IN THE SUPREME COURT OF FLORIDA

84,443

STATE OF FLORIDA,

Petitioner,

versus

MICHAEL PENNINGTON,

Respondent.

CASE NO.
5th DCA. CASE NO. 93-2898

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY

RESPONDENT'S BRIEF ON JURISDICTION

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
904-252-3367

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

SUMMARY OF ARGUMENT

Respondent agrees with Petitioner that this Honorable Court has jurisdiction to review the District Court's decision in this cause, although Respondent maintains that the District Court decision which is pending review by this Honorable Court and which is cited as controlling authority for the decision in this case directly and expressly conflicts with a different decision of this Honorable Court than that relied upon by Petitioner.

ARGUMENT

THE DISTRICT COURT'S DECISIONS IN THIS CASE AND IN THOMPSON v. STATE, 19 Fla. L. Weekly D1221 (Fla. 5th DCA June 3, 1994), DIRECTLY AND EXPRESSLY CONFLICT WITH ASHLEY v. STATE, 614 So. 2d 486 (Fla. 1993), AND ITS DECISION IN THIS CASE CITES AS CONTROLLING AUTHORITY THOMPSON v. STATE, 19 Fla. L. Weekly D1221 (Fla. 5th DCA June 3, 1994), WHICH IS PENDING REVIEW BY THIS HONORABLE COURT.

Respondent disagrees with Petitioner's contention that the District Court's decision in this case conflicts with this Honorable Court's decision in Massey v. State, 609 So. 2d 598 (Fla. 1992); but submits that the District Court's decision, rather, is in direct and express conflict with Ashley v. State, 614 So. 2d 486 (Fla. 1993).

In Massey, this Honorable Court held that the State's failure to physically place a copy of a written notice of its intent to habitualize Massey in his hands was harmless error; but Massey was convicted of burglary of a dwelling and grand theft at a trial and there was a clear record made, via the prosecutor's announcement in open court and in Massey's presence, of Massey's having actually received notice of the State's intent to ask the trial court to sentence him as an habitual offender. In Thompson v. State, 19 Fla. L. Weekly D1221 (Fla. 5th DCA June 3, 1994) (APPENDIX), the District Court's decision reveals that the Respondent was not provided with a notice of the **trial court**'s intent to sentence him as an habitual offender until after he had entered a plea.

Petitioner asserts that "Because Respondent had actual notice of the possibility of a habitual offender sentence before he entered his plea, the protections afford by Ashley v. State, 614 So. 2d 486 (Fla. 1993), were provided to him, and any error in failing to provide formal written notice of habitualization was harmless." (Petitioner's Brief on Jurisdiction, Page 4.) (Emphasis supplied.) Ashley, however, requires that a defendant must be given written notice of intent to habitualize, not just the defendant be aware of the possibility of habitualization. Ashley, 614 So. 2d at 490.

The District Court's decision further conflicts with Ashley in that the District Court's remand for resentencing in Thompson v. State, supra, authorizes the trial court to sentence the defendant however it deems appropriate "consistent with guidelines or habitualization restrictions" so long as the defendant is given the opportunity to withdraw his or her plea and proceed to trial. Thompson, supra. In Ashley, however, the cause was remanded for resentencing **within the sentencing guidelines**[1]. Id., 614 So. 2d at 491.

Respondent agrees that an additional basis for this Honorable Court to accept jurisdiction in this cause exists in Jollie v. State, 405 So. 2d 418 (Fla. 1981), wherein this

---

[1] It should be noted, also, that in Rolling v. State, 619 So. 2d 20 (Fla. 5th DCA 1993), the District Court held that by failing to give the defendant notice of habitual offender sentencing prior to the acceptance of his **plea**, the State was not entitled to seek habitual offender status, and "as in Ashley, the cause is remanded to the trial court for resentencing under the sentencing guidelines." Id., 619 So. 2d at 23.

