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SID J. WHITE
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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. 84,071; 84,176; 84,148; 84,150 and 83,951

RICHARD BLACKWELL,

Respondent.

______________________/

ON DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

AMENDED MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS[1]

THOMPSON, case no. 83,951

Thompson was charged by information with one count of burglary of a dwelling in case no. 92-31832CFAES (R 45). Thompson plead guilty as charged to burglary of a dwelling, and to two other charges in two separate cases (R 6, 7, 78). The written plea agreement contained the following:

> 4. I have read the information or indictment in this case and I understand the charge(s) to which I enter my plea(s). My attorney has explained to me the total maximum penalties for the charge(s) and as a result I understand the following:
>
> * * *
>
> c. 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 50 years imprisonment and a mandatory minimum of 20 years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.
>
> d. That should I be determined by the Judge to be a Non-Violent Habitual Felony Offender, and should the judge sentence me as such, I could receive up to a maximum sentence of 50 years imprisonment and a mandatory minimum of 0 years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.
>
> * * *

(R 78; Appendix A)). The plea agreement also set forth that

[1]Petitioner will address the facts of each of the five consolidated cases separately. The citations to the record on appeal are to each separate case under which the facts cited to appear.

Thompson was aware of all of the provisions and representations of the plea agreement, that he discussed the plea agreement with his attorney and that he fully understood it (R 79). Thompson signed the written plea agreement (R 7, 79).

During the plea hearing held on October 14, 1992, Thompson stated that he had thoroughly read the plea agreement (R 7). Thompson also stated he had an adequate opportunity to ask questions of his attorney about the plea agreement (R 8). Thompson understood the agreement and had no questions about it (R 8). Thompson stipulated to a factual basis based on the facts contained in the affidavits (R 9). The trial judge found Thompson's plea was freely and voluntarily made and the plea was accepted (R 10). The plea agreement was filed on October 14, 1992 (R 78).

On November 12, 1992, the trial judge filed notice and order for a separate proceeding to determine if Thompson qualified as a habitual felony offender (R 80-81). Thompson filed a motion to strike the court's notice of habitual offender sentencing (R 54-55). The motion was denied (R 56).

On March 30, 1993, the sentencing hearing was held (R 13-39). Thompson had no objection to the PSI or the scoresheet (R 24). Thompson objected to the court's filing of the notice and to the notice having been filed after the plea was taken (R 20). The trial judge overruled the objections (R 21). When asked if Thompson had any submissions to make as to whether he qualified as a habitual offender, defense counsel stated "not as to qualifications" (R 21). The trial judge found, based upon

Thompson's prior convictions, that Thompson qualified as a habitual violent felony offender (R 22-23). Defense counsel, Thompson and a minister requested that Thompson not be habitualized (R 24-30). Thompson was adjudicated guilty (R 31, 57, 66). Thompson was sentenced to 15 years incarceration with a five year mandatory minimum followed by 5 years probation on case no. 92-31832 (R 31, 59-61, 66-69). The trial judge pointed out that the sentence imposed was within the guidelines (R 32).

Thompson appealed his conviction and sentence to the Fifth District Court of Appeal (R 70). On February 4, 1994, the Fifth District vacated Thompson's sentence and remanded for resentencing within the guidelines because Thompson did not receive written notice of intent to habitualize prior to the entry of his plea. The state filed a motion for rehearing/rehearing en banc. A response was filed by Thompson. On June 3, 1994, the Fifth District granted the motion for rehearing en banc and withdrew their prior opinion. Thompson v. State, 638 So. 2d 116 (Fla. 5th DCA 1994), review pending, case no. 83,951 (Appendix G). The Fifth District found that the acknowledgement contained in the plea agreement of the penalties that the defendant "could" receive if habitualized was insufficient to constitute notice of intent to habitualize. Thompson, supra. Thompson's conviction and sentence were reversed and remanded. Judge Goshorn dissented. Thompson, at 118-119.

Petitioner filed a notice to invoke this court's jurisdiction. Jurisdictional briefs were filed by both petitioner and Thompson.

On November 23, 1994, this court accepted jurisdiction.

BROWN, Case no. 84,176

Brown was charged by information with one count of unlawful sale or delivery of cocaine (R 26). Brown plead guilty as charged (R 27). The written plea agreement contained the following:

> 4. I have read the information or indictment in this case and I understand the charge(s) to which I enter my plea(s). My attorney has explained to me the total maximum penalties for the charge(s) and as a result I understand the following:
>
> * * *
>
> c. 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 10 years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.
>
> d. That should I be determined by the Judge to be a Non-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 N/A years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.
>
> * * *

(R 27; Appendix B). The plea agreement also set forth that Brown was aware of all of the provisions and representations of the plea agreement, that he discussed the plea agreement with his attorney and that he fully understood it (R 28). Brown signed the written plea agreement (R 4, 28).

During the plea hearing held on March 24, 1993, Brown stated that he had thoroughly read the plea agreement (R 4). Brown also stated he had an adequate opportunity to ask questions of his attorney about the plea agreement (R 4). Brown understood the agreement and had no questions about it (R 4). The trial judge asked Brown if he was aware that if a notice was issued and it was determined that he was a habitual offender that the fifteen year sentence Brown faced could double (R 5). Brown understood this (R 5). Brown also understood he would not be entitled to basic gain time on any habitual offender sentence (R 5). Brown stipulated to a factual basis based on the facts contained in the affidavits (R 5-6). The trial judge found Brown's plea was freely, voluntarily, knowingly and intelligently made and the plea was accepted (R 6). The plea agreement was filed on March 24, 1993 (R 27).

A hearing was held on July 29, 1993 (R 8-11). No objections were made to the PSI (R 10). The trial judge stated that the PSI made it apparent that Brown may classify as a habitual offender and the court would be issuing a notice to conduct a separate proceeding to determine if Brown classified (R 10). Brown's case was then continued until September (R 15). On August 2, 1993, the trial judge filed notice and order for a separate proceeding to determine if Brown qualified as a habitual felony offender (R 29-30). On August 3, 1993, Brown filed a motion to strike the notice (R 31-32).

On September 29, 1993, the sentencing hearing was held (R 12-21). Brown had no objection to the PSI or the scoresheet (R 14).

The trial judge denied the motion to strike (R 14, 33). Brown had no submission as to whether he qualified as a habitual offender (R 15). The trial judge found, based upon Brown's prior convictions, that Brown qualified as a habitual offender (R 15, 43-44). Defense counsel requested that Brown be sentenced in accordance with the recommendation in the PSI; Brown declined to say anything (R 15). Brown was adjudicated guilty (R 16, 45). Brown was sentenced to 364 days county jail with credit for time served and placed on two years community control followed by three years probation (R 16, 47-51).

Brown appealed his conviction and sentence to the Fifth District Court of Appeal (R 35). On July 1, 1994, the Fifth District vacated Brown's sentence and remanded pursuant to the Fifth District's opinion in Thompson, supra. Brown v. State, 638 So. 2d 120 (Fla. 5th DCA 1994) (Appendix H). The acknowledgement found to be lacking in Thompson is the same as that found in Brown's plea agreement. Thompson, at 117. Judge Goshorn dissented based upon his dissent in Thompson and his opinion in Oglesby v. State, 627 So. 2d 585 (Fla. 5th DCA 1993), rev. denied, No. 82, 987 (Fla. March 11, 1994).

Petitioner filed a notice to invoke jurisdiction. Jurisdictional briefs were filed by both petitioner and Brown. On November 23, 1994, this court accepted jurisdiction.

BLACKWELL, Case no. 84,071

Blackwell was charged by information with one count of

unlawful sale or delivery of cocaine (R 29). Blackwell plead guilty as charged (R 30). The written plea agreement contained the following:

> 4. I have read the information or indictment in this case and I understand the charge(s) to which I enter my plea(s). My attorney has explained to me the total maximum penalties for the charge(s) and as a result I understand the following:
>
> * * *
>
> c. 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.
>
> d. That should I be determined by the Judge to be a Non-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.
>
> * * *

(R 30; Appendix C). The plea agreement also set forth that Blackwell was aware of all of the provisions and representations of the plea agreement, that he discussed the plea agreement with his attorney and that he fully understood it (R 31). Blackwell signed the written plea agreement (R 4, 31).

During the plea hearing held on March 18, 1993, Blackwell stated that he had thoroughly read the plea agreement (R 7). Blackwell also stated he had an adequate opportunity to ask

questions of his attorney about the plea agreement (R 7). Blackwell understood the agreement and had no questions about it (R 7-8). The trial judge asked Blackwell if he was aware that a notice for habitual offender purposes could be issued and if it was determined that he was a habitual offender that the fifteen year sentence Blackwell faced could double and he would face up to 30 years (R 9). Blackwell understood this (R 9). Blackwell also understood he would not be entitled to basic gain time on any habitual offender sentence (R 9). Blackwell stipulated to a factual basis based on the facts contained in the affidavits (R 10). The trial judge found Blackwell's plea was freely, voluntarily, knowingly and intelligently made and the plea was accepted (R 11). Defense counsel stated immediately prior to the close of the plea hearing stated that Blackwell may be a habitual offender and the trial judge should wait as to the ARE program until sentencing (R 13-14). The plea agreement was filed on March 18, 1993 (R 30).

On July 29, 1993, the trial judge filed notice and order for a separate proceeding to determine if Blackwell qualified as a habitual felony offender (R 32-33). On August 2, 1993, Blackwell filed a motion to strike the notice (R 31-32).

On September 29, 1993, the sentencing hearing was held (R 16-26). Blackwell had no objection to the PSI or the scoresheet (R 18). The trial judge denied the motion to strike (R 18). Blackwell had no submission as to whether he qualified as a habitual offender (R 18). The trial judge found, based upon

Blackwell's prior convictions, that Blackwell qualified as a habitual offender (R 18-19, 22, 45-46). Blackwell asked the trial judge to put him on probation (R 20-21). Blackwell was adjudicated guilty (R 22, 37). Blackwell was sentenced to four years incarceration followed by six years probation (R 22, 39-40, 48-51).

Blackwell appealed his conviction and sentence to the Fifth District Court of Appeal (R 52). On June 17, 1994, the Fifth District vacated Blackwell's sentence and remanded pursuant to the Fifth District's opinion in Thompson, supra. Blackwell v. State, 638 So. 2d 119 (Fla. 5th DCA 1994) (Appendix I). The acknowledgement found to be lacking in Thompson is the same as that found in Blackwell's plea agreement. Thompson, at 117.

Petitioner filed a notice to invoke jurisdiction. Jurisdictional briefs were filed by both petitioner and Blackwell. On November 23, 1994, this court accepted jurisdiction.

