. On the contrary, combining the allegation of theft of merchandise valued at less than $100 with the cited statute readily leads to the conclusion that the crime charged is a second-degree misdemeanor. Only if prior offenses were alleged would the information, amplified by the statute, charge a felony.

Even though §814.012(2)(c) embodies both misdemeanor and felony petit theft, and the text of the information alleges value of less than one hundred dollars without alleging prior offenses, the state insists that the information was sufficient because it was "cast in the statutory language," citing State v. Cadieu, 353 So.2d 150 (Fla. 1st DCA 1978). That argument flounders on the same shoal as the related incorporation-by-reference theory. The statute proscribes three separate offenses, which are first-degree and second-degree misdemeanor petit theft and felony petit theft. The felony portion is not merely an enhancement as in the habitual offender statute, §775.084. The words this Court used in Harris make clear that felony petit theft is a separate offense:

> 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. (Emphasis added)
>
> 356 So.2d at 316

Being a substantive offense, felony petit theft has as its essential elements all those required for petit theft plus two prior convictions. Were it otherwise, this Court would not have said in Harris that felony petit theft is a substantive offense rather than an enhancement. Being a substantive offense distinct from misdemeanor petit theft, the distinguishing element is prior convictions. By not alleging priors, the misdemeanor and felony portions would be the same offense, but with an enhanced penalty for third and subsequent offenders; yet Harris expressly rejected that analysis. Since, therefore, prior offenses are elements of the offense and not merely elements of the penalty, those elements must be stated in the charging document.

The information here was not "cast in the statutory language" of felony petit theft because it omitted the essential elements which distinguish that substantive offense from the separate substantive offense of misdemeanor petit theft. The only statutory language "cast" in the information against respondent was that of misdemeanor petit theft. A different conclusion would negate the rule that the charging document must show the jurisdiction of the court; an information alleging only theft of property valued at less than one hundred dollars and not alleging two prior convictions on its face is insufficient to vest jurisdiction in the circuit court. That rule should not be changed.

State v. Cadieu, supra, is not on point. Unlike the charge

here, Cadieu's information alleged all the essential elements of the crime of lewd assault on a minor; its flaw was in not alleging the particular acts charged. Cadieu moved to dismiss the information after trial but not before trial. The test applied to a post-trial motion was whether the information is so defective it would not support a conviction, as opposed to the pretrial standard of whether the information gave notice of the particular acts. In this context, the First District said that the information was not so defective as to fail to support a conviction. It was "cast in the statutory language" (meaning it alleged all the elements) but was imperfect for lack of allegations of fact. This did not render the information void. The Court said:

> 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.
>
> 353 So.2d at 151.

Because the information in Cadieu did not omit essential elements, the rationale of that case is not germain here. Had Cadieu been decisive, surely Judge Smith, who wrote the majority opinions in both Cadieu and Phillips, would have recognized the similarities.

Alleging essential elements is necessary for two separate reasons in this case, both of which are of fundamental nature. One is the due process right not to be convicted of a charge "that was never made." Cole v. Arkansas, 333 U.S. 196, 201 (1948).

Even failure to object at trial does not preclude a due process violation from being raised for the first time on appeal, because an error of that magnitude is considered fundamental. Castor v. State, 365 So.2d 701 (Fla. 1978). The failure to allege the essential elements of an offense renders any subsequent conviction invalid. This principle was reiterated by this Court in State v. Gray, 335 So.2d 816, 818 (Fla. 1983), as follows:

> . . . conviction on a charge not made by the indictment or information is a denial of due process of law. Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); De Jonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937). If the charging instrument completely fails to charge a crime, therefore, a conviction thereon violates due process. Where an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state. Since a conviction cannot rest upon such an indictment or information, the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any time - before trial, after trial, on appeal, or by habeas corpus.
>
> (Emphasis added)

The failure of the state to allege the essential element of prior convictions was a due process fundamental error and therefore properly assertable for the first time on appeal.

A second fundamental error resulting from not alleging priors was lack of subject matter jurisdiction in the circuit court. This is primarily the ground relied upon the the District Court. Ample precedent supports its position.

