IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 85,102

SARAM LAWS,

Respondent.
_____/

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

MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with one count of unlawful sale or delivery of cocaine (R 35). Respondent plead guilty as charged (R 38). 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:
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> * * *
>
> c. That a hearing may hereafter be set and conducted in this case to determine if I qualify to be classified as a Habitual Felony Offender or a Violent Habitual Felony Offender, and :
>
> (1) 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.
>
> (2) 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.
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> * * *

(R 38) (Appendix A). The plea agreement also set forth that respondent 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 39). Respondent

signed the written plea agreement (R 4, 39).

During the plea hearing held on April 16, 1993, respondent stated that he had thoroughly read the plea agreement (R 4). Respondent also stated he had an adequate opportunity to ask questions of his attorney about the plea agreement (R 4). Respondent understood the agreement and had no questions about it (R 4). Respondent understood that the agreement as to sentence with the state was only a recommendation to the trial judge and the judge was not bound by the agreement (R 5). Respondent stipulated to a factual basis based on the facts contained in the affidavits (R 5-6). The trial judge found respondent's plea was freely, voluntarily, knowingly and intelligently made and the plea was accepted (R 6).

On November 23, 1993, a sentencing hearing was held (R 8-16). There was an objection to the scoresheet by respondent (R 10-14). the trial judge stated that it appeared that respondent would qualify as a habitual felony offender (R 14). The trial judge stated that no previous notice had been filed and ordered that the sentencing be continued (R 14). No objection was made (R 14-15).

On November 29, 1993, the trial judge filed notice and order for a separate proceeding to determine if respondent qualified as a habitual felony offender (R 40-41). A motion to strike the notice was filed on December 2, 1993 (R 42-43). Respondent was ROR'd into a residential treatment program (R 44, 45). The ROR was revoked after respondent absconded (R 46, 47-48). The motion to strike was denied (R 49).

On May 26, 1994, the sentencing hearing was held (R 17-31). Respondent had no objection to the updated scoresheet (R 19). The trial judge found, based upon respondent's prior convictions, that respondent qualified as a habitual offender (R 20-21, 57-58). Respondent knew he was guilty (R 21). Respondent was adjudicated guilty (R 26, 52). Respondent was sentenced to 6 years incarceration followed by 5 years probation (R 26, 54-55, 61-64). While respondent was sentenced as a habitual offender the sentence imposed was not for an extended period (R 27).

Respondent appealed his conviction and sentence to the Fifth District Court of Appeal (R 65). On January 13, 1995, the Fifth District vacated respondent's sentence and remanded pursuant to the Fifth District's opinion in Thompson v. State, 638 So. 2d 116 (Fla. 5th DCA 1994), review pending, case no. 83,951. Laws v. State, 648 So. 2d 843 (Fla. 5th DCA 1995) (Appendix B). In Thompson, supra, 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. The acknowledgement found to be lacking in Thompson is the same as that found in respondent's plea agreement (R 38); Thompson, at 117.

Petitioner filed a notice to invoke jurisdiction. Jurisdictional briefs were filed by both petitioner and respondent. On March 29, 1995, this court accepted jurisdiction.

SUMMARY OF ARGUMENT

The Fifth District erred in determining that the plea agreement in this case was insufficient to give respondent notice that he may be sentenced as a habitual offender. Respondent read, understood, signed and discussed the plea agreement with his attorney. The plea agreement set forth that respondent could be habitualized, the maximum sentence he faced and that he 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 "will" be habitualized; the most that may be said is a defendant may or possibly could be habitualized. If the plea agreement was insufficient notice, any error in failing to give respondent separate written notice was harmless as respondent had actual notice that he may be habitualized. The decision in this case should be quashed, respondent's conviction and sentence reinstated and the decision in Thompson, supra, overruled.

Furthermore, this court should re-examine and clarify its decision in Ashley, infra. The decision in this case and in Thompson, supra, crystallizes 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.

ARGUMENT

POINT ON APPEAL

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

In the instant case, a separate written notice of intent to habitualize was not filed prior to the entry of respondent's plea. However, unlike in Ashley v. State, 614 So. 2d 486 (Fla. 1993), the failure to file a separate written notice is not fatal in this case. The plea agreement which respondent 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 a hearing may hereafter be set and conducted in this case to determine if I qualify to be classified as a Habitual Felony Offender or a Violent Habitual Felony Offender, and :
>
> (1) 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.