HOLMES, Case no. 84,148

Holmes was charged by amended information with one count of attempted burglary of a conveyance (R 19). Holmes plead guilty as charged (R 20). The written plea agreement contained the following:

> 4. I have read the information or indictment in this case and I understand the charge(s) to which I enter my plea(s). My attorney has explained to me the total maximum penalties for the charge(s) and as a result I understand the following:
>
> * * *
>
> c. 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 ___10___ years imprisonment and a mandatory minimum of ___5___ years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.
>
> d. That should I be determined by the Judge to be a Non-Violent Habitual Felony Offender, and should the judge sentence me as such, I could receive up to a maximum sentence of ___10___ years imprisonment and a mandatory minimum of ___0___ years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.

* * *

(R 20; Appendix D). The plea agreement also set forth that Holmes was aware of all of the provisions and representations of the plea agreement, that he discussed the plea agreement with his attorney and that he fully understood it (R 21). Holmes signed the written plea agreement (R 6, 21).

During the plea hearing held on January 29, 1993, Holmes stated that he had thoroughly read the plea agreement prior to signing it (R 8). Holmes also stated he had an adequate opportunity to ask questions of his attorney about the plea agreement (R 8). Holmes understood the agreement and had no questions about it (R 8-9). Holmes stipulated to a factual basis based on the facts contained in the affidavits (R 10-11). The trial judge found Holmes' plea was freely and voluntarily made and the plea was accepted (R 11). The plea agreement was filed on January 29, 1993 (R 20).

On March 11, 1993, the trial judge filed notice and order for

a separate proceeding to determine if Holmes qualified as a habitual felony offender (R 25-26, 29-30). On March 19, 1993, Holmes filed a motion to strike the notice (R 27-28). The motion to strike was denied on September 15, 1993 (R 32).

On September 29, 1993, Holmes was adjudicated guilty (R 33). Holmes was sentenced to four years incarceration followed by three years probation as a habitual offender (R 35-37, 39-40, 43-46).

Holmes appealed his conviction and sentence to the Fifth District Court of Appeal (R 47). On July 1, 1994, the Fifth District vacated Holmes' sentence and remanded pursuant to the Fifth District's opinion in Thompson, supra. Holmes v. State, 639 So. 2d 151 (Fla. 5th DCA 1994) (Appendix J). The acknowledgement found to be lacking in Thompson is the same as that found in Holmes' plea agreement. Thompson, at 117.

Petitioner filed a notice to invoke jurisdiction. Jurisdictional briefs were filed by both petitioner and Holmes. On November 23, 1994, this court accepted jurisdiction.

JONES, Case no. 84,150

Jones was charged by information with one count of unlawful possession of cocaine (R 16). Jones plead guilty as charged (R 21). The written plea agreement contained the following:

> 4. I have read the information or indictment in this case and I understand the charge(s) to which I enter my plea(s). My attorney has explained to me the total maximum penalties for the charge(s) and as a result I understand the following:
>
> * * *

> c. 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 __10__ years imprisonment and a mandatory minimum of __5__ years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.
>
> d. That should I be determined by the Judge to be a Non-Violent Habitual Felony Offender, and should the judge sentence me as such, I could receive up to a maximum sentence of __10__ 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.

* * *

(R 21; Appendix E). The plea agreement also set forth that Jones was aware of all of the provisions and representations of the plea agreement, that he discussed the plea agreement with his attorney and that he fully understood it (R 22). Jones signed the written plea agreement (R 22, 54).

During the plea hearing held on October 30, 1992, Jones stated that he had thoroughly read the plea agreement prior to signing it (R 54). Jones also stated he had an adequate opportunity to ask questions of his attorney about the plea agreement (R 55). Jones understood the agreement and had no questions about it (R 55). Jones stipulated to a factual basis based on the facts contained in the affidavits (R 55). The trial judge accepted Jones' plea (R 55). The plea agreement was filed on October 30, 1992 (R 21).

On December 4, 1992, notice of intent to seek habitual offender sentencing was filed (R 23). On December 17, 1992, a sentencing hearing was held (R 1-13). Objections were made to the

PSI, but were waived (R 3-5). Jones had no submission as to whether he qualified as a habitual offender (R 5). The trial judge found, based upon Jones' prior convictions, that Jones was a habitual offender (R 6, 9, 27-28). Defense counsel and Jones requested that Jones be placed on community control (R 7-8). Jones was adjudicated guilty (R 8, 9, 29). Jones was sentenced to four and a half years incarceration followed by five years probation (R 9, 31-33, 38-41).

Jones appealed his conviction and sentence to the Fifth District Court of Appeal (R 42). On July 1, 1994, the Fifth District vacated Jones' sentence and remanded pursuant to the Fifth District's opinion in Thompson, supra. Jones v. State, 639 So. 2d 147 (Fla. 5th DCA 1994) (Appendix K). The acknowledgement found to be lacking in Thompson is the same as that found in Jones' plea agreement. Thompson, at 117.

Petitioner filed a notice to invoke jurisdiction. Jurisdictional briefs were filed by both petitioner and Jones. On November 23, 1994, this court accepted jurisdiction. On motion by petitioner, the above five cases were consolidated for review by this court.

SUMMARY OF ARGUMENT

The Fifth District erred in determining that the plea agreements in these cases were insufficient to give the respondents notice that they may be sentenced as habitual offenders. Each of the five respondents read, understood, signed and discussed the plea agreement with their attorneys. The plea agreements set forth that the respondents could be habitualized, the maximum sentence each of them faced and that they would not be entitled to gain time. Petitioner asserts this was sufficient notice. It is both improper and impossible to inform a defendant that he or she "will" be habitualized; the most that may be said is a defendant may or possibly could be habitualized. If the plea agreements were insufficient notice, any error in failing to give the respondents separate written notice prior to entering their pleas was harmless, as each of the five respondents had actual notice that he may be habitualized. The decision in this case should be quashed, the convictions and sentences of the five respondents should be reinstated and the decision in Thompson, supra, overruled.

Furthermore, this court should re-examine and clarify its decision in Ashley, infra. The decisions in these cases crystalize the problems inherent in the practical application of this court's decision in Ashley, infra. Thompson, supra, and the other cases cited herein indicate that Ashley, infra, raised more questions than it answered. Ashley, infra, should be clarified to reflect that notice which states only the possibility that a defendant may be habitualized is sufficient. Also, the affect of gain time or

early release on a defendant's sentence is a collateral consequence, not a direct consequence. Ashley, infra, should be clarified to reflect that a trial judge need only inform a defendant of the maximum possible sentence which may be imposed, not that he or she may serve more or less of that sentence depending upon which sentencing scheme the defendant is sentenced under. Finally, Ashley should be clarified as to whether or not an objection is required to preserve the issue for appellate review where some form of notice was given and the defendant later claims the notice was insufficient.

<u>ARGUMENT</u>

<u>POINT ON APPEAL</u>

> THE FIFTH DISTRICT COURT OF APPEAL ERRED IN FINDING THAT THE RESPONDENTS HAD NOT BEEN GIVEN NOTICE OF THE INTENT TO HABITUALIZE PRIOR TO RESPONDENTS ENTERING THEIR PLEAS; THE PLEA FORM EACH OF THE RESPONDENTS SIGNED, READ AND UNDERSTOOD GAVE THE RESPONDENTS SUFFICIENT NOTICE, AS IT SET FORTH THE MAXIMUM SENTENCE THAT COULD BE IMPOSED IF THE RESPONDENTS WERE HABITUALIZED AND THAT THE RESPONDENTS WOULD NOT BE ENTITLED TO BASIC GAIN TIME; DUE TO THE CONFUSION CREATED BY THIS COURT'S DECISION IN <u>ASHLEY</u>, <u>INFRA</u>, THIS COURT SHOULD REVISIT AND CLARIFY <u>ASHLEY</u>.

In the instant five cases, a separate written notice of intent to habitualize was not filed prior to the entry of each of the respondents' plea. However, unlike in <u>Ashley v. State</u>, 614 So. 2d 486 (Fla. 1993), the failure to file a separate written notice is not fatal in these cases. The plea agreements which each of the respondents read, understood and signed set forth the following:

> 4. I have read the information or indictment in this case and I understand the charge(s) to which I enter my plea(s). My attorney has explained to me the total maximum penalties for the charge(s) and as a result I understand the following:
>
> * * *
>
> c. 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 _______ 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.
>
> d. That should I be determined by the Judge to be a Non-Violent Habitual Felony Offender, and should the judge sentence me as such, I could receive up to a maximum sentence

> of _______ 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.

* * *

The blanks in each of the plea agreements were filled in according to the maximum sentence each of the respondents was facing. Petitioner asserts that the written plea agreement complied with section 775.084(3)(b), Fla. Stat. (1991) and this court's decision in Ashley, supra.

Petitioner asserts that the Fifth District's decision in Thompson, supra, and the other four cases is incorrect. In Thompson, the Fifth District held that a plea agreement referred to above was insufficient notice as required by section 775.084 and Ashley, supra. In Thompson, the Fifth district overruled their prior decision in Oglesby v. State, 627 So. 2d 585 (Fla. 5th DCA 1993), rev. denied, Case no. 82, 987 (Fla. March 11, 1994),[2] wherein they held that the identical language in a plea agreement satisfied Ashley and that the harmless error analysis of Massey v. State, 609 So. 2d 598 (Fla. 1992), applied.[3] Petitioner asserts that the Fifth District not only elevated form over substance in reaching the decision it did in Thompson, but also ignored this court's decision in Massey v. State, 609 So. 2d 598 (Fla. 1992).

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[2] (Appendix F)

[3] Oglesby sought review by this court based upon conflict with Ashley. This court denied review. Petitioner asserts that by declining to accept jurisdiction this court approved the decision in Oglesby.

The majority in Thompson likewise ignored the sound and logical reasoning of Judge Goshorn's dissent. Petitioner further arrests that Thompson, supra, not only expands the decision in Ashley, but crystallizes the problems inherent in the practical application of Ashley.

Section 775.084(3)(b) provides:

> Written notice shall be served on the defendant and his attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence so as to allow the preparation of a submission on behalf of the defendant.

The purpose of the notice requirement is to prevent a defendant from being surprised at sentencing and to allow the defendant and/or the defendant's attorney the opportunity to prepare for the hearing. Massey, at 600; see also Roberts v. State, 559 So. 2d 289, 291 (Fla. 5th DCA 1990). Section 775.084(3)(b) does not specify the form the written notice must take or the words the notice must or must not contain.

The Fifth District has elevated form to a new height over substance in Thompson. In finding the written plea agreement to be insufficient to give the defendant notice of habitual offender sentencing, petitioner asserts that the Fifth District found that the procedural aspect or the actual written notice was of paramount importance to the substantive purpose, preparation of a submission on the defendant's behalf. Petitioner asserts that such a finding places the importance on the wrong portion of section 775.084(3)(b).

