IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 85,661

JOHNNY BOOTH,

Respondent.

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

RESPONDENT'S MERITS BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NANCY RYAN
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COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The respondent accepts the Statement of the Case and Facts as set out by the Petitioner, with the exception of the final paragraph on page 2, which continues on page 3. What happened at the hearing held on the Respondent's motion to withdraw plea, specifically, was as follows:

The defendant testified that he did not believe there was any real possibility he would be sentenced as a habitual offender, based on defense counsel's representations to him before the plea. (R 16-25) Defense counsel testified that he thought he remembered telling the defendant before the plea that there was a possibility he could be sentenced pursuant to the habitual offender statute, although the State had not sought habitual offender sentencing. (R 25-28) The judge denied the motion. (R 60)

SUMMARY OF THE ARGUMENT

The Respondent acknowledges that this case is indistinguishable from State v. Blackwell, 20 Fla. L. Weekly S354 (Fla. July 20, 1995). The Respondent, however, submits that the decision of the District Court of Appeal in this case is correct, since the trial court imposed the enhanced sentence in this case pursuant to its own notice of intent to impose habitual offender sentencing. That notice should be treated by this court as a nullity, as the Legislature has indicated its intent that such notices are only to be filed by State Attorney's offices.

POINT I

THE DECISION OF THE DISTRICT COURT OF APPEAL WAS CORRECT, SINCE THE HABITUAL OFFENDER SENTENCE WAS IMPOSED BY THE TRIAL COURT ON ITS OWN MOTION.

The Respondent acknowledges that this case is indistinguishable from State v. Blackwell, 20 Fla. L. Weekly S354 (Fla. July 20, 1995). The Respondent, however, submits that the decision of the District Court of Appeal in this case is correct, since the trial court imposed the enhanced sentence in this case pursuant to its own notice of intent to impose habitual offender sentencing. That notice should be treated by this court as a nullity, as the Legislature has indicated its intent that such notices are only to be filed by State Attorney's offices.

The Fifth District Court of Appeal recently noted that

> [t]he judge's ability to initiate habitual offender treatment has been placed in doubt by the enactment of section 775.08401, Florida Statutes (1993), which requires the "state attorney within each judicial district" to adopt uniform criteria to determine the eligibility requirements in determining which multiple offenders should be pursued as habitual offenders in order to ensure "fair and impartial application of the habitual offender statute." It appears that this statute, effective June 17, 1993, may very well have "repealed" Toliver v. State, 605 So. 2d 477 (Fla. 5th DCA 1992), rev. denied 618 So. 2d 212 (Fla. 1993), which permitted the sentencing judge to initiate habitual offender consideration. It now appears that the legislature has determined that it is only the state attorney, in order to ensure "fair and impartial appli-

> cation," who can seek habitual offender treatment of a defendant--and then only if the defendant meets... circuit-wide uniform criteria.

Santoro v. State, 644 So. 2d 585, 586 n.4 (Fla. 5th DCA 1994), jurisdiction accepted no. 84,758 (Fla. February 22, 1995).

Legislative intent is the polestar by which the courts must be guided in construing statutes. State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). The intent of a statute is the law, and that intent should be duly ascertained and effectuated. American Bakeries Company v. Haines City, 180 So. 524, 532 (Fla. 1938). The respondent submits that the Fifth District court has ascertained the Legislature's intention on this point, and that this court should effectuate that intent by affirming the Fifth District's decision in this case.

Also, as one judge has noted, "the wisdom and propriety of [habitual offender] notice issuing from the trial court is...questionable.... The appearance of impartiality of a sentencing judge may be compromised when he or she has already filed a notice to invoke a [discretionary] sentencing enhancement procedure." Steiner v. State, 591 So. 2d 1070, 1072 and n.2 (Fla. 2d DCA 1991) (Lehan, J., concurring). The procedure used in this case creates the appearance that the court has become an arm of the prosecution. Proceedings involving criminal charges must both be and appear to be fundamentally fair. Steinhorst v. State, 636 So. 2d 498, 501 (Fla. 1994). The procedure used to obtain the plea in this case should be disapproved; the district court's decision vacating the respondent's sentence should be affirmed for that reason.

CONCLUSION

The appellant requests this court to affirm the decision of the District Court of Appeal, and to remand this case to the trial court for resentencing pursuant to the guidelines.

Respectfully submitted,

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, FL 32118, by way of his in-basket at the Fifth District Court of Appeal and mailed to Johnny Booth, No. B 352983, Kissimmee CCC, 2925 Michigan Avenue, Kissimmee, FL 34744, on this 28th day of August, 1995.

NANCY RYAN
ASSISTANT PUBLIC DEFENDER