Circuit court jurisdiction over crimes is limited to felonies and to misdemeanors arising out of the same circumstances as a

felony which is also charged; jurisdiction over all other misdemeanors is in the county court. Art. V, Section 5(b), 6(d), and 20(c), Fla. Const.; Sections 26.012(2)(d) and 34.01(1)(a), Fla. Stat. A circuit court could not acquire jurisdiction over the misdemeanor of petit theft, unless it were joined with a felony count, arising from the same circumstances, which in this case it was not.

In Pope v. State, 268 So.2d 173 (Fla. 2nd DCA 1972) cert. discharged, 283 So.2d 99, the state alleged in an information filed in circuit court that the defendant possessed marijuana without additionally alleging whether the defendant had a prior conviction for that offense or possessed more than 5 grams. First-time possession of less than 5 grams of marijuana was a misdemeanor under the law then in effect, §404.15, Fla. Stat. (1971). After pleading guilty to the information and being sentenced to the state penitentiary, Pope appealed on the ground that he had been convicted and sentenced for a felony when his crime was only a misdemeanor. The Court held that without allegations of either a prior conviction or possession of more than 5 grams the information failed to charge a felony; the ensuing judgment and sentence imposed by the circuit court were void because:

> . . . such allegation is essential to the invocation of the jurisdiction of a felony court over the charge since the allegata of the accusatory writ are precisely the basis in the first instance upon which the court's jurisdiction over the subject matter thereof is predicated. Neither is alleged here and consequently the circuit court, which has felony jurisdiction only, did not acquire jurisdiction of the subject

> matter. Its judgments in the premises are therefore void. (Emphasis added) (footnotes omitted).
>
> 268 So.2d at 175

In a clairvoyant analogy directly applicable here, the Court also said:

> In principle, [this] situation is not unlike one wherein an indictment or information charges larceny, generally, without sufficient allegations from which it can be determined that the charge necessarily makes out the felony of grand larceny rather than petit larceny, a misdemeanor. Apart from due process considerations, involving notice to an accused of the nature of the offense with which he is charged, the felony court does not acquire jurisdiction because the allegata of the accusatory writ omit the essentials to make out a felony. If a crime is charged at all it is a misdemeanor. Moreover, such a defect, being jurisdictional, cannot be cured by consent nor waived by guilty plea. (Emphasis added) (footnotes omitted).
>
> Id., at 175, 76.

In Brehm v. State, 427 So.2d 825 (Fla. 3rd DCA 1983), the defendant was charged with and convicted of ten counts of tampering with a parking meter in violation of §877.08, Fla. Stat. As in petit theft, only subsequent offenses are felonies.[5] After finding guilt, the trial court adjudicated and sentenced the defendant as a felon because of previous convictions of the same offense. The Third District Court found the judgments and sentences void because:

> The information charging the defendant with the violation of Section 877.08

5 Sections 877.08(3), (4), Fla. Stat.

> failed to allege that the defendant had a prior conviction of the same offense. Consequently, the defendant could only have been guilty of a misdemeanor, over which the circuit court does not have jurisdiction. (Emphasis added).
>
> 427 So.2d at 826

In a footnote to that passage, which cited Harris, the Court said that, had the prior conviction "been properly pled," it would not have been brought to the jury's attention but determined in a post-verdict proceeding. Ibid, note 2.

Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981), held that allegations of theft of merchandise valued at less than one hundred dollars in an information captioned "Grand Theft," even when supplemented by a notice of intent to prosecute as a subsequent offender under §812.014(2)(c), were insufficient to charge a felony. The Court said:

> A misdemeanor not arising out of the same circumstances as a felony which is also charged is cognizable only in county court. Art. V, §§5(b) and 6(b), Fla. Const.; §§26.012(2) and 34.01, Florida Statutes (1979). If the information charges only the misdemeanor, the circuit court does not have jurisdiction and thus any judgment or sentence rendered by it is void. [Citations omitted.] The burden of properly invoking the court's jurisdiction is on the state. See, e.g., Pope at 176.
>
> * * *
>
> The state notes that no challenge to the jurisdiction of the circuit court appears on the record. See Fuller v. State, 159 Fla. 200, 31 So.2d 259 (1947); La Barbara v. State, 150 Fla. 675, 8 So.2d 662 (1942). The question whether the court has subject matter jurisdiction involves a claim of fundamental error and

> can be raised at anytime, even for the first time on appeal. (Emphasis added).