Honorable Court held that a District Court of Appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by the Supreme Court constitutes prima facie conflict and allows the Supreme Court to exercise its jurisdiction. Thompson v. State, 19 Fla. L. Weekly D1221 (Fla. 5th DCA June 3, 1994), is pending acceptance of jurisdiction by this Honorable Court in Supreme Court Case Number 83,951.

CONCLUSION

For the reasons expressed herein, Respondent agrees that grounds exist for this Honorable Court to exercise its discretionary jurisdiction and grant review of the Fifth District Court of Appeal's decision in this cause.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
904-252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, by delivery to his basket at the Fifth District Court of Appeal; and by mail to the Respondent, this 10th day of October, 1994.

ATTORNEY

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

versus

MICHAEL PENNINGTON,

Respondent.

CASE NO.
5th DCA. CASE NO. 93-2898

RESPONDENT'S BRIEF ON JURISDICTION

A P P E N D I X

terest award to the extent that it fails to award Baker interest from April 1, 1985, the date FP, Inc., terminated Baker from the project. *See Argonaut Ins. Co. v. May Plumbing, Co.*, 474 So. 2d [redacted] (Fla. 1985); *Ferrell v. Ashmore*, 507 So. 2d 691 (Fla. 1st [redacted] 1991); *United Aluma Glass v. Bratton Corp.*, 8 F.3d 756 (11th Cir. 1993).

Affirmed in part; reversed in part; and cause remanded for entry of a judgment in accordance with this decision.

* * *

STONG v. STONG. 3rd District. #93-1483. August 17, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *See and compare Marcoux v. Marcoux*, 464 So. 2d 542 (Fla. 1985); *Grant v. Corbitt*, 95 So. 2d 25 (Fla. 1957); *Solomon v. Gordon*, 4 So. 2d 710 (1941); *Walsh v. Walsh*, 388 So. 2d 240 (Fla. 2d DCA 1980); *Tillman v. Tillman*, 222 So. 2d 218 (Fla. 1st DCA 1969); *Bullard v. Bullard*, 195 So. 2d 876 (Fla. 2nd DCA 1967), *Schwartz v. Schwartz*, 143 So. 2d 901 (Fla. 2d DCA 1962).

CROWLEY CARIBBEAN TRANSPORT, INC. v. XELA CORPORATION. 3rd District. #93-2420. August 17, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *Lance v. Wade*, 457 So. 2d 1008 (Fla. 1984); *Foreman v. E.F. Hutton & Co.*, 568 So. 2d 531 (Fla. 3d DCA 1990); *Horacio O. Ferrera No. Am. Div., Inc. v. Moroso Performance Products, Inc.*, 553 So. 2d 336 (Fla. 4th DCA 1989).

DAVIS v. STATE. 3rd District. #94-345. August 17, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Nordelo v. State*, 603 So. 2d 36 (Fla. 3d DCA 1993).

STATE v. DAVIDSON. 3rd District. #94-280. August 17, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *Collier v. Boney*, 525 So. 2d 971 (Fla. 1st DCA 1988); *State v. Twelves*, 463 So. 2d 493 (Fla. 2d DCA 1985).

NORRIS v. STATE. 3rd District. #93-2624. August 17, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *Crump v. State*, 622 So. 2d 963 (Fla. 1993).

* * *

Criminal law—Sentencing—Guidelines

MICHAEL PENNINGTON, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-2898. Opinion filed August 19, 1994. Appeal from the Circuit Court for Volusia County, John W. Watson, III, Judge. Counsel: [redacted]es B. Gibson, Public Defender, and Nancy Ryan, Assistant Public Defend[redacted]Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, [redacted]ahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) The sentence in this case is violative of the dictates of *Thompson v. State*, 19 Fla. L. Weekly D1221 (Fla. 5th DCA June 3, 1994) and must be vacated. Upon remand appellant must be given the option to withdraw his guilty plea should the court intend to depart from the sentencing guidelines. Finally, it is apparent the court's written community control order is different from the judge's oral pronouncements.