> (2) 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.
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> * * *

(R 38) (Appendix A). 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 this case and in Thompson, supra, is incorrect. In Thompson, the Fifth District held that a plea agreement which contained the identical language set forth 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),[1] 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.[2] 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

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[1](Appendix C)

[2]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.

598 (Fla. 1992). The majority in Thompson likewise ignored the sound and logical reasoning of Judge Goshorn's dissent. Petitioner further arrests that the decision in 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 in the defendant's behalf. Petitioner asserts that such a finding places the importance on the wrong portion of section 775.084(3)(b).

In this case, the plea agreement stated that a hearing may be

set to determine if respondent qualified as a habitual felony or violent felony offender (R 38) (Appendix A). The plea agreement set forth the maximum sentences respondent was facing if found to be a habitual offender. At neither the plea nor the sentencing hearing did petitioner argue, object or complain that he did not know that he was facing a possible sentence as a habitual offender (R 1-31). The only objection was to the PSI and ot the propriety of the judge filing the notice (R 10-14, 42-43). 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.[3] 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 respondent had knowledge of possible habitual offender sentencing. The written plea agreement was sufficient written notice.

Should this court determine that the plea agreement was

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[3]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, respondent was given notice in the plea agreement. There was no objection to the form of the notice. 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.

insufficient written notice, respondent had actual notice and 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 case, the plea agreement informed respondent that he could be sentenced as a habitual felony offender and gave respondent and his attorney an opportunity to prepare for the hearing. Respondent went over the agreement with his lawyer prior to entering his plea, understood the agreement and signed the agreement (R 4-6, 39).

Petitioner asserts that the purpose of the written notice requirement was accomplished in this case, as respondent had actual notice that he could be facing a habitual offender sentence and what that maximum sentence was. Respondent was given an opportunity to prepare for the hearing. Respondent gave the trial judge no reasons why he should not have been habitualized. "It is inconceivable that [respondent] was prejudiced by not having received the written notice [prior to the entry of his plea]." Massey, at 600. The failure to provide written notice was harmless in this case. 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 and in this case, the Fifth District held that the acknowledgement in the written plea agreement did not comply with Ashley because the plea agreement said that respondent **may** be sentenced as a habitual offender rather than respondent **would** be sentenced as a habitual offender. 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 respondent of the possibility that he could be sentenced as a

habitual felony offender. It would be not only 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 was 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. 92-96 (1992); Dugger v. Grant,

610 So. 2d 428 (Fla. 1992); Waite 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 under which sentencing scheme the defendant is sentenced. 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.[4] 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, 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

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[4]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.

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,[5] 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).

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

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[5]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.

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).[6] 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.

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

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[6]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).

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 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)[7] 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 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),

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

(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 case, as well as the decisions in Thompson, 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 this case 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 are not direct consequences 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, respondent was aware of this consequence at the time he entered his plea. The plea agreement specifically set forth that respondent would not receive any basic gain time if he was sentenced as a habitual offender (R 38) (Appendix A). This was sufficient to inform respondent that he would be serving more of his sentence. While petitioner requests this court clarify the Ashley decision, irrespective of that request, the written plea agreement in this case was sufficient notice and established that respondent's plea was knowing. If the written plea agreement was insufficient any error was harmless, as respondent had actual notice. The decision in this case should be reversed and the Thompson decision should be overruled.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner requests this court quash the decision 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

BONNIE JEAN PARRISH
ASSISTANT ATTORNEY GENERAL
Fla. Bar #768870
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118

COUNSEL FOR PETITIONER

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 5th day of May, 1995.

Bonnie Jean Parrish
Of Counsel

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 85,102

SARAM LAWS,

Respondent.
_____/

APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BONNIE JEAN PARRISH
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(904) 238-4990

COUNSEL FOR PETITIONER

INDEX TO APPENDIX

INSTRUMENTS

Appendix A

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

Case Number Pled to: 93-32429

STATE OF FLORIDA,
V.

Other Case Numbers Pending: _____

Filed in Open Court
Seventh Judicial Circuit
Volusia County, Florida

DATE: _____

SARAM LAWS
Defendant.

