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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, )

Petitioner, )

vs. )

CLYDE JEFFERSON, )

Respondent. )

CASE NO. 85,857

RESPONDENT'S BRIEF ON THE MERITS

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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 Clyde Jefferson

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POINT ON APPEAL

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL BECAUSE IT DOES NOT CREATE CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL. ON THE MERITS, REMAND TO ALLOW RESPONDENT AN OPPORTUNITY TO WITHDRAW HIS PLEAS IS REQUIRED . . . . .	4
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PRELIMINARY STATEMENT

Respondent was the appellant in the Fourth District Court of Appeal and the defendant in the trial court. Petitioner was the appellee and the prosecution below. In this brief the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote the Record on Appeal, which includes the relevant documents filed in the trial court.

The symbol "T" will denote the Transcript of the plea conference.

The symbol "ST" will denote the Transcript of the sentencing hearing.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts subject to the following additions. Petitioner did not file a separate notice of intent to seek imposition of a habitual offender sentence in the instant cases. However, the written plea petition (R 48-54) and the oral colloquies conducted, both at the time respondent initially entered his pleas (T 4-5) and later when they were maintained by him (ST 18), raised the possibility that a habitual offender sentence would be imposed. The trial court failed to advise respondent of the reasonable consequences of habitualization, including the total sentence that could be imposed on all charges and his ineligibility for certain forms of early release.

SUMMARY OF THE ARGUMENT

POINT ON APPEAL

The district court wrongfully concluded that its opinion in the case at bar was in direct conflict with that of another district court of appeal. Therefore, despite the district court's certification of conflict this Court should exercise its discretion and dismiss this appeal. On its merits the outcome of this case is controlled by the previous decisions of this Court in State v. Wilson, 20 Fla. L. Weekly S313 (Fla. July 6, 1995) and State v. Blackwell, 20 Fla. L. Weekly S354 (Fla. July 20, 1995). In the case at bar respondent, through the written plea petition and the oral colloquies with the trial court, was made aware of the possibility of being sentenced as a habitual felony offender. However, the trial court failed to personally confirm that respondent understood the consequences of being sentenced as a habitual offender. Accordingly, remand is necessary to afford respondent an opportunity to withdraw his pleas.

## ARGUMENT

### POINT ON APPEAL

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL BECAUSE IT DOES NOT CREATE CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL. ON THE MERITS, REMAND TO ALLOW RESPONDENT AN OPPORTUNITY TO WITHDRAW HIS PLEAS IS REQUIRED.

As a threshold matter, respondent questions whether this Court has jurisdiction to review the decision rendered by the district court. In Ashley v. State, 614 So. 2d 486 (Fla. 1993), this Court stated:

we 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. at 490.

The district court concluded that the trial court failed to fully comply with either of the aforementioned requirements. Jefferson v. State, 20 Fla. L. Weekly D1242 (Fla. 4th DCA May 24, 1995). As a result of the trial court's failure, the district court determined that habitualization was not an available sentencing option and remanded for imposition of a guideline sentence. Pursuant to Article V, Section (3)(b)(4) of the Florida Constitution, the district court certified conflict with Bell v. State, 624 So. 2d 821 (Fla. 2d DCA 1993) rev. denied, 634 So. 2d 622 (Fla. 1994).

In Bell the Second District Court of Appeal determined that the appropriate remedy when faced with Ashley error was not imposition of a guideline sentence, but was instead to provide the defendant an

opportunity to withdraw his plea and either plead anew or proceed to trial. Bell, 624 So. 2d at 821-822. The facts of Bell establish that written notice of intent to habitualize was filed prior to the defendant entering his plea, but that the trial court failed to personally confirm that he was aware of the ramifications of habitualization. The remedy afforded the defendant in Bell, which was subsequently approved in State v. Wilson, 20 Fla. L. Weekly S313 (Fla. July 6, 1995) and State v. Washington, 20 Fla. L. Weekly S341 (Fla. July 13, 1995), was deemed appropriate for use when the trial court fails to comply with the second Ashley requirement - confirmation by the court that the defendant understands the consequences of being sentenced as a habitual offender.

The remedy found appropriate in the case at bar was not applied to the mere failure to comply with prong two of Ashley. Faced with the failure to comply with both requirements of Ashley, the Fourth District Court of Appeal determined that the appropriate remedy was to remand for imposition of a guideline sentence.

The test for determining whether conflict exists is whether the later decision collides with the prior "on the same point of law so as to create an inconsistency or conflict among precedents." Kincaid v. World Insurance Co., 157 So. 2d 517, 518 (Fla. 1963). "If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, than no conflict can arise." Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). Jefferson involved a failure to comply with both Ashley requirements, while Bell concerned the failure to comply with prong two only. The controlling factual elements in Bell and Jefferson, that gave rise to



the different remedies, are distinguishable. As a result, no conflict between the two cases can exist.<sup>1</sup> Although the district court's certification provides a jurisdictional basis to review the instant case, see Taggart Corporation v. Benzing, 434 So. 2d 964, 966 (Fla. 4th DCA 1983), this Court should recognize the lack of conflict and exercise its discretion to dismiss this appeal, see A.B.G. v. State, 605 So. 2d 1261 (Fla. 1992).

On its merits the outcome of the instant appeal is controlled by this Court's previous decisions in State v. Wilson, 20 Fla. L. Weekly S313 (Fla. July 6, 1995) and State v. Blackwell, 20 Fla. L. Weekly S354 (Fla. July 20, 1995). The written plea petition signed by respondent and the oral colloquies conducted by the court, both before respondent entered his pleas and later when he maintained them, raised the possibility that a habitual offender sentence would be imposed. See Blackwell, 20 Fla. L. Weekly at S355. However, the trial court failed to discuss the consequences of habitualization with respondent, including the maximum sentence that could be imposed on all charges and his ineligibility for certain forms of early release. See Wilson, 20 Fla. L. Weekly at S314. Contrary to petitioner's assertion, respondent's failure to previously file a motion to withdraw his pleas in the trial court does not preclude relief. Mr. Wilson was granted relief despite his failure to previously seek withdraw of his plea in the trial court. As was the case in Wilson, respondent was informed neither of the maximum habitual offender term to which he was subject

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<sup>1</sup> Certification of conflict by a district court applies only to conflicts between decisions of the district courts; it does not extend to conflicts between decisions of this Court and the district courts. P. Padovano, Florida Appellate Procedure § 2.11.

nor that he might be ineligible for certain programs affecting early  
release. Therefore, the remedy afforded Mr. Wilson, remand for  
resentencing and an opportunity to withdraw his plea, should be  
afforded respondent.

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, respondent respectfully requests this Court dismiss the instant appeal or, if it is determined that reaching the merits of this case is appropriate, remand this cause to afford respondent an opportunity to withdraw his pleas.

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



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DAVID MCPHERRIN  
Assistant Public Defender  
Florida Bar No. 0861782

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to ANN CARRION, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Third Street, West Palm Beach, Florida 33401 by courier this 6th day of SEPTEMBER, 1995.



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Attorney for Clyde Jefferson