SENTENCE VACATED; REMANDED. (HARRIS, C.J., DAUKSCH and COBB, JJ., concur.)

* * *

Appeals—Attorney's fees—Order granting motion for attorney's fees and reserving jurisdiction to determine amount is non-final, non-appealable order—Appeal of order dismissed for lack of jurisdiction

TRANS ATLANTIC DISTRIBUTORS, L.P., Appellant, v. WHILAND AND COMPANY, S.A., etc., et al., Appellees. 5th District. Case No. 94-291. Opinion filed August 19, 1994. Non-Final Appeal from the Circuit Court for Orange County, Lawrence R. Kirkwood, Judge. Counsel: James S. Grodin and John R. Hamilton of Foley & Lardner, Orlando, for Appellant. Hal K. Litchford and Kristyn D. Elliott of Litchford, Christopher & Ruta, Orlando, for Appellees.

(PER CURIAM.) Trans Atlantic Distributors appeals the trial court's order granting appellees' motion for attorney's fees and reserving jurisdiction to determine the amount of fees. This is a non-final, non-appealable order and, therefore, this appeal must be dismissed for lack of jurisdiction. *See Winkelman v. Toll*, 632 [redacted] 2d 130 (Fla. 4th DCA 1994); *Malone v. Costin*, 410 So. 2d [redacted] (Fla. 1st DCA 1982).

DISMISSED. (DAUKSCH, GRIFFIN and DIAMANTIS, JJ., concur.)

* * *

Criminal law—Judgment—Correction

BEAU LUTHER BRIGHT, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-2332. Opinion filed August 19, 1994. Appeal from the Circuit Court for Marion County, Thomas D. Sawaya, Judge. Counsel: James B. Gibson, Public Defender and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ann M. Childs, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) Beau Luther Bright entered a plea of no contest to six felonies. We affirm the convictions and sentences imposed following his plea. In doing so, we correct a scrivener's error on the judgment to reflect that his plea was to a violation of section 810.02(2) Florida Statutes, and that a violation of that section is a first degree felony punishable by life imprisonment.

AFFIRMED as corrected. (SHARP, W., GOSHORN and THOMPSON, JJ., concur.)

* * *

Negotiable instruments—Notes—Mortgage foreclosure—Affirmative defenses—Fraudulent inducement—Plaintiff's status as holder in due course

EARLIE A. ROACH, FRANCE N. ROACH, et al., Appellants, v. FEDERAL NATIONAL MORTGAGE CORPORATION, Appellee. 5th District. Case Nos. 93-728, 93-1026, 93-1057, 93-1058, 93-1059, 93-1060, 93-1061, 93-1062. Opinion filed August 19, 1994. Appeal from the Circuit Court for Brevard County, Frank R. Pound, Jr., Judge. Counsel: Steven M. Greenberg of the Law Offices of Stephen L. Raskin, South Miami, for Appellants. John W. Little, III, Troy D. Ferguson and J. Russell Campbell of Steel, Hector & Davis, West Palm Beach, for Appellee.

(DAUKSCH, J.) Consistent with this court's recent decision in *James v. Nationsbank Trust Co. Nat. Ass'n*, 19 F.L.W. D1482 (Fla. 5th DCA July 8, 1994), we remand this cause to the trial court for further proceedings with regard only to the issue of whether appellants were fraudulently induced to sign the notes and mortgages which are the subject of each of their foreclosures and, if so, whether appellee ever attained the status of a holder in due course.

AFFIRMED in part; REVERSED in part; REMANDED. (HARRIS, C.J. and GRIFFIN, J., concur.)