WRITTEN PLEA(S) AUG 13 1993

1. I, SARAM LAWS, defendant herein, withdraw my Plea(s) of Not Guilty, and enter Plea(s) of:

(X) Guilty ( ) Nolo Contendere to Sale/Delivery of a Controlled Substance as to Count I
( ) Guilty ( ) Nolo Contendere to _____ as to Count ___
( ) Guilty ( ) Nolo Contendere to _____ as to Count ___
( ) Guilty ( ) Nolo Contendere to _____ as to Count ___

2. I understand that if the Judge accepts the Plea(s), I give up my right to (1) A trial by jury to determine whether I am Guilty or Not Guilty; or a hearing before the Judge if charged with violation of probation or violation of community control; (2) To confront the State's witnesses; (3) To compel the attendance of witnesses on my behalf; (4) To testify or to remain silent; and (5) To require the prosecutor to prove my guilt beyond a reasonable doubt (or by a preponderance of the evidence if charged with violation of probation or community control). I also understand that I give up my right to appeal all matters except the legality of my sentence or this Court's authority to hear this case.

3. I understand that a Plea of Not Guilty denies that I committed the crime(s); a Plea of Guilty admits that I committed the crime(s); a Plea of Nolo Contendere, or "No Contest", says that I do not contest the evidence against me.

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:

a. That should the Judge impose a guidelines sentence, I could receive up to a maximum sentence of 15 years imprisonment and a maximum fine of $ None or both.

b. That should the Judge impose a departure sentence, I could receive up to a maximum sentence of 15 years imprisonment and a fine of $ None (or both).

c. That a hearing may hereafter be set and conducted in this case to determine if I qualify to be classified as a Habitual Felony Offender or a Violent Habitual Felony Offender, and:

(1) 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.

(2) 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.

d. That whether a guidelines sentence or departure sentence or habitual offender sentence, I will receive a mandatory minimum sentence of N/A years imprisonment.

5. My attorney has explained the essential elements of the crime(s), and possible defenses to the crime(s). I understand that by entering the above plea(s) I am waiving any right to present any defenses I may have to the charge(s). I understand that by my GUILTY plea(s) or NO CONTEST plea(s) without express reservation of right of appeal I waive (give up) any grounds for appeals I might have about any decision, ruling or order the Judge has made in my case(s) up to this date. If I am not a citizen of this country, my plea(s) to this crime(s) may adversely affect my status in this country and may be subject to deportation as a result of my plea(s). If I am on parole, my parole can be revoked and I may have to serve the balance of that sentence; if I am on probation, my probation can be revoked and I can receive a separate legal sentence on the probation charge in addition to a sentence imposed on this case.

6. I represent that I have told this Judge my true name. Any other name that I have used I have made known to the prosecutor. I represent to the Judge and to the prosecutor that my prior criminal record (if any), whether felony or misdemeanor, including any crimes for which adjudication of guilt was withheld is consistent with that criminal record (if any) described in open court by myself and/or my attorney or the prosecuting attorney in my presence at the time of my plea being entered. I understand that in the event my true name is different than that represented to the Judge or in the event my criminal record is different than that which is so represented in open court or should I be arrested prior to sentencing herein for a criminal offense, or violation of probation or community control, although my plea(s) will stand, any recommendation that the prosecutor has made herein that a particular sentence or disposition be imposed or any agreement that the prosecutor has made to not seek a determination of habitual offender status and/or a habitual offender sentence herein, is no longer binding on the state, and any promise or agreement by the Judge (if any) made and acknowledged in this agreement in open court as to what I will receive as a sentence or disposition herein is no longer binding on the Judge.

7. The prosecutor, based upon my identity and my criminal record disclosed on the record by me or in my presence, has recommended: Sentence within the Guidelines; Release into ~~treatment~~ residential substance abuse treatment if deemed appropriate SL

8. I fully understand that the Judge is not bound to follow any recommendations or agreements of the prosecutor as to sentence or disposition and that the Judge has made no promise or agreement as to what I will receive as a sentence or disposition herein other than that made by the Judge and acknowledged in this agreement to have been so made, or otherwise been made by the Judge in my presence in open Court at the time of my plea(s) being entered. I acknowledge that should the Judge promise or agree as acknowledged herein or made in open Court at the time of my plea(s) being entered, to a particular sentence or disposition herein, and later announce prior to sentencing that the promised or agreed sentence or disposition will for any reason not be imposed, that I will be permitted to withdraw my plea(s) herein and enter a plea(s) of not guilty and exercise my right to a trial or hearing described in (2) above.

9. That I waive any requirement that the state establish on the record a factual basis for the charge(s) being pled to. I have read the facts alleged in the sworn information (or indictment) and in the sworn arrest reports, and/or complaint affidavits in the Court file, (and/or in the sworn affidavits alleging violation of probation or community control, and alleged in any probation or community control violation reports in the Court file if charged with such violations) and I agree that the Judge can consider those facts as the evidence against me and as describing the facts that are the basis for the charge(s) being

pled to and the facts to which I am entering my plea(s).