In each of these cases, the plea agreements stated the maximum

possible penalties each of the respondents were facing if they were found to be habitual offenders (Appendix A, B, C, D, E). At neither the plea nor the sentencing hearings did any of the respondents argue, object or complain that they did not know that they were facing a possible sentence as a habitual offender. The only objection was to the PSI (R 14). Petitioner acknowledges that this court has held that such an objection is not necessary for the preservation of the issue for appellate review where no notice has been given. Ashley, at 490. Petitioner asserts that an objection was necessary in this case, as respondent was given notice.[4] However, whether an objection was required or not, petitioner asserts that the lack of such an objection in this case is telling and supports petitioner's claim that the respondents each had knowledge of possible habitual offender sentencing. The written plea agreement was sufficient written notice.

Should this court determine that the plea agreement was insufficient written notice, respondents each had actual notice and

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[4]In Ashley, at 490, this court held that an objection to lack of notice was not required to preserve the issue for appellate review as it is a purely legal sentencing issue. Petitioner asserts that the only time an objection would not be required is in an Ashley-type situation, i.e., the defendant pled with absolutely no notice or knowledge that he or she may be habitualized. Petitioner asserts that in cases such as the instant one, where a defendant has both knowledge and notice that he may be habitualized an objection to the form of the notice is required. Here, the respondents were given notice in their plea agreements. While there was an objection to the trial judge filing the notice by several of the respondents, there was no objection to the notice in the plea agreement. Petitioner asserts that respondent's failure to object waived the issue for appellate review. This court should clarify Ashley so that it is clear under what circumstances an objection is required and when one is not.

any failure to provide separate written notice was harmless in this case pursuant to Massey, supra. The Fifth District in Oglesby found that Massey applied to such situations. The Fifth District ignored Massey in overruling Oglesby. See Thompson, supra. Petitioner asserts that it was error for the Fifth District to ignore Massey, as Massey is applicable to the instant case.

In Massey, at 598-599, Massey had actual knowledge that he may be sentenced as a habitual felony offender although he was never served with written notice. This court found any error was harmless. Id. at 600. In the instant cases, the plea agreements informed each of the respondents that they could be sentenced as a habitual felony offenders and gave the respondents and their attorneys an opportunity to prepare for the hearing. The respondents each went over the agreements with their lawyers prior to entering their pleas, understood the agreements and signed the agreements. Furthermore, respondents Brown and Blackwell were told by the trial judge during their plea hearings that they could be facing habitual offender sentencing which meant their maximum possible sentences could double and they would not be entitled to gain time. Both Brown and Blackwell understood this.

Petitioner asserts that the purpose of the written notice requirement was accomplished in these cases, as the respondents had actual notice that they could be facing habitual offender sentences and what those maximum sentences were. Each of the respondents were given an opportunity to prepare for their individual sentencing hearings. "It is inconceivable that [the respondents

were] prejudiced by not having received the written notice [prior to the entry of their pleas]." Massey, at 600. The failure to provide written notice was harmless in these cases. Massey, supra; Lewis v. State, 636 So. 2d 154 (Fla. 1st DCA 1994); Mansfield v. State, 618 So. 2d 1385 (Fla. 2d DCA 1993); see also Lucas v. State, 630 So. 2d 597 (Fla. 1st DCA 1993) (any error in failing to determine that predicate offense had not been pardoned or set aside was harmless); Critton v. State, 619 So. 2d 495 (Fla. 1st DCA 1993) (same); Green v. State, 623 So. 2d 1237 (Fla. 4th DCA 1993) (any error in habitualization was harmless); Suarez v. State, 616 So. 2d 1067 (Fla. 3d DCA 1993) (any error in failing to make required statutory findings was harmless where defendant accepted habitual offender sentence and waived right to hearing); Bonaventure v. State, 637 So. 2d 55 (Fla. 5th DCA 1994) (where evidence unrebutted, error in failing to make specific findings in support of habitual offender sentence was harmless); Pompa v. State, 635 So. 2d 114 (Fla. 5th DCA 1994) (same).

In Thompson, Brown, Blackwell, Holmes and Jones, the Fifth District held that the acknowledgement in the written plea agreements did not comply with Ashley because the plea agreements said that the respondents **may** be sentenced as habitual offenders rather than that the respondents **would** be sentenced as habitual offenders. Petitioner asserts that this court did not hold in Ashley that a defendant must be told unequivocally that he **would** be sentenced as a habitual offender prior to entering his plea, only that he **may** or **possibly could** be facing such a sentence. The Fifth

District played a game of semantics which did not need to and should not have been played.

In Ashley, at 480, this court held that

> in order for a defendant to be habitualized following a guilty or nolo plea, the following must take place prior to acceptance of the plea: 1) The defendant must be given written notice of intent to habitualize, and 2) the court must confirm that the defendant is personally aware of the **possibility** and reasonable consequences of habitualization. (Footnote omitted; emphasis added).

In reaching this holding, this court set forth the following:

> Because habitual offender maximums clearly constitute the "maximum possible penalty provided by law"--exceeding both the guidelines and standard statutory maximums--and because habitual offender sentences are imposed in a significant number of cases, our ruling in *Williams* [*v. State*, 316 So. 2d 267 (Fla. 1975),] and the plain language of [Florida Rule of Criminal Procedure] 3.172 require that before a court may accept a guilty or nolo plea from an eligible defendant it must ascertain that the defendant is aware of the **possibility** and reasonable consequences of habitualization. To state the obvious, in order for the plea to be "knowing," i.e., in order for the defendant to understand the reasonable consequences of his or her plea, the defendant must "know" beforehand that his or her potential sentence **may be** many times greater what it ordinarily would have been under the guidelines . . .

Ashley, at 489 (emphasis added).

There is nothing in Ashley to indicate that this court intended that a defendant be told prior to entering his plea that he **would**, as the Fifth District held, be sentenced as a habitual felony offender. Furthermore, section 775.084(3)(b) does not specify the form the written notice must take or the words it must

or must not contain. According to Ashley, the defendant must only know of the **possibility** that such sentencing **may** occur. The Fifth District ignored the plain language of Ashley.

The use of the word "may" in the plea agreement told the respondents of the possibility that they could be sentenced as a habitual felony offenders. It would not only be improper, but impossible to tell a defendant that he will be sentenced as a habitual offender, as opposed to telling the defendant he or she may be habitualized. While a defendant may have the requisite convictions, the state may be unable to document those convictions. If the state is unable to offer certified judgements and sentences and the defendant does not stipulate to his prior record, the defendant will not be found to be a habitual offender. In such a case, having told the defendant that he would be habitualized would be error and may be grounds for the defendant to withdraw his plea. If part of the plea agreement was that the defendant would be sentenced as a habitual offender and the defendant was not so sentenced, the state would also have grounds for invalidating the plea agreement. The purpose of the notice is not to inform the defendant that he or she will be habitualized, but rather that he or she may be habitualized.

Furthermore, as pointed out by the dissent of Judge Goshorn in Thompson, at 118, "[t]here are consequences, both legal and practical" to the state or the trial judge advising a defendant that he will be habitualized.

> Requiring the court to announce to a defendant, *before* accepting his or her plea,

> that the court will (as opposed to may) habitualize requires the court to make its decision prior to receipt and review of a presentence investigation, section 921.231, Fla. Stat. (1993), prior to a sentencing hearing and prior to review of any victim impact, section 921.143, Fla. Stat. (1993), all of which is contrary to the requirements of a sentencing hearing and is sure to raise additional legal challenges and charges that habitualization is being imposed indiscriminately. Likewise, to require the state to announce that it will (as opposed to may) attempt to habitualize will provide further fodder to the voices challenging the state's use of the habitual offender statutes. In this regard, I note that often at or immediately before a plea, the trial court, the state and indeed the defendant, are unaware of the defendant's exact criminal history. Accordingly, the court can only announce that, if the defendant's history so justifies, the court may consider or the state may seek to habitualize the defendant.

Thompson, at 118-119. Petitioner respectfully requests this court clarify its decision in Ashley to reflect that all that is required for the notice requirement to be met is that the defendant be aware that he or she may or possibly could be sentenced as a habitual felony or violent felony offender. As set forth above by petitioner and Judge Goshorn, this court could not have intended in Ashley that a defendant be told he **would** be sentenced as a habitual offender, as such would clearly be improper.

Another obvious problem with this court's decision in Ashley is its determination that the affect of gain time or early release on a defendant's sentence is a direct consequence of a plea. While petitioner agrees that a defendant should be told prior to entering a plea that he or she may be habitualized, which means the possibility of an enhanced sentenced being imposed, petitioner

respectfully submits that this court was in error when it also determined in Ashley that a defendant should be told that "habitualization may affect the possibility of early release through certain programs, . . ." Ashley, at 490 n.8. This court appears to have confused the amount of time a defendant may actually serve in jail with the maximum sentence which may be imposed upon a defendant. While a defendant should be aware of the maximum penalty he faces, whether as a habitual offender or not, petitioner asserts that how much of that sentence the defendant may actually serve due to the various types of gain time or early release is irrelevant.

In deciding Ashley, this court relied on Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709 (1969); Williams v. State, 316 So. 2d 267 (Fla. 1975); Black v. State, 599 So. 2d 1380 (Fla. 1st DCA 1992); Florida Rule of Criminal Procedure 3.172(c)(1); and Professor LaFave. As will be set forth below, not one of these five authorities holds that a defendant should be told that he or she will not receive gain time or will not be entitled to some form of early release if habitualized.

In Boykin, supra, the United States Supreme Court addressed the acceptance of a guilty plea without an affirmative showing that the plea was intelligent and voluntary. Nowhere in Boykin did the court hold that in order for a plea to be knowing the defendant must know that under certain sentencing schemes he or she may not be entitled to early release and may have to serve the entire sentence imposed. Petitioner asserts that the receiving of gain

time or some other form of early release is not a constitutional right. Gain time and early release programs are a creation of the state legislature and can be changed or taken away at anytime by the legislature. See generally Ch. 93-406, Laws of Fla. (repealing section 944.277); Op. Att'y. Gen. Fla. 92-96 (1992); Dugger v. Grant, 610 So. 2d 428 (Fla. 1992); Wait v. Singletary, 632 So. 2d 192 (Fla. 3d DCA 1994). It is impossible for anyone to accurately predict how future changes will affect a particular defendant's sentence.

In Ashley, at 488, this court quoted from Williams, supra. The Williams decision set forth the three essential requirements for taking a guilty plea. Id. at 271. The second requirement is that the "defendant must understand the nature of the charge and the consequences of his [or her] plea. The purpose of this requirement is to ensure that he [or she] knows . . . what maximum penalty may be imposed for the offense with which he [or she] is charged." Id.; see also Hinman v. United States, 730 F.2d 649 (11th Cir. 1984) (district court need only advise a defendant as to the charges, the mandatory minimum penalty and the maximum possible sentence). No where in Williams did this court hold that a consequence of a plea included any reference to whether a defendant would or would not receive gain time or be entitled to some other early release program. The consequence is the maximum sentence which may be imposed, **NOT** the amount of gain time or other form of early release a defendant will or will not receive.

