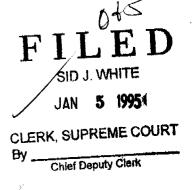
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner.

versus

CHARLES MAXWELL, a/k/a CHARLES COLEMAN,

Respondent.

S.CT CASE NO.84,879

DCA CASE NO. 94-35

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

JAMES B. GIBSON PUBLIC DEFENDER SEVENTH JUDICIAL CIRCUIT

KENNETH WITTS ASSISTANT PUBLIC DEFENDER Florida Bar No. 0473944 112-A Orange Avenue Daytona Beach, FL 32114 Phone: 904-252-3367

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts contained in the petitioners jurisdictional brief.

<u>**ZUMMARY OF THE ARGUMENT**</u>

Respondent disagrees that the District Court's decision in this case conflicts with this Courts holding in <u>Massey v. State</u>, 609 So.2d 598 (Fla. 1992), since in this case the defendant was not on notice that habitualization would be sought.

The District Court's decision was based on a case pending for review in this Court. This Court therefore has jurisdiction under Jollie v. State, 405 So.2d 418 (Fla. 1981).

POINT

THIS COURT HAS JURISDICTION OVER THIS CAUSE BECAUSE THE LOWER COURT'S DECISION RELIED ON A CASE CURRENTLY PENDING REVIEW IN THIS COURT.

Respondent concedes that this Court has jurisdiction under Jollie v. State, 405 So.2d 4188 (Fla. 1981), since the District Court's opinion relied in part on <u>Thompson v. State</u>, 638 So.2d 116 (Fla. 5th DCA 1994), which is pending review in this Court.

Respondent disagrees, however, with Petitioners position that the District Court's opinion in this case conflicts with <u>Massey v. State</u>, 609 So.2d 598 (Fla. 1992). As the petitioner points out in its jurisdictional brief, <u>Massey</u> dealt with notice to a defendant that the State seeks to have the defendant punished as an habitual offender. In this case, if there was notice at all, it was merely that habitual offender sentencing was possible, not that it was being sought by anyone.

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CONCLUSION

BASED UPON the argument and authorities expressed herein, Respondent respectfully requests that this Honorable Court accept jurisdiction in this cause.

Respectfully submitted,

JAMES B. GIBSON PUBLIC DEFENDER SEVENTH JUDICIAL CIRCUIT

Jenney Watte

KENNETH WITTS ASSISTANT PUBLIC DEFENDER Florida Bar No. 0473944 112 Orange Avenue, Suite A Daytona Beach, Florida 32114 Phone: 904/252-3367

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal; and mailed to Charles Maxwell, a/k/a Charles Coleman, Inmate No. 107011, #6-4209, Main Unit, Central Florida Reception Center, P.O. Box 628040, Orlando, Florida 32862-8040, on this 3rd day of January, 1995.

KENNETH WITTS ASSISTANT PUBLIC DEFENDER

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner. Versus CHARLES MAXWELL, a/k/a CHARLES COLEMAN, Respondent.

APPENDIX

11/18/94 Fifth District Court of Appeal Opinion

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT JULY TERM 1994

CHARLES MAXWELL,

Appellant,

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

CASE NO. 94-35 🧹

STATE OF FLORIDA,

v.

Appellee.

Opinion filed November 18, 1994

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

James B. Gibson, Public Defender, and Kenneth Witts, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Belle B. Turner, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

We vacate the habitual offender sentence imposed in this case and remand this cause for resentencing. <u>See Santoro v. State</u>, 19 Fla. L. Weekly D2302 (Fla. 5th DCA Oct. 28, 1994); <u>Thompson v.</u> <u>State</u>, 638 So. 2d 116 (Fla. 5th DCA 1994). <u>See also Cole v. State</u>, 640 So. 2d 1194 (Fla. 1st DCA 1994).

Sentence VACATED; cause REMANDED.

PETERSON and DIAMANTIS, JJ., concur. GRIFFIN, J., dissents without opinion. RECEIVED

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PUBLIC DEFENDER'S OFFICE 7th CIR. APP. DIV.