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**FILED**

SID J. WHITE

EEB 28 1992

CLERK, SUPREME COURT

BY— Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. 79,303

MIGUEL TITO,

Respondent.  

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ON PETITION FOR REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

AMENDED JURISDICTIONAL BRIEF OF PETITIONER

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### STATEMENT OF THE CASE AND FACTS

The opinion of the Second District Court of Appeal, a copy of which is appended hereto, outlines the relevant facts at this stage of the proceedings.

The sole issue on direct appeal was whether the trial court had erred in sentencing Respondent Titø on three (3) cases, all of which were before the court for sentencing at the same time, but two of which were for sentencing following a second revocation of Respondent's probation, the third being for original sentencing on a new offense. The Second District held (1) that the trial court should have used the original guidelines scoresheets in determining the sentences in the probation revocation cases "notwithstanding the fact that it is resentencing in these cases at the same time it is imposing an original sentence in another case," slip opinion at 3; (2) that the trial court could not exceed a one-cell bump-up in determining the sentences in the probation revocation cases; and (3) that the habitual felony offender sentence for the new offense was improper because the statutory requirement of two sequential prior convictions was not met.

### SUMMARY OF THE ARGUMENT

A5 pointed out in the dissent to the opinion below, on the issue of whether the original guidelines scoresheet must be used in sentencing on revocation of probation where the trial court is resentencing on such a case at the same time it is imposing an original sentence on another case, the majority opinion below, in answering the question in the affirmative, is in conflict with

this Honorable Court. It is also in conflict with another district court.

This Court has recently held that, where there are multiple violations of probation, the sentence may be successively bumped to one higher cell for each violation. Because there were two violations of probation in the instant case, the trial court was entitled to sentence Respondent within the range of a two-cell bump-up, and the Second District's holding to the contrary is in conflict with this Honorable Court.

This Court has also recently held that sequential prior felony convictions are not required under the current version of the habitual felony offender statute. Thus, the Second District's holding to the contrary in this case is also in conflict with this Honorable Court.

#### ARGUMENT

ISSUE I: WHETHER CONFLICT EXISTS BETWEEN THE INSTANT DECISION AND DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS ON THE ISSUE OF WHETHER THE TRIAL COURT MUST USE A SINGLE SCORESHEET FOR ALL OFFENSES PENDING BEFORE THE COURT FOR SENTENCING.

As Judge Parker points out in his dissent on this issue, the majority's holding here conflicts with, inter alia, this Court's holding in Clark v. State, 572 So.2d 1387 (Fla. 1991), that the trial court must use a single scoresheet for all offenses pending before the court for sentencing. The Fifth District has also so held, Gallagher v. State, 476 So.2d 754 (Fla. 5th DCA 1985), as has the Second District itself on more than one occasion, Bembow v. State, 520 So.2d 312 (Fla. 2d DCA 1987); Boston v. State, 481 So.2d 550 (Fla. 2d DCA 1986). See also Peters v. State, 531

So.2d 121 (Fla. 1988); State v. Salsberry, 487 So.2d 402 (Fla. 5th DCA 1986).

Thus, although the instant majority opinion is in accord with the Fourth District on this issue, True v. State, 564 So.2d 1104 (Fla. 4th DCA), rev. denied, 576 So.2d 291 (Fla. 1990), as that opinion notes, it is in conflict with both this Honorable Court and the Fifth District. Accordingly, this Court has jurisdiction to review the instant case on the basis of conflict and should exercise that jurisdiction in order to resolve the conflict between the Second District (in the instant case and at least one other, Walker v. State, No. 90-3358 (Fla. 2d DCA Jan. 24, 1992) and the Fourth District on the one hand and this Court, the Fifth District, and the Second District (in several other cases) on the other.

ISSUE 11: WHETHER CONFLICT EXISTS BETWEEN THE INSTANT DECISION AND A DECISION OF THIS COURT ON THE ISSUE OF WHETHER A SENTENCE AFTER MULTIPLE PROBATION VIOLATIONS CAN EXCEED A ONE-CELL BUMP-UP.

At the time the decision below was rendered, it was not clearly in conflict with a decision of this Court. However, this Honorable Court has now decided Williams v. State, No. 75,919 (Fla. Feb. 6, 1992), in which this Court held that, where there are multiple violations of probation, the sentence may be successively bumped one cell higher for each violation. Under Williams, because there were two probation violations in the instant case, the trial court would be entitled to a two-cell bump-up, and the Second District's holding that the trial court was limited to a one-cell bump-up is in conflict with Williams.

ISSUE 111: WHETHER CONFLICT EXISTS BETWEEN THE INSTANT DECISION AND DECISIONS OF THIS COURT ON THE ISSUE OF WHETHER A DEFENDANT'S PRIOR FELONY CONVICTIONS MUST BE SEQUENTIAL IN ORDER FOR HIM TO QUALIFY AS A HABITUAL FELONY OFFENDER.

The Second District held in the instant case, in accord with the decision of the First District in Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991), that sequential felony convictions were still necessary for a defendant to meet the definition of a habitual felony offender under the 1988 version of Section 775.084(1)(a)1, Florida Statutes. However, this Honorable Court has recently quashed the First District's Barnes decision in State v. Barnes, No. 77,751 (Fla. Feb. 20, 1992), and held that the habitual felony offender statute currently in effect contains no sequential conviction requirement. Thus, the instant Second District decision is in conflict with this Court's Barnes decision as well.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Petitioner respectfully requests that this Honorable Court exercise its discretion to review the instant case and resolve the existent conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail Deborah K. Brueckheimer, Assistant Public Defender, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, this 21<sup>st</sup> day of February 1992.



OF COUNSEL FOR PETITIONER