As demonstrated by these decisions, Florida courts have uniformly and consistently adhered to the principle that, when prior convictions elevate a misdemeanor to a felony, those prior convictions must be alleged in order to confer jurisdiction on the circuit court. This principle has not been eroded, as the state suggests, by State v. King, 426 So.2d 12 (Fla. 1983). The juvenile there had been indicted for an offense that, under Chapter 39, should have been prosecuted by an information. The defendant raised this point for the first time on appeal, and the issue was whether the right not to be indicted could be asserted on appeal when it had not been asserted at trial. The Court saw the question as

> whether the error committed is a fundamental error affecting the court's jurisdiction, thereby rendering its judgment void.
>
> 426 So.2d at 14

In answer, the Court said infirm judgments could be either void or voidable. Objections to void judgments could be raised at any time, but objections to voidable judgments must be timely made. The test applied to determine if the judgment was void or only voidable was whether the court had jurisdiction over the subject matter and over the party. If that dual jurisdiction were acquired, the ensuing judgment, even if erroneous, was binding unless properly attacked on appeal. The Court noted that by failing to object in the trial court King had subjected himself

to the jurisdiction of the Court, thereby waiving the defect of jurisdiction over the person. The state here seizes on that portion of the King opinion to assert that jurisdiction can be waived. Yet the other jurisdictional prong, i.e., subject matter jurisdiction, is what is at issue here. Rather than that element being waived in King, this Court held that

> the trial court had jurisdiction of the subject matter . . . because it is a circuit court which has jurisdiction of all felonies. §26.012(2)(d), Fla. Stat. (1981). (Emphasis added)
>
> Id., at 14

King, therefore, does not stand for the proposition that lack of subject matter jurisdiction is a defect which is waived by failure to object. That kind of jurisdictional flaw was not present in King, so King is not controlling in this case, where the circuit court did not have subject matter jurisdiction.

The District Court here, as in Phillips, supra, correctly perceived that subject matter jurisdiction, a non-waivable defect, was missing and the circuit court's judgment and sentence were void. As this Court noted in King, supra, 426 So.2d at 14 "[o]bjections to a void judgment can be raised at any time."

The state argues, however, (pp. 19,20, State's Brief) that a subsequent decision of the First District in Pickelsimer v. State, (consolidated with others) __ So.2d __, Case No. AR-155, (Fla. 1st DCA, November 9, 1983) 8 FLW 2670 is inconsistent with its opinion in Phillips because the court refused to "speculate" on the outcome had motions to dismiss not been filed. Pickelsimer should be no puzzle. The issue on appeal was not, as it

was in Phillips, whether the flaw in the information was a fundamental error that could be raised at any time. For that reason the court said it "need not reach the issue presented in Phillips . . . ." 8 FLW at 2670. But even if another panel of the First District, in an opinion written by the judge who dissented in Phillips, appears reluctant to adhere to Phillips, that is of no consequence now. This court's answer to the certified question from Phillips and this case will settle the issue.[6]

The question certified by the District Court, was correctly answered by Phillips. Failure to allege the elements which elevate a misdemeanor to a felony is a fundamental error which deprives the circuit court of jurisdiction over the subject matter, renders subsequent proceedings void, and may be asserted at any time. Lack of objection or motion to dismiss in the circuit court is not a bar to raising this defect on appeal.

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6 The state also disparages Pickelsimer for holding that the circuit court had jurisdiction to rule on the motions to dismiss. In making the attack the state overlooked abundant precedent stating that a court has jurisdiction to conduct proceedings to ascertain its own jurisdiction. E.g., State ex rel. B.F. Goodrich v. Trammell, 140 Fla. 500, 192 So. 175 (1930); Sun Insurance Co. v. Boyd, 105 So.2d 574 (Fla. 1958).

IV CONCLUSION

The decision of the District Court should be affirmed, because it correctly considered and sustained the respondent's claim of lack of jurisdiction in the circuit court.

Respectfully submitted,

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SECOND JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Barbara Ann Butler, Assistant Attorney General, Suite 513, Duval County Courthouse, Jacksonville, Florida 32202 and a copy mailed to respondent, Shelton Penson Donald, Jr., c/o Floyd Donald, 1009 East Street, N.E., Washington, D.C. 20002 on this 31st day of January, 1984.

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