In order for a plea to be knowing, this court in Ashley, at

489, stated that the defendant must know the maximum possible sentence "and that he or she will have to serve more of it." This court then noted that this view was endorsed by the First District's decision in Black, supra, and Professor LaFave. In quoting from the Black decision, this court quoted from Judge Zehmer's special concurrence. Judge Zehmer did not state that a defendant must be told that he or she will not receive the same amount of gain time if habitualized. While Judge Zehmer stated that the trial judge failed to determine if Black understood the significance of being sentenced as a career criminal, petitioner asserts that the "significance" referred to is not that Black would receive less gain time, but that Black was facing a maximum sentence that was double what the plea agreement indicated. Neither the majority nor the concurrence in Black hold that a defendant must be told he or she will not receive the same amount of gain time as someone who was not habitualized.

Furthermore, Professor LaFave likewise does not support this court's determination that a defendant should be told that as a habitual offender he or she will serve more of his or her sentence. Professor LaFave's only endorsement is that a defendant should be told of the maximum possible penalty that could be imposed. Professor LaFave makes no mention that a defendant should be told he or she may have to serve more of a sentence depending upon which sentencing scheme the defendant is sentenced under. See 2 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure section 20.4 (1984).

Finally, petitioner asserts that rule 3.172(c)(1) does not

require that a defendant be told that if habitualized he will serve a greater portion of his sentence. See State v. Will, 645 So. 2d 91, 95 (Fla. 3d DCA 1994). This court has previously held that rule 3.172(c) "sets forth the **required** areas of inquiry when the trial court accepts a plea." Id.; State v. Ginebra, 511 So. 2d 960 (Fla. 1987). Rule 3.172(c)(1) requires only that a defendant understand "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law . . ." Petitioner asserts that the maximum possible penalty provided by law does not mean the maximum possible sentence less gain time or some other form of early release. The maximum possible penalty provided by law for a third degree felony is five years unless a habitual offender sentence is to be imposed. The maximum possible penalty then doubles and becomes ten years. Irrespective of gain time or early release, the maximum possible time a defendant may be incarcerated for a third degree felony is either 5 years or 10 years as a habitual felony offender.[5] As the Second District stated in Simmons v. State, 611 So. 2d 1250, 1252 (Fla. 2d DCA 1992):

> . . . It is one thing, however, to insist that a defendant be warned his sentence may be extended, and another to require an additional warning that a determinate sentence will not later be shortened.

While the trial judge is required to advise a defendant of the maximum possible penalty provided by law which he or she is facing,

[5]In a perfect world, a defendant would serve the sentence imposed, day for day. However, we do not live in a perfect world and convicted criminals reap this benefit.

the trial judge is not required to advise the defendant of every collateral consequence which may follow a guilty or no contest plea. Zambuto v. State, 413 So. 2d 461 (Fla. 4th DCA 1982); Simmons, at 1252; Polk v. State, 405 So. 2d 758 (Fla. 3d DCA 1981); Blackshear v. State, 455 So. 2d 555 (Fla. 1st DCA 1984); see also Will, at 94 (quoting Ginebra, at 960-961 (emphasis added): "It is clear under both state and federal decisions that *the trial court judge is under no duty to inform a defendant of the collateral consequences of his guilty plea*."); Hinman, supra (court not required to explain special parole and its consequences).

> . . . "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment."

Zambuto, at 462 (citation omitted). According to Ginebra, at 961,[6] the trial judge's obligation to ensure that a defendant understands the direct consequences of his or her plea encompasses "only those consequences . . . which the trial court can impose." The other consequences of which a defendant must be informed are contained in rule 3.172(c). The affect of gain time or early release on a defendant's sentence is not a consequence the trial judge can impose and is not contained in rule 3.172(c).

Prior to Ashley, the loss of or accumulation of gain time was

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[6]Ginebra was superseded by the amendment to rule 3.172(c)(8). While the holding of Ginebra, deportation is a collateral consequence, has been superseded, petitioner asserts that Ginebra remains good law.

considered to be a collateral consequence. Simmons, at 1252-1253; Horton v. State, 646 So. 2d 253 (Fla. 1st DCA 1994); Will, supra; Levens v. State, 598 So. 2d 120 (Fla. 1st DCA 1992); Wright v. State, 583 So. 2d 399 (Fla. 1st DCA 1991); Blackshear supra; Ladner v. Henderson, 438 F.2d 638 (5th Cir. 1971). Also, when parole was previously available there was no requirement that a defendant be warned about parole eligibility, because parole was viewed as a matter of legislative and executive grace; not a direct consequence of a plea. Simmons, at 1253; see also Hinman, supra (court not required to explain special parole and its consequences); Morales-Guarjardo v. United States, 440 F.2d 775 (5th Cir. 1971) (fact that trial judge failed to advise defendant of his ineligibility for parole does not invalidate guilty plea). Likewise, there was no duty to warn those who opted for a guidelines sentence that they were ineligible for parole under the guidelines. Id.; Glover v. State, 474 So. 2d 886 (Fla. 1st DCA 1985).[7] This court's language in Ashley that the defendant should be told "the fact that habitualization may affect the possibility of early release through certain programs" is wholly inconsistent with this court's decision in Ginebra and the above cited cases.

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[7]It appears that this court has determined, post-Ashley, that the earning of provisional credits is a collateral consequence, as provisional credits could not "possibly be a factor at sentencing or in deciding to enter a plea bargain." Griffin v. Singletary, 638 So. 2d 500, 501 (Fla. 1994); see also Dugger v. Roderick, 584 So. 2d 2 (Fla. 1991). The Eleventh Circuit has likewise found Florida's control release is comparable to provisional credits, as "the purpose of control release is to address the administrative problem of prison overcrowding, not to confer a benefit on the prison population." Hock v. Singletary, 8 Fla. L. Weekly Fed. C943, C944 (11th Cir. January 9, 1995).

As previously stated, gain time and other early release programs are established by the legislature. The trial judge has no control over how much gain time a defendant may or may not receive. The trial judge also has no control over whether a defendant qualifies for some form of early release. The only situation which petitioner can envision in which the trial judge has some form of control is when the trial judge retains jurisdiction. The retention of jurisdiction is a consequence which the trial judge can impose and is a direct consequence of a plea. State v. Green, 421 So. 2d 508 (Fla. 1982). However, petitioner disagrees with and questions this court's logic as to why retaining jurisdiction is a direct consequence of a plea. Petitioner asserts that retaining jurisdiction is a direct consequence because the trial judge imposes such a restriction, not because a defendant may have to serve more of the sentence imposed.

As stated above, the only consequence of the sentence which is a direct consequence of the plea is the maximum possible sentence which may be imposed by law. Petitioner asserts that "[l]oss of basic gain time is not a consequence which the trial court imposes. Accordingly, loss of eligibility for basic gain time is a collateral consequence of a plea." Will, at 95.

It should be pointed out to this court that Ginebra was not cited in Ashley. It is not at all clear as to whether Ginebra was given any consideration in the writing of the Ashley opinion. The lack of reference to Ginebra gives rise to but one conclusion: "the primary consideration in Ashley was the state's complete

failure to advise the defendant of its intent to seek habitual offender sentencing prior to the entry of the guilty." Horton, at 256.

In determining that a direct consequence of a plea is that "habitualization may affect the possibility of early release through certain programs . . .", this court went beyond the issue raised in Ashley. It is not clear in Ashley whether this court intended that failure to so inform a defendant requires an automatic or per se reversal. Petitioner asserts that the failure to so inform a defendant does not render his or her plea involuntary and does not result in an automatic reversal. Informing the defendant of a collateral matter is aspirational at best. See Horton, at 256; Simmons, at 1253.

Section 775.084(4)(e) provides that a habitual offender sentence is not subject to the sentencing guidelines, that a defendant sentenced as a habitual offender shall not get the benefit of chapter 947, and shall not be eligible for gain time with the exception of up to 20 days incentive gain time as provided for in section 944.275(4)(b). Sections 944.277(1)(g)[8] and 947.146(4)(g) specifically set forth that a person sentenced or who has previously been sentenced under section 775.084 is not entitled to provisional credits or control release. Those sections also set forth that persons who have been convicted or previously convicted of committing or attempting to commit sexual battery; or assault, aggravated assault, battery, or aggravated battery and a sex act

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[8]Repealed by Chapter 93-406, Laws of Fla.

was attempted or completed; or kidnapping, burglary or murder and the offense was committed with the intent to commit sexual battery are not entitled to provisional credits or control release. Sections 944.277(1)(c)-(e) and 947.146(4)(c)-(e), Fla. Stat. (1991). Sections 944.277(1) and 947.146(4) also set forth additional circumstances under which a defendant is not entitled to control release or provisional credits. See section 944.277(1)(a), (b), (f), (h), (i), and (j), Fla. Stat. (1991); section 947.146(4)(a), (b), (f), (h), and (i), Fla. Stat. (1991).

If Ashley in fact did create a per se rule of reversal, "it would make no sense to limit its application to habitual offender cases." Horton, at 256 n.2. It would appear that not only should those who may qualify as a habitual offender be told "that habitualization may affect the possibility of early release through certain programs," but those who have previously been habitualized if not presently habitualized, those who have been or previously been convicted of the enumerated crimes and those who received mandatory minimum penalties should also be warned that their prior and/or current convictions "may affect the possibility of early release through certain programs."

Taking Ashley to its literal and logical conclusion, it would appear to require that **every** person charged with a crime in order to make a "knowing" decision should be told, whether he chooses to plead or go to trial, of the affect of gain time or early release on any and all sentences that defendant may possibly face. Although it would appear that this burden would fall primarily on

defense counsel, the burden would likewise fall on the prosecutor and the trial judge. See Ashley, at 490 n.8; Koenig v. State, 597 So. 2d 256, 258 (Fla. 1992). Prior to a plea or a guilty verdict after trial, it is doubtful that either the prosecutor or the trial judge would be in a position to inform a defendant on the possible sentences he faces and the affect of gain time or early release, if any, on those sentences. However, it appears under Ashley, the failure to so inform any defendant, whether pleading or going to trial, would give rise to at the least a claim of ineffective assistance of counsel. Such a claim could result in not only the withdrawal of a plea, but also a new trial. Surely this could not have been this court's intent.

If this court did intend for Ashley to establish a per se rule, petitioner asserts that there should not be a special rule for habitual offenders, but all convicted felons which fall within the exceptions should be treated alike. A consequence of a plea should not be collateral in some cases and direct in other cases; it should either be direct or collateral to all cases. Petitioner asserts, as stated above, that the consequence of early release is purely collateral and should be treated as such with all defendants; the direct consequence is the maximum amount of incarceration which may be imposed, not that the defendant may serve more time than a dissimilarly situated defendant.

Should this court determine that gain time or early release is a direct consequence of a plea petitioner asserts that rule 3.172(c) should be amended to reflect all defendant's should be

warned that their previous and current convictions "may affect the possibility of early release through certain programs." The determination of early release consequences by this court to be a direct consequence should be treated as this court treated the determination that deportation was a direct consequence, amend the rule. See Fla. R. Crim. P. 3.172(c)(8).