* * *

Criminal law—Probation—Condition requiring payment to county First Step program reversed where condition was not orally pronounced and trial court failed to reference statutory authority

STEPHEN MARCO MORRIS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-1694. Opinion filed August 19, 1994. Appeal from the Circuit Court for Volusia County, Uriel Blount, Jr., Senior Judge. Counsel: James B. Gibson, Public Defender, and Nancy Ryan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellee.

(DIAMANTIS, J.) We affirm Stephen Marco Morris's convictions and sentences for two counts of dealing in stolen property; however, we reverse the imposition of a special condition of Morris's probation which required him to pay $60 to First Step of Volusia County because this condition was not orally pronounced at sentencing, *see Shaddix v. State*, 599 So. 2d 269 (Fla. 1st DCA 1992), and because the trial court failed to reference the statutory authority for the imposition of such costs. *See Gedeon v. State*, 636 So. 2d 178 (Fla. 5th DCA 1994); *Thomas v. State*, 633 So. 2d 1122 (Fla. 5th DCA 1994), *rev. denied*, No. 83,501 (Fla. June 13, 1994). This reversal is without prejudice to the state to seek reimposition of such costs after Morris has been given adequate notice and opportunity to be heard on the matter. *See Williams v. State*, 580 So. 2d 326 (Fla. 5th DCA 1991). If the trial court does reimpose such costs on remand, the trial court shall reference the statutory authority for the imposition of such costs.

AFFIRMED in part; REVERSED in part; REMANDED. (HARRIS, C.J., and PETERSON, J., concur.)

* * *

stated that he owns a gun and has previously injured another individual under similar circumstances.

The co-employee's affidavit indicated that Conley, visibly upset, approached him at Travelers' Orlando office and wanted to discuss an alleged extramarital affair that Conley's wife was having with another employee.[1] After 45 minutes of conversation, the affiant was able to persuade Conley to leave the premises without further incident. Later, he learned from Conley's wife that Conley was carrying a baseball bat in his pant's leg, that he owned a gun and that he might be returning to Traveler's office to hurt or kill the employee allegedly involved with Conley's wife.

Travelers alleged the foregoing facts, that it had to hire and pay security guards to protect its employees and premises, and was not able to ascertain Conley's whereabouts.

The trial court correctly noted the general principle that a court of equity, as a rule, lacks jurisdiction to enjoin the commission of a crime. But simply because an act is illegal does not mean it cannot be proscribed by an injunction if grounds for that injunction otherwise exist. *Davis v. Florida East Coast R. R.*, 166 So. 2d 774 (Fla. 2d DCA 1964) (pattern of harassment, while criminal in nature, nonetheless warranted injunctive process because acts were detrimental to public safety). Moreover, an injunctive remedy is available to enjoin a trespass "where there is a probability of irreparable injury and an inadequate legal remedy." 29 Fla. Jur. 2d Injunctions, § 40; *see also DeRitis v. AHZ Corp.*, 444 So. 2d 93 (Fla. 4th DCA 1984) (irreparable injury may be established where damages are estimable only by conjecture).

In *Drake v. Henson*, 448 So. 2d 1205 (Fla. 3d DCA 1984), which we cited in our order directing the trial court to issue the temporary injunction pending resolution of this appeal, the appellants/plaintiffs argued over money with a business partner. The disagreement allegedly resulted in the defendant threatening the plaintiffs with injury to the plaintiffs and their property. The threats continued and the plaintiffs reported them to the police but to no avail. The plaintiffs then filed a suit seeking a temporary mutual restraining order without notice, a permanent injunction and other relief. When the cause came for hearing, the trial court, on its own motion, dismissed the cause for lack of subject matter jurisdiction. In reversing, the district court held that the trial court did have subject matter jurisdiction in the exercise of its equity jurisdiction. In so finding the court noted an equity court traditionally has been the forum to restrain threatened property damages. The court further noted that the opinion should not be construed as mandating the trial court to issue the permanent injunction requested, but simply to proceed with the cause.