10. In addition, I do agree and stipulate to the following: _____

11. I agree and stipulate to pay costs of $20.00 pursuant to F.S. 960.20, of $3.00 pursuant to 943.25(4); of $2.00 pursuant to 943.25(8); and $ 255 (as a court cost) pursuant to 943.25(8)(a). Further, I agree to pay:

(✓) A Public Defender fee of $ 100.

(✓) State Attorney costs of $ 250.

(✓) Law enforcement agency costs of $ 150.

( ) Restitution to _____ in the amount of $_____.

I understand that the above amounts are to be paid by me either as a condition of probation or community control, subject to violation if I fail to fully pay, or if I am not placed on a form of supervision, then after my release from custody subject to contempt of court if I fail to pay. I further state that I have received sufficient notice and hearing as to the above amounts and agree that I have the ability to pay them.

12. No one has pressured or forced me to enter the Plea(s), no one has promised me anything to get me to enter the (Plea(s) that is not represented in this Written Plea. I am entering the Plea(s) voluntarily of my own free will because:

( ) I believe that I am Guilty

(✓) I believe it is in my own best interest.

13. If I am permitted to remain at liberty pending sentencing I must notify bondsman or pre-trial release officer of any change in my address or telephone number, and if the Judge orders a Pre-Sentence Investigation (PSI) and I willfully fail to appear for an appointment with the probation officer, the Judge can revoke my release and place me in jail until my sentencing.

14. My education consists of the following: 8th ; I read, write and understand the English language. I am not under the influence of any drug, medication or alcohol at the time I sign this plea. I am not suffering from any mental problems at this time which affect my understanding of this Plea.

15. I am aware of all of the provisions and representations in this agreement through having read the agreement in its entirety or my attorney having read the agreement to me and I have discussed it with my attorney and I fully understand it. I have told my attorney everything I know about this case. I am fully satisfied with the way my attorney has handled this case for me.

SWORN TO, SIGNED AND FILED by the defendant in Open Court in the presence of defense counsel and Judge and under penalty of perjury this _____ day of _____, 199 .

DIANE M. MATOUSEK, Clerk
of the Circuit Court

K Mack 8/13/93
Deputy Clerk in Attendance

By: Jason Jason
Defendant's Signature

Defendants Initials: SL

CERTIFICATE OF DEFENSE COUNSEL

I, Defendant's Counsel of Record, certify that: I have discussed this case with defendant, including the nature of the charge(s), essential elements of each, the evidence against him/her for which I am aware, the possible defenses he/she has, the maximum penalty for the charge(s) and his/her right to appeal. No promises have been made to the defendant other than as set forth in this plea or on the record. I have explained fully this written plea to the defendant and I believe he/she fully understands this written plea, the consequences of entering it, and that defendant does so of his/her own free will. Further, from my interpretation of the facts and my study of the law there are facts to support each element of the charges to which the foregoing pleas are being entered. I further stipulate and agree that the Judge can consider the facts alleged in the sworn information (or indictment) and in the sworn arrest reports, complaint affidavits in the file, or in the sworn affidavits alleging violation of probation or community control, or alleged in any probation or community control violation reports in the Court file as the evidence against the defendant and as describing the facts that are the basis for the charge(s) being pled to and the facts to which the defendant is entering the plea(s).

Counsel for Defendant

CERTIFICATE OF PROSECUTOR

I confirm that the recommendations set forth in this plea agreement have been made.

Assistant State Attorney

ORDER ACCEPTING PLEA

The foregoing was received and accepted in open Court. The defendant has signed the foregoing in my presence or has acknowledged his above signature hereto in my presence. Such plea(s) are found to be freely and voluntarily made with knowledge of its meaning and possible consequences, and the same is hereby accepted.

_____

Circuit Court Judge

October 1991. Gary Williams also continued to ingest cocaine and he produced positive urinalyses for cocaine in September and October 1991.

11. S.J. WILLIAMS, a female child, was born on the 9th day of January 1992 having been exposed to the cocaine use of her mother; that child was adjudicated dependent and placed in the care of the Department.

12. From September 1990 through the date of trial, the relationship between the mother and Gary Williams was unstable. Gary Williams estimates that there were at least ten times in which the mother left their place of residence only to return at later dates. Repeated instances of physical violence and relapses into cocaine use marked their relationship despite attendance at multiple drug treatment programs.