Petitioner strongly asserts that any early release is a collateral consequence of a plea and rule 3.172(c) does not need to be amended. However, if this court has in fact determined that the affect of early release on a sentence is a direct consequence, those facing habitual offender sentencing should not be treated specially. All defendants should be treated alike and the rule should be amended.

As is apparent from the decision in the instant cases, as well as the decisions in Horton and Will, this court's Ashley decision has raised as many questions as it answered. See also Wilson v. State, 645 So. 2d 1042 (Fla. 4th DCA 1994); Heatley v. State, 636 So. 2d 153 (Fla. 1st DCA 1994). The Ashley decision should be clarified to reflect that notice as was given in these cases and notice which reflects only the possibility that a defendant may be habitualized is sufficient, thereby addressing the concerns of Judge Goshorn's dissent. Petitioner also requests this court clarify Ashley as to whether this court intended gain time or early release as a direct consequence of a plea. Petitioner again asserts that the affect of gain time and/or early release programs on a defendant's sentence is not a direct consequence of a plea.

It is impossible for the defense attorney, trial judge or prosecutor to accurately predict how much of a particular sentence a defendant will in fact serve. The direct consequence is the maximum sentence which may be imposed upon a defendant, not the amount of time a defendant will actually serve of the sentence imposed. Petitioner also requests this court clarify Ashley as to whether an objection to the form of notice is required in order to preserve the issue for appellate review as set forth in footnote 2 of the instant brief.

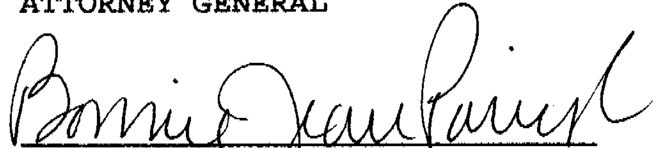
Finally, should this court determine that the affect of habitualization on gain time and early release is a direct consequence of a plea, each of the five respondents was aware of this consequence at the time they entered their pleas. The plea agreements specifically set forth that the respondents would not receive any basic gain time if they were sentenced as a habitual offender. This was sufficient to inform the respondents that they would be serving more of their sentences. While petitioner requests this court clarify the Ashley decision, irrespective of that request, the written plea agreements in these cases were sufficient notice and established that each of the respondents' pleas were knowing. If the written plea agreement was insufficient any error was harmless, as each of the five respondents had actual notice. The decisions in these cases should be reversed.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner requests this court quash the decisions in the instant case, overrule the decision in Thompson and clarify its decision in Ashley as requested above.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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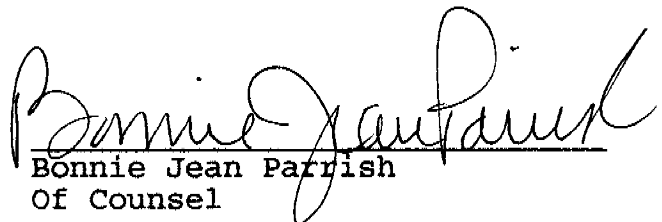
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Amended Merits Brief of Petitioner and Appendix has been furnished by delivery to Nancy Ryan, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 21st day of February, 1995.



Bonnie Jean Parrish
Of Counsel

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

RICHARD BLACKWELL,

Respondent.

___________________________/

CASE NO. 84,071; 84,176; 84,148; 84,150 and 83,951

APPENDIX

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Whether characterized as a request or an order, we conclude that Deputy Willmot's direction for Popple to exit his vehicle constituted a show of authority which *restrained Popple's freedom of movement because a reasonable person under the circumstances would believe that he should comply. See Dees v. State,* 564 So.2d 1166 (Fla. 1st DCA 1990).

Popple v. State, 626 So.2d 185 (Fla.1993) (emphasis added).

The state relies on this court's decision in *Curry v. State,* 570 So.2d 1071 (Fla. 5th DCA 1990). In *Curry,* the police entered a bar, walked up behind Curry, and told him: "Stop. Police." Curry walked away but threw a pill bottle containing rocks of cocaine on the ground. In affirming the denial of a motion to suppress this court held, "Only when the police begin an actual physical search of a suspect does abandonment become involuntary and tainted by an illegal search and seizure." *Curry* at 1073. *Curry* is supported by the decision in *California v. Hodari D.,* 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (U.S.Cal.1991) which held that a seizure does not occur until a person is actually physically subdued by an officer or submits to an officer's show of authority. *Hodari* drew "a clear distinction between those who yield to the authority of the police and those who flee." *Hollinger* at 1243. In *Curry,* the defendant did not submit to authority or comply with the officers' demand; he simply walked away, abandoning the cocaine as he ignored the order to stop. Here, Harrison, in full submission to the show of authority made, followed the order given to him by removing his hand from his pocket. The order and submission therefore constituted a seizure.

The judgment and sentence are vacated, the denial of the motion to suppress is reversed, and we remand for further proceedings.

REVERSED; REMANDED.

W. SHARP, and GOSHORN, JJ., concur.

Melvin OGLESBY, Appellant,

v.

STATE of Florida, Appellee.

No. 92-1844.

District Court of Appeal of Florida,
Fifth District.

Dec. 3, 1993.

Defendant appealed from judgment of the Circuit Court, Volusia County, John W. Watson, III, J., sentencing him as habitual offender. The District Court of Appeal, Goshorn, J., held that: (1) it was proper for trial court, rather than state, to file notice of habitual offender sentencing, and (2) trial court's failure to provide defendant with written notice of intent to habitualize prior to entry of defendant's guilty plea was harmless error.

Affirmed.

Criminal Law ⚿1203.3, 1203.26(4)

Trial court's failure to provide defendant with written notice of intent to habitualize prior to entry of defendant's guilty plea was harmless error, where defendant, by his signed written plea agreement, specifically acknowledged that his attorney explained to him total maximum penalties for charges and that he understood consequences of judge's determining him to be violent or nonviolent habitual felony offender, including maximum sentences and fact that he would not be entitled to receive any basic gain time.

James B. Gibson, Public Defender and Brynn Newton, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Bonnie Jean Parrish, Asst. Atty. Gen., Daytona Beach, for appellee.

GOSHORN, Judge.

Melvin Oglesby appeals from the judgment of the trial court sentencing him as a habitual offender. On appeal, he contends that it was error for the trial court, rather than the State, to provide him with the notice of intent to habitualize. He further argues that his sentence must be reversed because the notice was not provided prior to the entry of his plea. We affirm.

As to Oglesby's first contention, this court has previously held that it is proper for the trial judge to file the notice for habitual offender sentencing. *Toliver v. State,* 605 So.2d 477 (Fla. 5th DCA 1992), *review denied,* 618 So.2d 212 (Fla.1993). As to Oglesby's second contention, we acknowledge that approximately one year after Oglesby tendered his plea, but while this appeal was pending, the Florida Supreme Court decided *Ashley v. State,* 614 So.2d 486 (Fla.1993). In *Ashley,* the court held that

> in order for a defendant to be habitualized following a guilty or nolo plea, the following must take place prior to acceptance of the plea: 1) The defendant must be given written notice of intent to habitualize, and 2) the court must confirm that the defendant is personally aware of the possibility and reasonable consequences of habitualization.

Id. at 490 (footnote omitted). However, unlike the plea agreement in *Ashley* which expressly provided that Ashley would be sentenced under the guidelines, Oglesby, by his signed written plea agreement, specifically acknowledged that

> 4. I have read the information or indictment in this case and I understand the charge(s) to which I enter my plea(s). *My attorney has explained to me the total maximum penalties for the charge(s) and as a result I understand the following:*
>
> * * * * * *
>
> c. 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 that as to any habitual offender sentence I would not be entitled to receive any basic gain time.
>
> d. That should I be determined by the Judge to be a Non-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 0 years imprisonment *and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.* [Emphasis added].

The plea agreement further set forth that Oglesby had read the written plea, discussed it with his attorney, and that Oglesby fully understood the plea agreement. Oglesby made the same representations to the trial court in open court at the plea proceeding. We therefore find that the protections afforded by *Ashley* were provided to Oglesby prior to the entry of his plea and find that the "harmless error" analysis set forth by the supreme court in *Massey v. State,* 609 So.2d 598 (Fla.1992) applies. To hold otherwise would elevate form over substance.

AFFIRMED.

PETERSON and GRIFFIN, JJ., concur.

TOWN OF PONCE INLET, a Florida municipal corporation, Petitioner,

v.

Edmond R. RANCOURT and Paula Rancourt, husband and wife, Respondents.

No. 93-1667.

District Court of Appeal of Florida, Fifth District.

Dec. 3, 1993.

Town petitioned for writ of certiorari seeking review of order of the Circuit Court,

Appendix G

tive assistance" of the attorney in postconviction proceedings. The supreme court held that mutuality of the parties is not a prerequisite to the defensive application of collateral estoppel in a criminal-to-civil context, so that the plaintiff was collaterally estopped from raising the same facts underlying his unsuccessful "ineffective assistance of counsel" claim in his legal malpractice action against his former attorney.

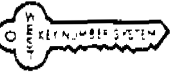
Stogniew relies heavily on *Zeidwig* to persuade us that the supreme court abandoned the mutuality-of-parties requirement and that this requirement should not be applied to prevent "offensive collateral estoppel" in the administrative proceedings—civil action context. We do not agree that the supreme court relaxed the mutuality-of-parties requirement to that extent. Further, we do not agree with Stogniew that she could be considered to have been in privity with the DPR in its investigation and discipline of McQueen, so that the requirement of mutuality of parties has been met.

In sum, we agree with the trial court that Stogniew could not use the DPR decision against McQueen as offensive collateral estoppel to preclude McQueen from contesting in this action the same facts that were involved in the DPR proceeding. Recognizing the strength of Stogniew's arguments, we certify the following question to the supreme court as a question of great public importance:

MAY AN ADMINISTRATIVE DETERMINATION OF A PROFESSIONAL'S MISCONDUCT BE USED AS CONCLUSIVE PROOF OF THE FACTS UNDERLYING THAT DETERMINATION IN A SUIT AGAINST THE PROFESSIONAL FOR NEGLIGENCE BASED ON THE SAME FACTS?

Affirmed; question certified.

BLUE and QUINCE, JJ., concur.



Willie T. THOMPSON, Appellant,

v.

STATE of Florida, Appellee.

No. 93-921.

District Court of Appeal of Florida,
Fifth District.

June 3, 1994.

After defendant entered negotiated plea agreement, the Circuit Court, Volusia County, John W. Watson, III, J., denied defendant's motion to strike court's notice for post-plea proceeding to determine habitual offender status. Defendant appealed. In hearing en banc, the District Court of Appeal, Harris, C.J., held that plea agreement in which defendant acknowledged consequences of habitual offender status did not provide notice that habitualization would be sought.

