IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

LARRY WASHINGTON,

Respondent.

CASE NO. 85,167

RESPONDENT'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

DAVID MCPHERRIN
Assistant Public Defender

Attorney for Larry Washington

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PRELIMINARY STATEMENT

Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellee in the District Court of Appeal, Fourth District. Respondent was the defendant and appellant in the lower courts. The parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote the consecutively numbered record on appeal.

The symbol "P" will denote petitioner's initial brief on the merits.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts.

SUMMARY OF THE ARGUMENT

Respondent was sentenced as a habitual felony offender following a guilty plea. Prior to entering his plea respondent was served notice of petitioner's intent to seek a habitual offender sentence. However, the trial court failed, during the plea colloquy, to confirm that respondent was personally aware of the consequences of habitualization as required by Ashley v. State, 614 So. 2d 486 (Fla. 1993).

In vacating respondent's habitual felony offender classification the Fourth District Court of Appeal followed Ashley and remanded for resentencing under the guidelines. Respondent challenges not the voluntariness of his plea, but the legality of being classified as a habitual felony offender. In Ashley this Court concluded the error created a sentencing issue. The Fourth District Court of Appeal noted this Court's conclusion and granted respondent the same relief granted in Ashley. The cases in conflict with the remedy supplied in Ashley and respondent's case failed to consider this Court's conclusion regarding the sentence.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY VACATED RESPONDENT'S HABITUAL FELONY OFFENDER SENTENCE AND REMANDED FOR IMPOSITION OF A GUIDELINE SENTENCE WHERE THE TRIAL COURT FAILED TO COMPLY WITH ASHLEY v. STATE AND, AS A RESULT, ERRONEOUSLY IMPOSED A HABITUAL FELONY OFFENDER SENTENCE FOLLOWING RESPONDENT'S PLEA OF GUILTY.

All persons convicted of committing a felony, except a capital felony, are subject to being sentenced under the sentencing guidelines. § 921.001(4)(a), Fla. Stat. (Supp. 1992). The recommended sentencing ranges established under the guidelines are assumed to be the appropriate sentence for the offender. Fla. R. Crim. P. 3.701(d)(8). The sentencing guidelines also provide a permitted sentencing range which allows the sentencing judge to exercise some discretion, upward or downward, from that which is recommended without the necessity of having a reasonable justification or providing a written explanation. Id. Those sentencing ranges, recommended and permitted, establish the presumptive sentence which, absent extraordinary circumstances, should be imposed. Cf. Scurry v. State, 489 So. 2d 25, 28 (Fla. 1986); Albritton v. State, 476 So. 2d 158 (Fla. 1985).

Although departures from the recommended and permitted sentencing ranges are not encouraged, they are not prohibited. Fla. R. Crim. P. 3.701(d)(11). However, imposition of a departure sentence requires compliance with a special sentencing procedure. To depart from the presumptive sentencing range a reasonable justification supporting aggravation or mitigation must exist and the grounds justifying departure must be set out in writing. Id. Knowing imposition of a departure sentence without compliance with the sentencing procedure is error requiring resentencing within the guidelines. See Pope v. State, 561 So. 2d 554 (Fla. 1990).

Another form of departure from the presumptive sentence is habitual offender sentencing. See Ashley v. State, 614 So. 2d 486, 489 (Fla. 1993). Habitual offender sentencing results in the doubling of the statutory maximums and the reduction in the ability to obtain early release. Id. Unlike sentencing under the guidelines, which applies to all felony

defendant's except those charged with capital crimes, habitual offender sentencing applies only to those who meet its criteria. § 775.084, Fla. Stat. (1991). The Florida Legislature has determined that extraordinary measures should be taken against that select group which meets the habitual offender criteria. §§ 775.0841-775.0843, Fla. Stat. (1991). Among those measures are giving priority to the investigation, apprehension, and prosecution of career criminals, Id., as well as increased prison terms upon conviction. § 775.084(4)(a), Fla. Stat. (1991).

Faced with sentencing a defendant, the court has a number of alternatives at its disposal. The court can impose a sentence consistent with the presumptive guidelines range, or it can impose a guideline departure sentence, or it can depart from the guidelines entirely and impose a habitual offender sentence. Based upon the inclusiveness of the sentencing guidelines, and the obstacles placed in the path of departure from its presumptive sentencing ranges, including the exclusive criteria of the habitual offender statute, it is apparent that sentencing pursuant to the presumptive guideline ranges is the rule, while departure sentences, whether under the guidelines or the habitual offender statute, are the exception.

Undoubtedly realizing that habitual offender sentencing is a departure from the normative view of sentencing, provided by the guidelines, and that the Legislature intended to bring the vast resources of the State to bear against those accused of being habitual felony offenders this Court adopted a sentencing procedure which must be followed before a court can lawfully impose a habitual offender sentence. See Ashley v. State, 614 So. 2d at 490. In Ashley the Court said:

> [W]e 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.