13. That despite irregular attendance at varying programs and sporadic success, the mother and Gary Williams have not refrained from the use of cocaine as evidenced by their usage as recently as October 1993. Further, in the exercise of the court's fact-finding function, the court finds the testimony of Gary Williams to be incredible both because of its nature and because of his demeanor at trial. Of particular note is his testimony wherein he implies that the only occasions on which he has ingested cocaine since the children were placed with the Department are those occasions in which urinalyses demonstrated that he had, indeed, ingested cocaine.

14. The mother and Gary Williams are both chronic cocaine users and are co-dependent personalities. The court finds their recent breakup to be merely a continuation of the ongoing pattern established in their violent relationship which has been proven detrimental to themselves and has rendered the safe return of the children to either of them impossible. In accord with the testimony of Mr. Hudson, their counselor, the court finds that this pattern cannot be broken without a significant commitment to counseling; three and one-half years after the initial placement of the children, neither the mother nor Gary Williams have made that commitment nor have they committed to living a drug-free life.

After examining the history of this family and listening to all the evidence, including Williams' inability to remain drug free or to demonstrate an ability to provide his children a safe environment free of drugs, drug addicts and violence, the lower court made the difficult decision to terminate Williams' parental rights. The lower court concluded the evidence clearly and convincingly showed a likelihood that the children would suffer neglect if they were reunited with their father. *See* § 39.01(37), Fla.Stat. (1993).[2] We have no basis to gainsay that decision. *Kingsley v. Kingsley*, 623 So.2d 780 (Fla. 5th DCA 1993). The decision of the lower court is affirmed.

AFFIRMED.

COBB, GRIFFIN and DIAMANTIS, JJ., concur.

Saram LAWS, Appellant,

v.

STATE of Florida, Appellee.

No. 94-1308.

District Court of Appeal of Florida, Fifth District.

Jan. 13, 1995.

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

2. The lower court's order terminating parental rights states:

> This finding is rendered despite the initial detriment that the children may suffer as a result of the destruction of the bond which exists between the parents and their children: the court finds that, without a doubt, it is far better for these children to be placed for adoption with a loving and stable family than it is to have these children remain in foster care any longer awaiting the rehabilitation of their parents which will likely never occur.

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

Robert A. Butterworth, Atty. Gen., Tallahassee, and Steven J. Guardiano, Senior Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

The sentence is vacated on the authority of *Santoro v. State*, 644 So.2d 585 (Fla. 5th DCA 1994) and remanded for proceedings consistent with *Thompson v. State*, 638 So.2d 116 (Fla. 5th DCA 1994).

SENTENCE VACATED and REMANDED.

COBB, PETERSON and GRIFFIN, JJ., concur.

CORPORATE SERVICE, INC. and Walmart Stores, Inc., Appellants,

v.

Lisa H. JUSTUS, Appellee.

No. 94–537.

District Court of Appeal of Florida, First District.

Jan. 17, 1995.

The Judge of Compensation Claims, Gail A. Adams, made attorney award and appeal was taken. The District Court of Appeal, Allen, J., held that judge erred by failing to limit criteria used to determine amount of attorney fees to those benefits which were not timely paid.

Reversed and remanded.

Workers' Compensation ⇐1981

Trial court determining attorney fees benefits in workers' compensation case erred by failing to limit application of factors to benefits which were not timely paid. West's F.S.A. § 440.34(3)(b).

William H. Rogner of Hurley & Rogner, P.A., Orlando, for appellants.

Mary Bland Love and John H. McCorvey, Jr. of Gobelman and Love, Jacksonville, for appellee.

ALLEN, Judge.

The employer/servicing agent appeal a workers' compensation order by which the claimant was awarded an attorney's fee under section 440.34(3)(b), Florida Statutes (1989). We conclude that in applying the section 440.34(1), Florida Statutes (1989) criteria as to the amount of the fee, the judge erred by failing to limit the application of those factors to the benefits which were untimely under section 440.34(3)(b). The statutory criteria should not be applied to payments which were voluntarily made, or which were otherwise timely provided after being claimed, because section 440.34(3)(b) does not authorize a fee in such circumstances. *See National Distributing v. Campbell*, 632 So.2d 647 (Fla. 1st DCA 1994). Furthermore, in applying the section 440.34(1) criteria the judge should consider only those attorney hours and other factors pertaining to the underlying benefits upon which fee entitlement is properly predicated. *See Steel Fabricators v. Jordan*, 643 So.2d 35 (Fla. 1st DCA 1994).

The appealed order is reversed and the case is remanded for reconsideration as to the amount of the attorney's fee.

LAWRENCE and BENTON, JJ., concur.

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,