ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

TERRY J. JOYCE,

Respondent.

Case No. 93,540

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

DALE E. TARPLEY
Assistant Attorney General
Florida Bar No. 0872921
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813)873-4739

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On or about September 21, 1995 the Respondent, Terry J. Joyce, was charged by information with eight counts of delivery of cocaine, eight counts of possession of cocaine, and one count of sale of a substance in lieu of a controlled substance. The offenses were alleged to have occurred at various times in July and August of 1995. (R. 30-36) On January 29, 1996 the state noticed the Respondent as a habitual felony/habitual violent felony offender. (R. 41)

On January 29, 1996 the Respondent executed a Plea Form, Acknowledgment and Waiver of Rights. (R. 42) The plea form indicated the plea was "open," i.e., there was no agreement as to his sentence. (Id.) However, the plea form did include a statement to the effect that he had discussed the maximum possible and any applicable mandatory minimum penalties and possible defenses with his attorney and was satisfied with the attorney's services. The plea form included a disclaimer that there were no guarantees regarding what gain time, if any, the Respondent would receive should he be sentenced to Florida State Prison. (R. 43) The form advised the Respondent that treatment as a habitual offender would affect eligibility for gain/credit time. (Id.)

The Respondent entered his guilty plea on the same date he executed the plea form. (R. 101-113) The trial court advised the Respondent that he would not face habitual felony sentencing on

the possession of cocaine counts. (R. 106) The court further advised the Respondent that if habitualized on the delivery of cocaine counts, he was facing thirty years in prison. (R. 107) As the Second District Court of Appeal points out in the attached opinion, the trial court did not discuss the effect of habitual offender sentences on eligibility for early release. Joyce v. State, Case No. 96-01508, slip op. at 2 (Fla. 2d DCA, June 26, 1998).

The trial court did ascertain that the Respondent was entering the plea knowingly and voluntarily and that he had discussed the plea with his attorney. (R. 107-108) Upon determining a factual basis for the plea, the trial court accepted the plea. (R. 110) A sentencing hearing was convened February 29, 1996. (R. 115-134) The state offered into evidence copies of the Respondent's prior judgments and sentences as predicates to habitualization. (R. 120-123) The trial court found the Respondent qualified for treatment as a habitual felony offender and announced her intent to sentence him as such. (R. 123-24)

The court then sentenced the Respondent to fifteen years in prison as a habitual felony offender on the delivery of cocaine counts, to five years in prison for the possession of cocaine counts, and to five years in prison for sale of substance in lieu of a controlled substance. (R. 130-133) The sentences were all ordered to run concurrently. (R. 47-85) On appeal, in the ab-

sence of a motion to withdraw the plea, the Respondent argued the trial court failed to comply with the second prong of Ashley v. State, 614 So. 2d 486, 490 (Fla. 1993), i.e., the trial court failed to explain the consequences of habitual offender sentencing.

In response, the state argued that the plea form adequately apprised the Respondent of the consequences of habitualization. The state further questioned whether the Ashley question was ripe for appellate review. The state cited Williams v. State, 691 So. 2d 484 (Fla. 4th DCA 1997) (en banc) in which the Fourth District held that even in matters involving Ashley violations, a defendant is precluded from bringing a direct appeal when judgment has been entered on a plea of guilty or nolo contendere without an express reservation of that right. Unless a defendant reserves the right to appeal, he or she is limited to collateral attack. 691 So. 2d at 485.

The state argued that the Respondent should not be entitled to review of the Ashley question since he did not move to withdraw the plea, nor did he expressly reserve the right to appeal any issue. The Second District, in its opinion attached hereto, rejected the state's contention that the Ashley question was not ripe for review. It reversed the Respondent's habitual offender sentences and remanded with instructions to give him the opportunity to withdraw the plea. Joyce, slip op. at 2. However, the

Court in a footnote recognized that it has acknowledged conflict with Williams on the same issue in Thompson v. State, 706 So. 2d 1361, 1362 n.1 (Fla. 2d DCA 1998). Joyce, slip op. at 2 n.1.

It is based on the Second District's acknowledgment of conflict with Williams that the state requests the court to accept jurisdiction in the instant case.

SUMMARY OF THE ARGUMENT

The Court should accept conflict jurisdiction based on the Second District's acknowledgment of conflict with the Fourth District's Williams decision, and also based on conflict with the First District's decision in Rhodes v. State, infra.