We hold that Travelers' request for a temporary injunction was adequate when it alleged, *inter alia*, that Conley's threatened action would result in irreparable injury because a bloody rampage might occur, there is no remedy for an interruption to appellant's orderly business operations, and a security guard had to be obtained to intercept Conley, should he return. Travelers' allegations, coupled with supporting affidavits that Conley not only made threats but also took affirmative action to commit violent acts on Traveler's premises, are sufficient to support an order granting a temporary injunction. We note that violence directed towards one or more individuals committed in business establishments during business hours is occurring with frequency around the nation, and often affects other innocent bystanders both physically and emotionally, as well as property. Here, there exists what one could reasonably perceive to be a situation in which persons in Travelers' employ may be in imminent danger and Traveler's property may be damaged from Conley's partially carried out threats.

Accordingly, we vacate the order dismissing the action and remand this cause for reconsideration by the trial court in light of this opinion and the requirements of Rule 1.610(a), Florida Rules of Civil Procedure.

REVERSED; REMANDED. (COBB and DIAMANTIS, JJ., concur.)

---

[1]There is no finding that Conley's suspicions are correct.

* * *

Criminal law—Sentencing—Habitual violent felony offender—Requirement that defendant be made aware that state or judge will seek habitual offender treatment prior to plea was not satisfied by provision in negotiated plea form stating generally the maximum sentence if defendant is considered habitual violent felony offender

WILLIE T. THOMPSON, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-921. Opinion filed June 3, 1994. Appeal from the Circuit Court for Volusia County, John W. Watson, III, Judge. James B. Gibson, Public Defender, and Nancy Ryan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Robin Compton Jones, Assistant Attorney General, Daytona Beach, for Appellee.

ON REHEARING EN BANC

[Original Opinion at 19 Fla. L. Weekly D256c]

(HARRIS, C. J.) 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.

We acknowledge that this court in *Oglesby v. State*, 627 So. 2d 585 (Fla. 5th DCA 1993), *rev. denied*, Table No. 82,987 (Fla. March 11, 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 informs him generally as to the maximum 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.

APPENDIX 2

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

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 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, SHARP, W., PETERSON, GRIFFIN, DIAMANTIS and THOMPSON, JJ., concur. GOSHORN, J., dissents, with opinion.)

[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).

(GOSHORN, J., 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* 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 acknowledges being informed of his potential sentence should he be habitualized. Therefore, in my view, Thompson was 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*, No. 82,987 (Fla. Mar. 11, 1994) and it is bad policy to do so. I would affirm.

* * *

Criminal law—Sexual battery

JERRY DOYLE FARMER, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-1818. Decision filed June 3, 1994. Appeal from the Circuit Court for Sumter County, John W. Booth, Judge. James B. Gibson, Public Defender and Lyle Hitchens, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) AFFIRMED. (COBB and GOSHORN, JJ., concur. SHARP, W., J., concurs specially, with opinion.)

(SHARP, W., J., concurring specially.) Because the record in this case contains no motion for judgment of acquittal, directed verdict, or motion for new trial, we cannot consider Farmer's sole point on appeal that the evidence at trial was insufficient to convict him of sexual battery of the fourteen-year-old child victim.[1] *Hogan v. State,* 427 So. 2d 202 (Fla. 4th DCA 1983), *approved in part, quashed in part on other grounds,* 451 So. 2d 844, 845 (Fla. 1984).

This result is disquieting to say the least, because the medical evidence and testimony in this case was not supportive of the child victim's testimony. That testimony provided the *sole* basis for Farmer's conviction. And reasonable inferences based on the doctor's testimony support Farmer's assertion of innocence.

The doctor testified he found no evidence of any sexual battery or activity when he examined the child the day following the alleged sexual battery. The child lacked any hymen at all. He said this was most unusual in a child of fourteen who was not sexually active.

He testified that had the child been of sexual battery the prior night would