Reversed and remanded.

Goshorn, J., filed dissenting opinion.

1. Criminal Law ⇐1203.3

Defendant's acknowledgment, in plea agreement, of penalties defendant could receive if determined to be habitual offender, did not constitute notice of state's or court's intent to seek habitual offender status.

2. Criminal Law ⇐1192

On remand due to trial court's seeking of habitual offender status without proper notice to defendant, if trial court sought to impose sentence outside guideline range, court was required to give defendant opportunity to withdraw plea.

James B. Gibson, Public Defender, and Nancy Ryan, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Robin Compton Jones, Asst. Atty. Gen., Daytona Beach, for appellee.

'SON, Appellant.

[illegible] Appellee.

3-921.

Appeal of Florida,
District.

, 1994.

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III, J., denied defen-
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District Court of Ap-
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l dissenting opinion.

1203

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1192

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status without proper
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give defendant oppor-
lea.

Public Defender, and
blic Defender, Daytona

orth, Atty. Gen., Talla-
Compton Jones, Asst.
Beach, for appellee.

ON REHEARING EN BANC

HARRIS, Chief Judge.

We grant the State's motion for rehearing en banc, withdraw our previous opinion and substitute the following.

Willie T. Thompson entered into a negotiated plea with the State in which he acknowledged.

> 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 *50* years imprisonment and a mandatory minimum of *20* years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.

The court accepted the plea on *October 14.*[1] On *November 12,* the Judge filed a Notice and Order for Separate Proceeding to Determine if Defendant is Habitual Felony Offender or Habitual Violent Felony Offender. The defense moved to strike the notice as untimely. The judge denied the motion, determined that Thompson was an habitual violent felony offender and sentenced him as such. Thompson appeals; we reverse.

[1] We acknowledge that this court in *Oglesby v. State,* 627 So.2d 585 (Fla. 5th DCA 1993), *rev. denied,* 637 So.2d 236 (Fla.1994), held that a similar provision in a negotiated plea satisfied the notice requirement of *Ashley v. State,* 614 So.2d 486 (Fla.1993). On further reflection, we find that such a provision does not satisfy the *Ashley* standard and recede from *Oglesby.*

Ashley requires that the defendant must be made aware *prior to his plea* that either the State intends to seek habitual offender treatment or that the court intends on its own to consider habitual offender treatment at sentencing. The previously quoted provision in the form negotiated plea does not suggest that the defendant *will be* considered for habitual offender treatment; it merely [illegible] generally [illegible] the habitual sentence *if he is* so considered.

Ashley requires that the defendant be made aware that someone (the State or the Judge) will seek habitual offender treatment prior to his plea *so* that he can take that into account in deciding whether or not to plead. Merely advising him that the law may possibly be applicable to him (the statute itself gives him that notice) is not the same as advising him that someone will actively seek to apply it against him.

Ashley specifically holds:

> In sum, we hold that in order for a defendant to be habitualized following a guilty or *nolo* plea, the following must take place prior to acceptance of the plea: (1) the defendant must be given written notice of intent to habitualize, and (2) the court must confirm that the defendant is personally aware of the possibility and reasonable consequences of habitualization.

Ashley, 614 So.2d at 490.

In the case at bar, condition two was met; condition one clearly was not.

[2] We recede from *Oglesby,* reverse the sentence in this case and remand for resentencing. The *Ashley* court remanded for resentencing within the guidelines because that was consistent with Ashley's negotiated plea and Ashley had not requested to withdraw his plea. However, the *Ashley* court did not consider the possibility that the trial court might believe from a review of Ashley's record (a review only possible after the plea because the PSI was not prepared pre-plea) that it could not in good conscience proceed under the plea. In such instance, we have held that the trial court may sentence as it deems appropriate—consistent with guideline or habitualization restrictions—so long as it gives the defendant an opportunity to withdraw his or her plea and proceed to trial.[2] Giving the defendant the opportunity to withdraw the plea eliminates any prejudice that might otherwise occur because of a sentencing decision made on an after acquired

1. Although the court assured itself that Thompson understood the plea, there was no discussion that the court intended to consider habitual offender treatment.

2. *Bolling v. State,* 631 So.2d 310 (Fla. 5th DCA 1994).

PSI. At resentencing, therefore, the trial court should either sentence within the guideline range or, if it believes that a greater sentence is justified, so advise the defendant and permit him to either accept the greater sentence or withdraw his plea.

REVERSED and REMANDED.

DAUKSCH, COBB, W. SHARP, PETERSON, GRIFFIN, DIAMANTIS and THOMPSON, JJ., concur.

GOSHORN, J., dissents, with opinion.

GOSHORN, Judge, dissenting.

Today, the majority unnecessarily expands the rule announced by the supreme court in *Ashley v. State,* 614 So.2d 486 (Fla.1993) and imposes yet another requirement on the already overburdened trial judges of the State of Florida. In my view, attempting to comply with the majority's directive is unnecessarily burdensome in practice, is not needed to provide a defendant with the required constitutional protections, and is certain to generate legal challenges.

Justice Shaw succinctly set forth the analysis supporting the court's decision in *Ashley:*

> Because habitual offender maximums clearly constitute the "maximum possible penalty provided by law"—exceeding both the guidelines and standard statutory maximums—and because habitual offender sentences are imposed in a significant number of cases, our ruling in *Williams* [*v. State,* 316 So.2d 267 (Fla.1975)] and the plain language of rule 3.172 require that before a court may accept a guilty or nolo plea from an eligible defendant it must ascertain that the defendant is aware of the *possibility and reasonable consequences of habitualization.* To state the obvious, in order for the plea to be "knowing," i.e., in order for the defendant to understand the reasonable consequences of his or her plea, the defendant must "know" beforehand that his or her *potential* sentence may be many times greater what it ordinarily would have been under the guidelines and that he or she will have to serve more of it.

Ashley, 614 So.2d at 489 (emphasis added). Certainly, through his plea agreement, Thompson acknowledged the *possibility and reasonable consequences* of habitualization. He also acknowledged being [illegible] potential sentence should he [illegible]. Therefore, in my view, Thompson [illegible] accorded the protections provided by the above quoted portion of *Ashley.*

The conflict, however, arises because the *Ashley* court, in summarizing its holding, worded its opinion as follows:

> In sum, we hold that in order for a defendant to be habitualized *following* a guilty or nolo plea, the following must take place prior to acceptance of the plea: 1) The defendant must be given written notice of intent to habitualize, and 2) the court must confirm that the defendant is personally aware of the possibility and reasonable consequences of habitualization.

Id. at 490 (footnote omitted). The majority, reasonably, interprets this language to require that a defendant be advised, not of the *possibility* of habitualization, but that someone (i.e., the court or the state) will "actively seek his habitualization." However, further adding to the confusion as to the proper interpretation of *Ashley* is the footnote to the last quoted language stating that "the defendant should be told of his or her *eligibility* for habitualization." *Id.* (emphasis added). I conclude that a fair reading of the entire *Ashley* opinion requires only that a defendant be advised or acknowledge that he knows of the *possibility, eligibility* and *consequences* of habitualization.

My concern about the majority's insistence that a defendant be advised that either the court or the state *will* (as distinguished from may) attempt to habitualize is not merely theoretical. There are consequences, both legal and practical. Requiring the court to announce to a defendant, *before* accepting his or her plea, that the court will (as opposed to may) habitualize requires the court to make its decision prior to receipt and review of a presentence investigation, § 921.231, Fla. Stat. (1993), prior to a sentencing hearing and prior to review of any victim impact, § 921.143, Fla.Stat. (1993), all of which is contrary to the requirements of a sentencing hearing and is sure to raise additional legal challenges and charges that habitualization is

being imposed indiscriminately. Likewise, to require the state to announce that it will (as opposed to *may*) attempt to habitualize will provide further fodder to the voices challenging the state's use of the habitual offender statutes. In this regard, I note that often at or immediately before a plea, the trial court, the state and indeed the defendant, are unaware of the defendant's exact criminal history. Accordingly, the court can only announce that, if the defendant's history so justifies, the court may consider or the state may seek to habitualize the defendant.

I believe the plea agreement in this case affords the defendant the essential protections required by *Ashley*. There is no need to recede from *Oglesby v. State*, 627 So.2d 585 (Fla. 5th DCA 1993), *review denied*, 637 So.2d 236 (Fla.1994) and it is bad policy to do so. I would affirm.

1

Howard T. SCOTT, Appellant,

v.

STATE of Florida, Appellee.

No. 93-1644.

District Court of Appeal of Florida,
Fifth District.

June 17, 1994.

Appeal from the Circuit Court for Volusia County; John W. Watson, III, Judge.

James B. Gibson, Public Defender, and Lyle Hitchens, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Rebecca Roark Wall, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Appellant Howard T. Scott appeals his sentencing as an habitual felony offender.[1] Scott signed a plea form that stated he "could" be sentenced as an habitual offender. He was not told specifically that he *would* be sentenced as an habitual offender. After he had entered his plea, the trial judge filed a notice that he would sentence Scott as an habitual offender if that determination was made at his sentencing hearing. After the sentencing hearing, Scott was sentenced as an habitual offender. We reverse and remand for resentencing. *See Ashley v. State*, 614 So.2d 486 (Fla.1993); *Thompson v. State*, 638 So.2d 116 (Fla. 5th DCA 1994). At resentencing, the trial judge may impose a guideline sentence or if he believes that a greater sentence is justified, he may so advise the defendant and permit him to either accept the greater sentence or withdraw his plea and proceed to trial. *Thompson*, 638 So.2d at 117.

REVERSED and REMANDED for proceedings consistent with this opinion.

DAUKSCH, GRIFFIN and THOMPSON, JJ., concur.

1. § 775.084(3)(b), Fla.Stat. (1991).

2

Richard BLACKWELL, Appellant,

v.

STATE of Florida, Appellee.

No. 93-2401.

District Court of Appeal of Florida,
Fifth District.

June 17, 1994.

Appeal from the Circuit Court for Volusia County; John W. Watson, III, Judge.

Appendix H

James B. Gibson, Public Defender and M.A. Lucas, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee and Kristen L. Davenport, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Appellant Richard Blackwell appeals his sentencing as an habitual felony offender.[1] Blackwell signed a plea form that stated he "could" be sentenced as an habitual offender for the offense of sale or delivery of cocaine.[2] Later, the trial judge filed a notice that Blackwell would be sentenced as an habitual offender. Blackwell moved to strike the notice. The motion was denied and Blackwell was sentenced as an habitual offender. We reverse and remand for resentencing. *See Ashley v. State,* 614 So.2d 486 (Fla.1993); *Thompson v. State,* 638 So.2d 116 (Fla. 5th DCA 1994). At resentencing, the trial judge may impose a guideline sentence or if he believes that a greater sentence is justified, he may so advise the defendant and permit him to either accept the greater sentence or withdraw his plea and proceed to trial. *Thompson,* 638 So.2d at 117.

