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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

STATE OF FLORIDA, )  
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Petitioner, )  
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)  
vs. )  
)  
)  
JOSEPH SANTORO, )  
)  
)  
Respondent. )  
\_\_\_\_\_ )

CASE NO. 84,758  
DCA Case No. 83-2404

APPEAL FROM THE CIRCUIT COURT  
IN AND FOR VOLUSIA COUNTY  
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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ASSISTANT PUBLIC DEFENDER  
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ATTORNEY FOR RESPONDENT

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1,2,4

OTHER AUTHORITIES

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IN THE SUPREME COURT OF FLORIDA

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Petitioner, )  
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vs. ) CASE NO.  
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JOSEPH SANTORO, )  
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Respondent. )  
\_\_\_\_\_ )

JURISDICTIONAL BRIEF OF RESPONDENT

SUMMARY OF ARGUMENT

Petitioner asserts in its jurisdictional brief that the District Court's decision in this case is in conflict with this Court's decision in Massey v. State, 609 So.2d 598 (Fla. 1992). The respondent disagrees and further submits that the District Court's decision does not conflict with this Court's decision in Ashley v. State, 614 So.2d 486 (Fla. 1993). Accordingly, the respondent respectfully requests that this Court not take jurisdiction of this case.

Finally, the respondent submits that although the District Court cites to Thompson v. State, 638 So.2d 116 (Fla. 4th DCA 1994) in finding that the respondent was provided inadequate notice of habitualization by the trial court prior to accepting his plea, this issue is moot in the instant case due to the respondent having already been sentenced on violating his community control and receiving a guidelines sentence.

## ARGUMENT

THE DISTRICT COURT'S DECISION IS NOT IN  
EXPRESS AND DIRECT CONFLICT WITH A DECISION  
OF THIS COURT.

Petitioner asserts in its jurisdictional brief that the District Court's decision in this case is in conflict with this Court's decision in Massey v. State, 609 So.2d 598 (Fla. 1992). The respondent disagrees, and further submits that the District Court's decision does not conflict with this Court's decision in Ashley v. State, 614 So.2d 486 (Fla. 1993).<sup>1</sup> The respondent accordingly disagrees with the State that this Court should take jurisdiction of this case to resolve the conflict alleged by Petitioner.

As to Massey, the State argues that the respondent had actual notice he could be habitualized, and that accordingly, any error in failing to notify him of habitualization would be considered in his case as harmless. The District Court's holding on that issue was as follows:

Although the form provision in this case is somewhat expanded from a similar provision in the plea agreement that we rejected in Thompson v. State, 638 So.2d 116 (Fa. 5th DCA 1994), it still does not comply with what we considered to be the Ashley mandate: that the defendant be made aware prior to pleading that his habitualization will be sought. The only notice given in this new version of the plea agreement is that "a hearing may hereafter be set" to determine

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<sup>1</sup> The Ashley, Thompson and Massey opinions are attached to this brief as Appendix I.

if the defendant qualifies as a habitual offender. As we stated in Thompson, the statute itself informs him of this possibility. What the supreme court required in Ashley, and what we required in Thompson, was that the defendant be advised, prior to plea, that someone (the State or the judge) will subject him to habitual consideration. This does not mean that the defendant must be advised that he will be habitualized. It only requires that the State advise the defendant prior to plea that he will be considered for habitualization. This requirement can easily be accomplished (though it may cut down on the number of pleas) by placing in the negotiated plea form a provision that states: "We will request that the court conduct a hearing to determine whether you should be sentenced as a habitual offender to an enhanced term as outlined below." This informs the defendant not that he might be considered for habitual treatment but that he will be so considered. It will take this or some similar notice, we think, to satisfy the requirements of Ashley. (footnote omitted)

Santoro v. State, 19 Fla. L. Weekly D2302 (Fla. 5th DCA October 28, 1994). (Appendix II) The respondent submits that the District Court ruled correctly on the notice issue, and that there is no conflict between the decision in Massey and the decision in this case. Nor does the instant decision conflict with this Court's decision in Ashley.

In Ashley, this Court noted that:

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:

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.

Section 775.084(3)(b), Fla.Stat. (1987).

614 So.2d at 489-90. This court in Ashley vacated the habitual offender sentence imposed in that case because:

[t]he record fails to show that at the time [his] plea was accepted Ashley had any personal understanding whatsoever that he would be habitualized or what habitualization entailed.

614 So.2d at 491.


Finally, on October 10, 1994, the respondent was sentenced to a three (3) year prison term under the sentencing guidelines for violating his community control in this same case. (See Appendix III) Therefore, because the District Court's opinion in the instant case does not specifically state, as the District Court did in Thompson, supra, which is currently pending review in this Court, that the trial court may resentence the respondent as a habitual felony offender if he is allowed the opportunity to withdraw his plea, and because the respondent has already been sentenced under the guidelines for violating his community control in the instant case, the issues raised in Petitioner's jurisdictional brief are moot. Jurisdiction should be denied by this Honorable Court.

CONCLUSION

For the reasons expressed herein, Respondent respectfully requests that this Honorable Court decline to accept discretionary jurisdiction in this cause.

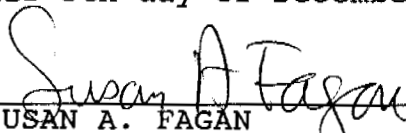
Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, FL 32118 and mailed to Joseph Santoro, Volusia County Branch Jail, Caller Service Box 2865, Daytona Beach, FL 32120 on this 5th day of December, 1994.

  
\_\_\_\_\_  
SUSAN A. FAGAN  
ATTORNEY FOR PETITIONER



IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, )  
 )  
 Petitioner, )  
 )  
 vs. ) CASE NO.  
 )  
 JOSEPH SANTORO, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

JURISDICTIONAL BRIEF OF RESPONDENT

A P P E N D I C E S

- APPENDIX I            Ashley v. State  
                         614 So.2d 486 (Fla. 1993)
- Thompson v. State  
                         638 So.2d 116 (Fla. 4th DCA 1994)
- Massey v. State  
                         609 So.2d 598 (Fla. 1992)
- APPENDIX II           Santoro v. State  
                         19 Fla. L. Weekly D2302  
                         (Fla. 5th DCA October 28, 1994)
- APPENDIX III         Sentence of October 10, 1994

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JOSEPH SANTORO,                        )  
  )  
                          Respondent.   )  
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CASE NO.

JURISDICTIONAL BRIEF OF RESPONDENT

A P P E N D I X I