

IN THE SUPREME COURT OF FLORIDA

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**FILED**  
SID J. WHITE  
JAN 5 1995  
CLERK, SUPREME COURT  
By \_\_\_\_\_  
Chief Deputy Clerk

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  
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COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	
THIS COURT HAS JURISDICTION OVER THIS CAUSE BECAUSE THE LOWER COURT'S DECISION RELIED ON A CASE CURRENTLY PENDING REVIEW IN THIS COURT.	3
CONCLUSION	4
CERTIFICATE OF SERVICE	4

TABLE OF CITATIONS

CASES CITED:

PAGE NO.

Jollie v. State  
405 So. 2d 418 (Fla. 1981)

2, 3

Massey v. State  
609 So. 2d 598 (Fla. 1992)

2, 3

Thompson v. State  
638 So. 2d 116 (Fla. 5th DCA 1994)

3

STATEMENT OF THE CASE AND FACTS

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

SUMMARY OF THE ARGUMENT

Respondent disagrees that the District Court's decision in this case conflicts with this Courts holding in Massey v. State, 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 Thompson v. State, 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 Massey v. State, 609 So.2d 598 (Fla. 1992). As the petitioner points out in its jurisdictional brief, Massey 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.

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

*Kenneth Witts*  
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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*  
KENNETH WITTS  
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner.	)	
	)	
versus	)	S.CT CASE NO. 84,879
	)	
CHARLES MAXWELL,	)	DCA CASE NO. 94-35
a/k/a CHARLES COLEMAN,	)	
	)	
Respondent.	)	
_____	)	

A P P E N D I X

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

949  
kw

CHARLES MAXWELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

CASE NO. 94-35 ✓

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. See Santoro v. State, 19  
Fla. L. Weekly D2302 (Fla. 5th DCA Oct. 28, 1994); Thompson v.  
State, 638 So. 2d 116 (Fla. 5th DCA 1994). See also Cole v. State,  
640 So. 2d 1194 (Fla. 1st DCA 1994).

Sentence VACATED; cause REMANDED.

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

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NOV 18 1994

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