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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 5th DCA No.: 93-2401

RICHARD BLACKWELL,

Respondent.

_____ /

84,071

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent entered a plea for sale or delivery of cocaine in violation of §893.13(1)(a)(1), Fla. Stat. (1991). Blackwell v. State, 19 Fla. L. Weekly D1321 (Fla. 5th DCA June 17, 1994). His plea form stated that he "could" be sentenced as an habitual offender and the trial court later filed a notice that Respondent would be sentenced as an habitual offender. Id. Respondent was sentenced as an habitual offender and the Fifth District Court of Appeal reversed and remanded for resentencing. Id. The Fifth directed that upon resentencing the trial judge may impose a guideline sentence or if a greater sentence is justified, advise the Respondent and permit him to accept the greater sentence or withdraw his plea and proceed to trial. Id. The State then filed a Notice To Invoke Discretionary Jurisdiction of this court based on express and direct conflict with a decision of this Court.

SUMMARY OF THE ARGUMENT

The decision by the Fifth District Court of Appeal in this case is in express and direct conflict with this Court's decision in Massey, infra. Due to this conflict, this Court should exercise its discretionary jurisdiction.

ARGUMENT

THE DECISION IN THIS CASE IS IN
EXPRESS AND DIRECT CONFLICT WITH A
DECISION FROM THIS COURT.

Petitioner asserts that the decision in the instant case is in express and direct conflict with this Court's decision in Massey v. State, 609 So. 2d 598 (Fla. 1992). In Massey, this Court held that the State's failure to strictly comply with the statute requiring that notice of the state's intention to have the defendant sentenced as an habitual offender be served upon the defendant, may be reviewed under the harmless error analysis. In that case, the State's error in failing to serve actual notice to the defendant was harmless where the defendant and his attorney had actual notice of the State's intention.

In the instant case, the Fifth District Court of Appeal reversed Respondent's sentence relying on Ashley v. State, 614 So. 2d 486 (Fla. 1993) and Thompson v. State, 19 Fla. L. Weekly D1221 (Fla. 5th DCA June 3, 1994). Thompson, is currently pending jurisdiction in this court, number 83, 951.

The instant decision is in express and direct conflict with Massey, supra, because the Fifth District failed to apply a harmless error analysis. As in Massey, the Respondent had actual notice of the possible consideration of habitual offender sanctions. At the time of entering his plea, Respondent signed a plea agreement which provided:

That should I be determined by the Judge to be a Violent Habitual Felony Offender, and should the Judge sentence me as such, I could receive up to a maximum sentence of

30 years imprisonment and a mandatory minimum of years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.

(See appendix, exhibit B) Respondent affirmatively indicated at his plea hearing that he read the written agreement before he signed it, that he had an adequate opportunity to ask questions of his attorney about the agreement, and that he understood the agreement. (Appendix C, p. 7-8) Further, Respondent was personally, specifically informed at his plea hearing about the possibility of a habitual offender sentence and the consequences of such a sentence. (Appendix C, p. 9) Because Respondent had actual notice of the possibility of a habitual offender sentence before he entered his plea, the protections afforded by Ashley, supra, were provided to him, and any error in failing to provide formal written notice of habitualization was harmless. The Fifth District erred in failing to apply a harmless error analysis as outlined in Massey, infra.

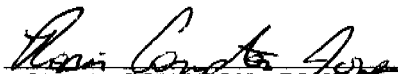
The Fifth District's decision in the instant case is in express and direct conflict with this Court's decision in Massey, infra. This honorable court should exercise its jurisdiction in this case and resolve the conflict between the two cases.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully requests this honorable court exercise its jurisdiction in this case.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief has been furnished by delivery to M.A. Lucas, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, FL, 32114, this 25th day of July, 1994.


Robin Compton Jones
Assistant Attorney General

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APPENDIX

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