The procedure adopted in Ashley serves to balance the individual's right to due process with the Legislature's announced policy to use extraordinary measures in prosecuting habitual

offenders.

Prong-two of the Ashley sentencing procedure requires the court to advise the defendant "of his or her eligibility for habitualization, the maximum habitual offender term for the charged offense, [and] the fact that habitualization may affect the possibility of early release through certain programs ...." Id. at 490, n. 8. This prong can only be accomplished through a pre-plea personal interview between the court and the defendant, it cannot be fulfilled by exchanges between counsel and the court. Id. at 491, n. 9. The failure to comply with the Ashley procedure requires reversal of the habitual offender sentence and resentencing under the guidelines, if so requested. See Id. at 491 & n. 10. In the case at bar, the trial court failed to carry out is obligation under prong-two of Ashley. Accordingly, since respondent has requested resentencing under the guidelines, rather than the opportunity to withdraw his plea, guideline resentencing is appropriate.

Appellant acknowledges that no objection was raised below to the trial court's failure to advise him consistent with the second prong of Ashley. However, errors of this nature, which are legal sentencing errors rather than ones that require the resolution of factual issues, can be raised on direct appeal even in the absence of a contemporaneous objection. Id. at 490; Taylor v. State, 601 So. 2d 540 (Fla. 1992). If it is apparent from the face of the record that the trial court failed to properly advise the defendant of the consequences of being sentenced as a habitual offender, reversal of the extraordinary sentence imposed is required and remand necessary for imposition of the normative guideline sentence. See Ashley 614 So. 2d at 491. Such is the case at bar. Therefore, the decision of the Fourth District Court of Appeal to vacate respondent's classification as a habitual offender and remand for imposition of a guideline sentence was correct.[1]

Petitioner asserts a number of arguments in support of its view that either no relief was warranted or that the improper remedy was granted. As a threshold matter, petitioner contends

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[1] Washington v. State, 20 Fla. L. Weekly D252 (Fla. 4th DCA Jan. 25, 1995).

that the trial court complied with the second prong of Ashley (P 10). This was accomplished, according to petitioner, through off record discussions between respondent and his attorney. Thus it can be inferred that respondent was adequately advised according to prong-two. Of course, petitioner freely admits that the trial court did not confirm with respondent his understanding of prong-two (P 11). As previously mentioned, the prong-two colloquy must be between the defendant and the trial court. Id. at 491, n. 9. The record unequivocally shows that no such colloquy occurred below. Accordingly, petitioner failed to shoulder its burden of establishing record compliance with Ashley. Cf. Alexander v. State, 575 So. 2d 1370, 1371 (Fla. 4th DCA 1991).

Assuming compliance with the second prong of Ashley can be established by resorting to inferences, the record at bar does not support that inference. Although the trial court advised respondent that he could be sentenced as a habitual offender, it failed to address the remaining aspects of prong-two (R 7). Neither the maximum habitual offender sentence nor the ineligibility for early release were discussed with respondent.[2] The trial court merely asked respondent if he discussed "this matter with your attorney" (R 10). In addition, at no time did respondent's attorney state that he advised respondent of the consequences surrounding habitualization. Significantly, the written plea form set forth the maximum possible penalty as 15 years (R 44), the maximum penalty for a non-habitual offender second degree felony. § 775.082, Fla. Stat. (1991).

In the alternative, petitioner, asserts that should it be determined that the trial court failed to adequately comply with prong-two, errors of that nature are subject to harmless error analysis and the error at bar was harmless (P 20). Petitioner relies upon Massey v. State, 609

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[2] Respondent acknowledges that citizens of Florida have constructive notice of its laws. In spite of that maxim, this Court stated that the trial court must verbally confirm that the defendant is aware of these consequences. Ashley, 614 So. 2d at 491, n. 9. Respondent assumes that the language used by this Court in its decisions has purpose and meaning. Respondent also assumes, contrary to the tenor of petitioner's brief, that the language used by this Court has legal significance and should be followed.

So. 2d 598 (Fla 1992) to support its argument. In Massey this Court found that the state's failure to provide the defendant with advanced written notice of intent to habitualize was harmless error. The error was harmless because the defendant, although not notified in writing, was actually notified by the state that it intended to have him habitualized. The receipt of actual notice allowed the defendant an opportunity to prepare for his sentencing hearing in the same manner as would written notice. See Massey v. State, 609 So. 2d 598, 600 (Fla. 1992). Accordingly, no harm was precipitated by the error. Unlike Massey, where actual notice served as a substitute for written notice thereby rendering the error harmless, here respondent was not advised of the consequences of habitualization, either by the court in a pre-plea colloquy or through any acceptable substitute means. As a result, the rationale of Massey does not apply to the error at bar.