REVERSED and REMANDED for proceeding consistent with this opinion.

COBB, W. SHARP and THOMPSON, JJ., concur.

Jessie BROWN, II, Appellant,

v.

STATE of Florida, Appellee.

No. 93-2397.

District Court of Appeal of Florida, Fifth District.

July 1, 1994.

Appeal from the Circuit Court for Volusia County; John W. Watson, III, Judge.

1. § 775.084(3)(b), Fla.Stat. (1991).

2. § 893.13(1)(a)(1), Fla.Stat. (1991).

James B. Gibson, Public Defender, and Brynn Newton, Asst. Public Defender, Daytona Beach, for appellant.

No appearance for appellee.

GRIFFIN, Judge.

This is an *Anders*[1] case in which appellant's counsel has raised the issue of the habitual offender sentence while recognizing this court's opinion in *Oglesby v. State,* 627 So.2d 585 (Fla. 5th DCA 1993), from which we have now receded in *Thompson v. State,* 638 So.2d 116 (Fla. 5th DCA 1994). *Thompson* controls this case and we remand for further proceedings consistent with *Thompson.*

We also agree there is a discrepancy between the court's oral pronouncement concerning community control condition 31 that appellant may meet his monetary conditions of community control by conversion to community service hours if appellant chooses. The written order deviates from the oral pronouncement and should be made to conform.

JUDGMENT AFFIRMED; SENTENCE VACATED; AND REMANDED.

W. SHARP, J., concurs.

GOSHORN, J., dissents, with opinion.

GOSHORN, Judge, dissenting.

I respectfully dissent for the reasons set forth in my opinion in *Oglesby v. State,* 627 So.2d 585 (Fla. 5th DCA 1993) *review denied,* No. 82,987, 637 So.2d 236 (Fla. Mar. 11, 1994) and my dissent in *Thompson v. State,* 638 So.2d 116 (Fla. 5th DCA 1994).

1. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

Appendix I

being imposed indiscriminately. Likewise, to require the state to announce that it will (as opposed to may) attempt to habitualize will provide further fodder to the voices challenging the state's use of the habitual offender statutes. In this regard, I note that often at or immediately before a plea, the trial court, the state and indeed the defendant, are unaware of the defendant's exact criminal history. Accordingly, the court can only announce that, if the defendant's history so justifies, the court may consider or the state may seek to habitualize the defendant.

I believe the plea agreement in this case affords the defendant the essential protections required by *Ashley*. There is no need to recede from *Oglesby v. State*, 627 So.2d 585 (Fla. 5th DCA 1993), *review denied*, 637 So.2d 236 (Fla.1994) and it is bad policy to do so. I would affirm.

1

Howard T. SCOTT, Appellant,

v.

STATE of Florida, Appellee.

No. 93-1644.

District Court of Appeal of Florida, Fifth District.

June 17, 1994.

Appeal from the Circuit Court for Volusia County; John W. Watson, III, Judge.

James B. Gibson, Public Defender, and Lyle Hitchens, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Rebecca Roark Wall, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Appellant Howard T. Scott appeals his sentencing as an habitual felony offender.[1] Scott signed a plea form that stated he "could" be sentenced as an habitual offender. He was not told specifically that he *would* be sentenced as an habitual offender. After he had entered his plea, the trial judge filed a notice that he would sentence Scott as an habitual offender if that determination was made at his sentencing hearing. After the sentencing hearing, Scott was sentenced as an habitual offender. We reverse and remand for resentencing. *See Ashley v. State*, 614 So.2d 486 (Fla.1993); *Thompson v. State*, 638 So.2d 116 (Fla. 5th DCA 1994). At resentencing, the trial judge may impose a guideline sentence or if he believes that a greater sentence is justified, he may so advise the defendant and permit him to either accept the greater sentence or withdraw his plea and proceed to trial. *Thompson*, 638 So.2d at 117.

REVERSED and REMANDED for proceedings consistent with this opinion.

DAUKSCH, GRIFFIN and THOMPSON, JJ., concur.

1. § 775.084(3)(b), Fla.Stat. (1991).

2

Richard BLACKWELL, Appellant,

v.

STATE of Florida, Appellee.

No. 93-2401.

District Court of Appeal of Florida, Fifth District.

June 17, 1994.

Appeal from the Circuit Court for Volusia County; John W. Watson, III, Judge.

James B. Gibson, Public Defender and M.A. Lucas, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee and Kristen L. Davenport, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Appellant Richard Blackwell appeals his sentencing as an habitual felony offender.[1] Blackwell signed a plea form that stated he "could" be sentenced as an habitual offender for the offense of sale or delivery of cocaine.[2] Later, the trial judge filed a notice that Blackwell would be sentenced as an habitual offender. Blackwell moved to strike the notice. The motion was denied and Blackwell was sentenced as an habitual offender. We reverse and remand for resentencing. *See Ashley v. State,* 614 So.2d 486 (Fla.1993); *Thompson v. State,* 638 So.2d 116 (Fla. 5th DCA 1994). At resentencing, the trial judge may impose a guideline sentence or if he believes that a greater sentence is justified, he may so advise the defendant and permit him to either accept the greater sentence or withdraw his plea and proceed to trial. *Thompson,* 638 So.2d at 117.

REVERSED and REMANDED for proceeding consistent with this opinion.

COBB, W. SHARP and THOMPSON, JJ., concur.

1. § 775.084(3)(b), Fla.Stat. (1991).

2. § 893.13(1)(a)(1), Fla.Stat. (1991).

Jessie BROWN, II, Appellant,

v.

STATE of Florida, Appellee.

No. 93-2397.

District Court of Appeal of Florida, Fifth District.

July 1, 1994.

Appeal from the Circuit Court for Volusia County; John W. Watson, III, Judge.

James B. Gibson, Public Defender, and Brynn Newton, Asst. Public Defender, Daytona Beach, for appellant.

No appearance for appellee.

GRIFFIN, Judge.

This is an *Anders*[1] case in which appellant's counsel has raised the issue of the habitual offender sentence while recognizing this court's opinion in *Oglesby v. State,* 627 So.2d 585 (Fla. 5th DCA 1993), from which we have now receded in *Thompson v. State,* 638 So.2d 116 (Fla. 5th DCA 1994). *Thompson* controls this case and we remand for further proceedings consistent with *Thompson.*

We also agree there is a discrepancy between the court's oral pronouncement concerning community control condition 31 that appellant may meet his monetary conditions of community control by conversion to community service hours if appellant chooses. The written order deviates from the oral pronouncement and should be made to conform.

JUDGMENT AFFIRMED; SENTENCE VACATED; AND REMANDED.

W. SHARP, J., concurs.

GOSHORN, J., dissents, with opinion.

GOSHORN, Judge, dissenting.

I respectfully dissent for the reasons set forth in my opinion in *Oglesby v. State,* 627 So.2d 585 (Fla. 5th DCA 1993) *review denied,* No. 82,987, 637 So.2d 236 (Fla. Mar. 11, 1994) and my dissent in *Thompson v. State,* 638 So.2d 116 (Fla. 5th DCA 1994).

1. *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

1

James Steven BERNING, Appellant,

v.

STATE of Florida, Appellee.

No. 93-2352.

District Court of Appeal of Florida,
Fifth District.

July 1, 1994.

Defendant was convicted in the Circuit Court for Marion County, Carven D. Angel, J., of vehicular homicide, and he appealed. The District Court of Appeal, Cobb, J., held that evidence was sufficient to support conviction.

Affirmed.

Automobiles ⚿355(13)

Conviction of vehicular homicide was supported by evidence that defendant, while driving in rain on hilly two-lane road at excessive speed, attempted to pass another vehicle in no-passing zone, resulting in head-on collision with oncoming vehicle and death of other driver.

James B. Gibson, Public Defender, and M.A. Lucas, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Belle B. Turner, Asst. Atty. Gen., Daytona Beach, for appellee.

COBB, Judge.

The appellant, Berning, contends the facts adduced at his trial were insufficient to sustain his conviction of vehicular homicide. The evidence favorable to the state was that Berning, while driving in the rain on a hilly two-lane road at an excessive speed, attempted to pass another vehicle in a no-passing zone, resulting in a head-on collision with an oncoming vehicle and the death of the other driver. In our opinion, these facts were sufficient. *See Byrd v. State*, 531 So.2d 1004 (Fla. 5th DCA 1988). We find no merit in the appellant's argument in respect to the denial of his motion to dismiss per Florida Rule of Criminal Procedure 3.190(c)(4). *See e.g., State v. Patel*, 453 So.2d 218 (Fla. 5th DCA 1984).

AFFIRMED.

HARRIS, C.J., and DAUKSCH, J., concur.

2

Darryl HOLMES, Appellant,

v.

STATE of Florida, Appellee.

No. 93-2343.

**District Court of Appeal of Florida,
Fifth District.**

July 1, 1994.

Appeal from the Circuit Court for Volusia County; John W. Watson, III, Judge.

James B. Gibson, Public Defender, and Lyle Hitchens, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Kristen L. Davenport, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Holmes appeals from the four-year habitual offender sentence he received after entering a guilty plea to attempted burglary of a conveyance.[1] Holmes did not receive any notice the state or trial judge intended to seek an enhanced sentence prior to entering his plea. The plea form merely says that "should" he be determined to be a felony offender by the trial judge he "could" receive a longer prison sentence and "would not be entitled" any basic gain time.

1. §§ [illegible] 777.04, Fla.Stat. (1993).

We have held that this type of [illegible] does not satisfy the notice requirement [illegible] *Ashley v. State*, 614 So.2d 486 (Fla.1993). *See Thompson v. State*, 638 So.2d 116 (Fla. 5th DCA 1994). Accordingly, we vacate the sentence and remand. On remand, the trial court may sentence as it deems appropriate. The trial court should give Holmes an opportunity to withdraw his plea and proceed to trial if it determines an enhanced sentence is justified, or sentence Holmes to a guidelines sentence.

Sentence VACATED; REMANDED.

COBB, W. SHARP and THOMPSON, JJ., concur.

Timothy Wayne GRASSO, Appellant,

v.

STATE of Florida, Appellee.

No. 93-1681.

District Court of Appeal of Florida, Fifth District.

July 1, 1994.

Defendant was convicted in the Circuit Court for Volusia County, John W. Watson, III, J., and sentenced as habitual offender, and he appealed. The District Court of Appeal, W. Sharp, J., held that trial court gave defendant adequate warnings of intent to seek enhanced sentence.

Affirmed.

1. Criminal Law [illegible] 1203

Although [illegible] trial [illegible] failed to give defendant written notice of intent to seek enhanced sentencing prior to accepting defendant's guilty pleas at plea hearing, trial judge gave defendant adequate warnings in his statement at plea hearing.

2. Criminal Law ⚷1042

Defendant's failure to object to two conditions of probation at sentencing hearing was fatal to his challenge on appeal.

