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IN THE SUPREME COURT OF FLORIDA

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JAMES B. MASSEY,  
Petitioner,  
versus  
STATE OF FLORIDA,  
Respondent.

S.CT. CASE NO. 79,211

ON DISCRETIONARY REVIEW FROM  
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES:

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SUMMARY OF THE ARGUMENT

The issue of the omission of the mandatory notice requirement is preserved for appellate review. At sentencing stage, defense counsel objected to the lack of notice. (R472-473) And in reference to Mr. Massey's personal notice, a contemporaneous objection is not required. See Johnson v. State, 468 So.2d 458 (Fla. 3d DCA 1985).

ARGUMENT

THE ISSUE OF THE OMISSION OF THE  
MANDATORY NOTICE REQUIREMENT IS  
PRESERVED FOR APPELLATE REVIEW.

**The** State argues that the issue of the omission of the mandatory habitual offender notice is not preserved for appellate review.

On January 31, 1990 during the trial in the instant case, the State filed in open court the Habitual Offender Notice but failed to hand a copy of the Notice to Mr. Massey, pro se defendant. **The State's** excuse was "I have not had a chance to get it copied, though **Judge.**" (R87) Any objection at this point **would** have been premature, because the State's remark implies that the State was going to send Mr. Massey a copy and because Section 775.084(3)(b), Florida Statutes (**1989**), allows the State up until the time of the sentencing hearing to convey a copy to the defendant.

The issue of whether a defendant is required to make a contemporaneous objection to the lack of Notice of Habitual Offender Status has been resolved in Crapps v. State, **483 So.2d 544** (Fla. 1st DCA 1986), quashed in part on other grounds, **498 So.2d 415** (Fla. **1986**); and in Johnson v. State, **468 So.2d 458** (Fla. 3d DCA 1985). The First District Court of Appeals stated:

The State did not file a notice of intent to seek habitual offender status, as required by Section **775.084(3)(b)**, Florida Statutes, in Case Number **BC-334**. Appellant's failure to contemporaneously object to that lack of notice **does** not constitute a waiver of his right to raise that question on appeal. State v. Rhoden, **448 So.2d 1013** (Fla. 1984).

**Failure** to comply with the statutory notice requirement was error. Thus, the habitual offender finding, as it affects Case Number BC-334, is improper.

Id. at 546.

**And** in Johnson, supra, the Third District Court of Appeals stated:

We reverse the sentence imposed in this cause and remand to the trial court for resentencing according to the guidelines for the reason that it is clear from the record, and appellee so admits, that appellant was not given notice, as required by Section 775.084, Florida Statutes (1983), that an enhancement hearing would take place. This issue was not waived for appellate purposes by appellant's failure to make a contemporaneous objection. Walker v. State 462 So.2d 452 (Fla. 1985); State v. Rhoden, 448 So.2d 1013 (Fla. 1984).

In conclusion, based on the above case law, Mr. Massey was not required to make a contemporaneous objection.<sup>1</sup>

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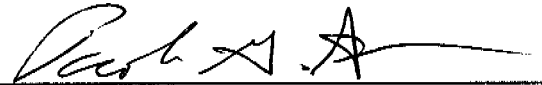
<sup>1</sup> It is important to point out that at the sentencing stage, Mr. Massey's trial attorney did object to the lack of notice. (R472-473)

CONCLUSION

BASED UPON the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal in this case.

Respectfully submitted,

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

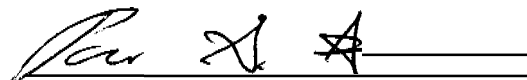


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CERTIFICATE OF SERVICE

I **HEREBY** CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal; and mailed to James B. Massey, Inmate No. C-084033, Okaloosa Corr. Inst., P.O. Box 578, Crestview, Florida 32536, on this 7th day of July, 1992.



PAOLO G. ANNINO  
ASSISTANT PUBLIC DEFENDER