Lastly, petitioner, relying upon Bell v. State, 624 So. 2d 821 (Fla. 2d DCA 1993) rev. denied, 634 So. 2d 622 (Fla. 1994), argues that even if the trial court failed to properly advise respondent of the consequences of being sentenced as a habitual offender, and even if that error is not harmless the appropriate remedy is not to remand for imposition of a guideline sentence but instead to allow respondent to withdraw his plea and proceed to trial if, and only if, a motion to withdraw the plea was filed in the court below (P 11-20). Petitioner posits two arguments in support of its contention. The first ground appears to be based upon a perceived distinction between failures to comply with prong-one, written notice, and prong-two, discussion of consequences. According to petitioner, failure to provide written notice of intent to habitualize renders the habitual offender sentence "illegal". In that situation remand is necessary to correct the sentence by vacating the habitual offender status and resentencing under the guidelines. However, where the error arises from the trial court's failure to discuss the consequences of habitualization, the issue is not the legality of the sentence, but the voluntariness of the plea. When that is the case the sentence need not be corrected, rather the

plea need be withdrawn and the cause set for trial.[3]

Petitioner draws support for this artificial distinction from its mistaken belief that the sentence imposed in Ashley was "illegal". The sentence imposed in Ashley, while imposed in an erroneous manner, was not "illegal". See Judge v. State, 596 So. 2d 73, 76-78 & n. 1 (Fla. 2d DCA 1993)(reh'g en banc). A habitual offender sentence is "illegal" only if the defendant fails to meet the criteria for habitualization or the term of years imposed exceeds the statutory maximum. Id. at 78. Accordingly, remand in Ashley was not for the purpose of correcting an "illegal" sentence, but was instead due to the trial court's failure to follow the proper procedure in imposing a habitual offender sentence.

Petitioner also argues that the Ashley opinion was solely concerned with the absence of written notice and that the remainder of the opinion, which addressed the importance of consequence discussion was mere surplusage, obiter dicta, to which the remedy of remand for a guideline sentence did not apply. The Ashley court drew no such distinction between lack of prong compliance and appropriate remedies.[4] Rather, the Court announced that it is unlawful to impose a habitual offender sentence without written notice and consequence discussion, which will result in remand for a guideline sentence.

The decision of the Fourth District Court of Appeal in Wilson v. State, 645 So. 2d 1045 (Fla. 4th DCA 1994), cited below as requiring resentencing within the guidelines, carefully analyzed this Court's decision in Ashley and concluded that failure to comply with

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[3] Respondent has not, at any time, argued that the failure of the trial court to comply with prong-two rendered his plea involuntary. Neither has respondent sought to withdraw his plea.

[4] The Ashley court could have remanded with directions to serve the defendant with notice of intent to habitualize followed by a discussion of the consequences of habitualization. Thereafter, the trial court could have inquired of the defendant whether he wanted to maintain his plea or withdraw it and proceed to trial. That, however, was not what was done. Because the trial court did not follow the proper procedure in imposing a habitual offender sentence remand was for imposition of a guidelines sentence.

its habitual offender sentencing procedure requires resentencing under the guidelines.[5] In Bell, the Second District, in cursory fashion, ignored this Court's conclusion that the failure to comply with the notice[6] requirements of 775.084 and Rule 3.172 created a sentencing issue and instead ordered that the defendant be given the opportunity to withdraw his plea. Bell, 624 So. 2d at 822. Based upon the arguments made above and the very holding of Ashley, the decision of the Fourth District in Wilson and, a priori, the case here under review, announced the proper remedy. Failure to comply with the requirements of Ashley precludes imposition of a habitual offender sentence. Accordingly, the decision under review should be affirmed.

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[5] Remand was for resentencing within the terms of the plea. Mr. Wilson, who received notice of intent to habitualize, entered an open plea to the non-habitual statutory maximum for a second degree felony of 15 years. Because the trial court failed to comply with Ashley in accepting Mr. Wilson's plea, habitualization was not a viable sentencing option. Therefore, the only available sentence was a guideline sentence. The facts at bar are almost entirely the same as those found in Wilson.

[6] Notice must contemplate both written notice of intent to habitualize and oral notice of the consequences of habitualization. Written notice, without confirmation that the defendant understands the significance of that notice, is no notice at all. Similarly, oral notice of the consequences of habitualization without written notice of the state's intent to seek habitualization, is useless notice.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, respondent respectfully requests this Honorable Court affirm the decision of the Fourth District Court of Appeal, vacate respondent's habitualization and remand for resentencing under the guidelines.

Respectfully submitted,

RICHARD JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street\6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

DAVID MCPHERRIN
Assistant Public Defender
Florida Bar# 0861782

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to WILLIAM A. SPILLIAS, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Third Street, West Palm Beach, Florida 33401 by courier this 24TH day of MARCH, 1995.

Attorney for Larry Washington