James B. Gibson, Public Defender, and Susan A. Fagan, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Mark S. Dunn, Asst. Atty. Gen., Daytona Beach, for appellee.

W. SHARP, Judge.

[1] Grasso appeals his habitual offender sentence, various conditions of probation imposed at the sentencing hearing, and certain fees imposed.[1] Although the state and trial judge failed to give Grasso written notice of intent to seek enhanced sentencing prior to accepting Grasso's guilty pleas at the plea hearing, the trial judge gave Grasso adequate warnings which in our view satisfy the requirements of *Ashley v. State*, 614 So.2d 486 (Fla.1993); *Thompson v. State*, 638 So.2d 116 (Fla. 5th DCA 1994).[2]

[2] Grasso failed to object to the two conditions of probation he now challenges (abstaining from alcohol and not entering any establishment whose primary purpose is the sale or consumption of alcoholic beverages), at the sentencing hearing. That is fatal to his challenge on appeal. *See Larson v. State*, 572 So.2d 1368 (Fla.1991); *Bentley v. State*.

1. A public defender fee of $100.00, $250.00 for the state attorney's costs and $150.00 for law enforcement agency costs.

2. At the plea hearing, the trial judge said:

> If you have two or more prior felony convictions on your record—and you already said you do—there would be a separate proceeding conducted. It would be set for the 24th, the same day the sentencing would be set. If you have those two prior felony convictions, then your sentence doubles .... If in fact you are habitual, qualified to be one, *I will classify you as a habitual.* (emphasis supplied)

The trial court also warned Grasso he would not be entitled to basic gain time and the sentence could be consecutive to sentences he was then serving.

[illegible] because Bugg did not bring an [illegible] for an accounting and dissolution, [illegible] is no basis to award attorney's fees. [illegible] *[illegible]berg v. Kline*, 542 So.2d 1002, 1005 [illegible] 3d DCA 1988) (finding that the trial court erred in awarding attorney's fees on the basis that the plaintiff recovered partnership assets incident to an accounting when the plaintiff did not bring an action for dissolution but instead, the parties agreed to the dissolution), *review denied*, 553 So.2d 1165 (Fla.1989); *Balzam v. Cohen*, 427 So.2d 329, 331 (Fla. 3d DCA 1983) (reversing attorney's fees awarded on the basis of the *Richey* exception because partner did not bring an action for dissolution), *disapproved of on other grounds by, Johnson v. Bednar*, 57[illegible] So.2d 822, 826 (Fla.1991); *Granger Lumber Co., Inc. v. Preston*, 391 So.2d 370, 371 (Fla. 1st DCA 1980) (stating that where action was for breach of employment contract, prevailing party was not entitled to attorney's fees absent a controlling statute or agreement between the parties although accountant was required to establish the debt).

COST OF APPRAISAL

[3,4] The Cheeks assert that the trial [illegible] also erred in requiring them to pay for [illegible] appraisal costs because Bugg did not [illegible] on the significant issues in the litiga[illegible] citing *Moritz v. Hoyt Enterprises, Inc.*, [illegible] So.2d 807 (Fla.1992). However, this is [illegible] test. The Cheeks must bear the cost [illegible] appraisal because, under the partner[illegible] agreement, they had a duty to do so.[4]

[illegible] summary, we reverse the order of the [illegible] awarding Bugg his costs and at[illegible] fees, and affirm the determination [illegible] Cheeks are responsible for the cost [illegible] appraisal. In view of our resolution of [illegible] based upon the issues already [illegible] we find it unnecessary to address [illegible] remaining point on appeal.

AFFIRMED in part; REVERSED in part; REMANDED.

HARRIS, C.J., and COBB, J., concur.

Robert JONES, Appellant,

v.

STATE of Florida, Appellee.

No. 93–109.

District Court of Appeal of Florida, Fifth District.

July 1, 1994.

Defendant pleaded guilty to one count of possession of cocaine, and was sentenced in the Circuit Court, Volusia County, John W. Watson, III, J. Defendant appealed sentence. The District Court of Appeal, W. Sharp, J., held that mention in plea agreement, of possibility that defendant might be sentenced as an habitual offender, did not constitute compliance with statute requiring that state notify defendant, prior to defendant's entry of guilty plea, that habitual offender sentence would be sought.

Reversed and remanded.

Criminal Law ⟹273.1(4), 1203.3

Reference in plea agreement, to possibility that defendant might be sentenced as habitual offender, did not constitute compliance with requirement that state give defendant notice, prior to defendant's entry of

[illegible] affairs"). In contrast, an appraisal [illegible]tion or estimation of value of property [illegible] partial, disinterested person of suitable [illegible]ons." *Black's Law Dictionary* 100 (6th [illegible]

[illegible] erred, however, in finding that Bugg [illegible] to the appraisal costs (and attorney's fees) under section 620.665(2) of the Florida Statutes. This section grants a partner the right to an accounting if such exists under the terms of an agreement. Here, the agreement entered into between the parties did not provide for the right to a formal accounting. It merely obligated the managing general partners to obtain an independent appraisal of partnership assets.

plea, that it would seek habitual offender sentencing. West's F.S.A. § 775.084(3)(b).

James B. Gibson, Public Defender, and Daniel J. Schafer, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Mark S. Dunn, Asst. Atty. Gen., Daytona Beach, for appellee.

W. SHARP, Judge.

Jones appeals from a sentencing order, imposing an habitual offender sentence, after he pled guilty to one count of possession of cocaine.[1] Jones was sentenced to 4½ years incarceration, followed by 5 years probation. He argues the trial judge erred in imposing this sentence because the state did not file a written notice of intent to seek habitual offender treatment[2] until *after* the plea had been entered. We agree and reverse.

Jones signed a written plea agreement on October 30, 1992. The agreement recited that Jones could receive a maximum sentence of 5 years, or 10 years if the judge determined him to be an habitual offender. The state filed its notice of intent to seek habitual offender treatment on December 2, 1992. At the sentencing hearing on December 17, 1992, the judge inquired whether Jones had read the plea agreement and conferred with his attorney prior to signing it. Jones responded in the affirmative. The judge then sentenced Jones, imposing habitual offender treatment.

In *Ashley v. State,* 614 So.2d 486, 489–490 (Fla.1993), the supreme court discussed section 775.084, Florida Rule of Criminal Procedure 3.172,[3] and *Williams v. State,* 316 So.2d 267 (Fla.1975). The facts of *Ashley* are virtually indistinguishable from those presented here except that in *Ashley,* the defendant had unsuccessfully sought to withdraw his plea in the trial court. On appeal he merely appealed his sentence as illegal. The court emphasized that a plea involving habitual offender treatment must be knowing and voluntary because such sentences are imposed in a significant number of cases and they exceed both the guidelines and the standard statutory maximum sentences.

In *Ashley,* the court held that an habitual felony offender sentence imposed under these facts was illegal:

> [C]onsistent with [that] analysis under rule 3.172, the relevant portion of the habitual offender statute states unequivocally that *before a defendant may enter a plea* or be sentenced he or she must be given written notice of intent to habitualize. (emphasis added).

Ashley, 614 So.2d at 490. In sum, *Ashley* appears to require a pre-plea notice of intent to habitualize for an habitual offender sentence to stand as legally valid, even though as a practical matter, this is not the way criminal cases are currently handled at the trial level.

The state notes that the plea agreement raised the possibility of an habitual offender sentence, and that the judge conducted an inquiry of Jones, prior to sentencing him, as to whether the plea was knowing and voluntary. It argues the foregoing was sufficient to meet the dictates of *Ashley.* However, we considered this issue *en banc* and ruled against the state's position. *See Thompson v. State,* 638 So.2d 116 (Fla. 5th DCA 1994).

Accordingly, we reverse the sentence and remand this case to the trial court. At resentencing, the court should either sentence within the guidelines or, if it believes a more severe punishment is justified, it should so advise appellant and allow him the option of

1. Section 893.13(1)(f), Florida Statutes (1991), a third degree felony.

2. As authorized by section 775.084(3)(b), Florida Statutes (1991), which provides:

> Written notice shall be served on the defendant and his attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence so as to allow the preparation of a submission on behalf of the defendant.

3. Rule 3.172(a) provides:

> Before accepting a plea of guilty or nolo contendere, the trial judge shall be satisfied that the plea is voluntarily entered and that there is a factual basis for it.

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withdrawing his plea or accepting the greater sentence.

REVERSED AND REMANDED.

PETERSON and DIAMANTIS, JJ., concur.

Charles G. STRICKLAND, Appellant,

v.

Terry B. STRICKLAND, Appellee.

No. 93–2607.

District Court of Appeal of Florida,
Fifth District.

July 1, 1994.

In dissolution action, the Circuit Court, St. Johns County, Richard G. Weinberg, J., entered final judgment of dissolution. Former husband appealed. The District Court of Appeal, Harris, C.J., held that record did not justify trial court's alimony award in light of fact that disparities in income existed both before and after granting of alimony.

Reversed and remanded.

Diamantis, J., concurred specially.

1. Divorce ⚷239

Record did not justify trial court's alimony award, in light of fact that disparities in income existed both before and after granting of alimony; trial court found that husband had net income of $30,000 and wife had net income of $20,000, and awarded wife alimony so as to give her annual income of $29,000 and husband annual income of $21,000.

2. Divorce ⚷287

Where language of divorce judgment indicated that court may have intended to impute income to husband for purposes of determining alimony but failed to do so, trial court would be instructed on remand to indicate, in event it would impute income, amount imputed as well as source of such income.

Richard E. Gentry, St. Augustine, for appellant.

Paul L. Martz, of Martz and Cushman, P.A., and H. Davis Upchurch, Jr., St. Augustine, for appellee.

HARRIS, Chief Judge.

Charles G. Strickland timely appeals from a final judgment of dissolution. We reverse.

[1] We agree that the wife is entitled to alimony but the record does not justify the amount awarded in this case. The trial court found that the husband had a net income of $30,000 and the wife had a net income of $20,000. It then awarded her alimony of $750 per month, giving her an annual income of $29,000 and the husband an annual income of $21,000. One seems no more reasonable than the other.

[2] Language in the Final Judgment indicates that the court might have intended to impute income to the husband but failed to do so. On remand, if the court does impute income, it must indicate the amount imputed as well as the source of such income. *Wendroff v. Wendroff*, 614 So.2d 590 (Fla. 1st DCA 1993); *Hogle v. Hogle*, 535 So.2d 704 (Fla. 5th DCA 1988).

In the matter of the distribution of marital assets, the court awarded the husband's veterinary practice to him and allocated it a value of "between $30,000 and $50,000" based on the testimony of the wife's expert. If the property is, in fact, worth $50,000, then the disparity in the wife's favor is only about $10,000. If, however, the veterinary practice is only worth $30,000, then the disparity is too great to be sustained even under *Canakaris*. For that reason, the court should tell us the value *it* placed on the veterinary practice.

REVERSED and REMANDED for proceedings consistent with this opinion.