ARGUMENT

THE HONORABLE COURT SHOULD ACCEPT JURISDICTION OF THE INSTANT CASE BASED ON THE SECOND DISTRICT COURT OF APPEALS ACKNOWLEDGMENT OF CONFLICT WITH THE FOURTH DISTRICT AS TO THE PROPER REMEDY FOR A DEFENDANT WHO PLEADS GUILTY OR NOLO CONTENDERE AND FAILS TO RESERVE THE RIGHT TO APPEAL, YET CLAIMS A VIOLATION OF ASHLEY V. STATE, 614 SO. 2D 486 (FLA. 1993) IN REGARD TO THE FAILURE TO ADVISE OF THE CONSEQUENCES OF HABITUAL OFFENDER SENTENCING.

The Second District acknowledges that its holding conflicts with that of the Fourth District in Williams v. State, 691 So. 2d 484 (Fla. 4th DCA 1997). In Williams, the Fourth District in an en banc decision held:

> Even in matters involving alleged *Ashley* violations, a defendant is precluded from bringing a direct appeal when judgment has been entered on a plea of guilty or nolo contendere. A defendant may not appeal from a judgment entered on his guilty plea or from a judgment "entered on a plea of nolo contendere without an express reservation of the right of appeal from a prior order of the lower tribunal, identifying with particularity the point of law being reserved." Fla. R. App. P. 9.140(b).
>
> In the instant case, since appellant has not expressly reserved the right to direct appeal, he may obtain review only by collateral attack. §924.06(3); *see Robinson v. State*, 373 So. 2d 898, 901-902 (Fla. 1979); *Norman v. State*, 634 So. 2d 212, 213 (Fla. 4th DCA 1994).

691 So. 2d at 485. The decision of the Second District is also

in direct and express conflict with the reasoning of the First District in Rhodes v. State, 704 So. 2d 1080 (Fla. 1st DCA 1997).

In Rhodes, the First District stated that the failure to advise the defendant of certain legal consequences, such as the loss of gain time, affects only the validity of the plea and can be corrected by allowing the defendant to withdraw his plea with the permission of the court. However, as the court noted in Rhodes, a challenge to the validity of the plea may not be asserted on direct appeal but must first be addressed to the trial court by a motion to withdraw his plea in accordance with the dictates of Robinson v. State, 373 So. 2d 898 (Fla. 1979).

The First District in Rhodes also distinguished this Court's reasoning in State v. Wilson, 658 So. 2d 521 (Fla. 1995):

> [t]hat decision does not modify the existing preservation of error. The issue settled in *Wilson* was the proper remedy for an *Ashley* violation, not the requirement for preserving such a claim for review. It does not appear to us that the supreme court intended to recede from its holding in *Robinson* that a defendant may not challenge the voluntariness of a guilty plea on direct appeal unless the issue has been preserved for review by a motion to withdraw the plea.

704 So. 2d at 1082. Since the Second District's opinion in the instant case expressly and directly conflicts with the decision of the Fourth District in Williams and with the reasoning of the First District in Rhodes, this Court has jurisdiction to review the instant case on the basis of conflict.

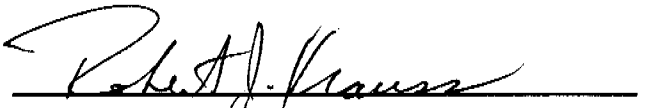
The Court should accept jurisdiction in order to resolve the conflict between the Second District and the Fourth and First Districts.

CONCLUSION

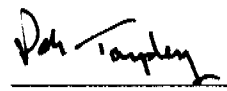
Based on the foregoing facts, argument, and citations of authority, Petitioner respectfully requests that this Honorable Court exercise its discretion to review the instant case and resolve the existent conflict.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

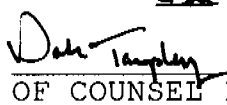


DALE E. TARPLEY
Assistant Attorney General
Florida Bar No. 0872921
2002 N. Lois Ave., Ste. 700
Westwood Center
Tampa, Florida 33607-2366
(813)873-4739

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Scott L. Robbins, Esq., 1409 Swann Avenue, Tampa, Florida 33606 this 23rd day of July, 1998.



OF COUNSEL FOR PETITIONER