IN THE SUPREME COURT OF FLORIDA

CASE NO. 01-1811

FRITZ MAJOR,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

The Petitioner, Fritz Major, was the pro se coram nobis movant in the trial court and the pro se appellant in the Third District Court Of Appeal. Upon issuance of decision and certification, the lower court appointed counsel to represent the Petitioner before this Court. The designation "R." will refer to the record before the Court.

STATEMENT OF THE CASE AND FACTS

On July 19, 1993, the defendant, then 16 years of age, appeared before the criminal division of the Eleventh Judicial Circuit Court and entered a plea of no contest to an information charge of aggravated assault with a handgun on February 3, 1993 (R. 13-16, 30). The recommended and permitted sentencing guidelines range was any non-state prison sanction (R. 38). The defendant was adjudicated guilty and, as discussed in the plea, was sentenced to 18 months imprisonment, with a recommendation by the court of incarceration in a youthful offender facility (R. 18-19, 36-37).

On August 7, 2000, the defendant filed in this Court a petition for writ of error coram nobis, asserting that a sentence in a subsequent federal case had, on the basis of the 1993 conviction, been enhanced from 210 months to 364 months, i.e., had been enhanced by twelve years and ten months, and had the defendant known that the 1993 case could be used to provide such enhancement in this or any other case, he would not have entered his no contest plea and would have proceeded to trial (R. 57, 58, 60, 65). By order of September 6, 2000, this Court transferred the petition to the Circuit Court of the Eleventh Judicial Circuit, as a motion filed pursuant to Florida Rule of Criminal Procedure 3.850 (R. 71). As the lower court correctly observed, "[t]he defendant filed within the two-year window of *Wood v. State*, 750 So. 2d 592

(Fla. 1999), so the petition is timely[,]" and under *Wood* the petition is treated as a rule 3.850 motion for post-conviction relief. *Major v. State*, 790 So. 2d 550, 551 (Fla. 3d DCA 2001).

In affirming the trial court's ensuing denial of relief on the basis that enhancement in a subsequent case is a collateral consequence of which the trial court or counsel have no duty to advise, the lower court applied its own prior case law and relegated this Court's recent statement on the matter to a nullity:

> We are firmly committed to the proposition that the type of claim advanced by the defendant is not cognizable by motion for postconviction relief, since there is no duty to anticipate a defendant's future recidivism. As we explained in *Fox:*
>
> > [A] judge is required to inform a defendant only of the direct consequences of his plea and is under no duty to apprise him of any collateral consequences. A direct consequence is one that has a " 'definite, immediate, and largely automatic effect on the range of the defendant's punishment.' "
> >
> > " '[A] plea's possible enhancing effect on a subsequent sentence is merely a collateral consequence of the conviction; it is not the type of consequence about which a defendant must be advised before the defendant enters the plea.' " The sentencing court is not required "to anticipate a defendant's recidivism."

> Therefore, the fact that the felony adjudication might be used against the defendant in a subsequent federal prosecution was a collateral consequence of the plea and was not an issue the trial judge was required to cover in the plea colloquy.

659 So. 2d at 1327 (citations omitted); *see U.S. v. Woods,* 870 F. 2d 285 (5th Cir.1989); *Dixson,* 785 So. 2d at 744; *Rhodes,* 701 So. 2d at 389.

As a matter of common sense, a defendant is already under a legal duty not to go out and commit more crimes in the future, regardless of whether the penalty is "ordinary" or enhanced. Neither the court nor counsel is required to advise a defendant what penalty he can expect to receive for crimes not yet committed. The defendant can avoid further sentencing consequences, enhanced or otherwise, by refraining from committing new crimes.

Future sentence enhancement for a later crime is not a direct consequence of a plea at all, but is instead contingent first on the defendant's voluntary decision to commit another crime; second, on whether the new crime is one capable of having enhanced sentencing; and third, on the prosecutor's discretionary decision whether to seek enhancement. Future sentence enhancement is plainly a collateral consequence, not a direct consequence, of the defendant's plea in the earlier case. Judge Echarte's ruling which denied relief is entirely correct.

III.

We must, however, address a seemingly contrary statement in a recent decision of the Florida Supreme Court, *State v. Perry,* 786 So. 2d 554 (Fla.2001). In that

coram nobis case, the Florida Supreme Court said:

> The second element requires that a defendant be sufficiently informed so that he or she understands the consequences of his or her plea--that the defendant realizes the decision to plead guilty waives some of his or her constitutional rights, like the right to a jury trial, as well as other significant consequences. *Williams,* 316 So.2 d at 271. This Court accordingly has permitted a writ of error coram nobis where the petitioner asserted he was not informed his plea could constitute a "prior offense" in subsequent proceedings. *See Wood v. State,* 750 So. 2d 592 (Fla.1999). *See also Peart v. State,* 756 So. 2d 42 (Fla. 2000) (permitting a writ of error coram nobis where petitioners asserted they were not informed that deportation was a possible consequence of their pleas). *State v. Perry,* 786 So. 2d at 557.

We conclude that the foregoing portion of the *Perry* decision is dictum. The actual issue in *Perry* was whether the defendant had truly been guilty of grand larceny when he took a motorcycle temporarily for a "joyride." *Id.* at 555. There was no issue in *Perry* regarding future recidivism. Perry's claim was that under the facts of the case, he was not guilty of a felony at all. *Id.* at 557.

The *Perry* decision relies on *Wood.* But the only issue in *Wood* was whether Wood's petition for writ of error coram nobis was subject to a two-year time limit. 750 So. 2d at 595. In footnote three of *Wood,* the court specifically declined to reach any other issue than the

question of timeliness. *Id.* at 595 n. 3.

> The Florida Supreme Court has previously held that a "trial judge is under no duty to inform a defendant of the collateral consequences of his guilty plea." *Ginebra,* 511 So. 2d 960, 960-61 (Fla. 1987). That part of *Ginebra* remains good law. [Footnote omitted.] The consequence under discussion here--possible future sentence enhancement if the defendant commits a future crime--is a collateral consequence. We conclude that *Perry* and *Wood* have not overturned this court's decisions in *Fox, Rhodes,* and *Dixson.*

Id. at 551-52.

The lower court certified to this Court as a question of great public importance:

> WHETHER THE TRIAL COURT OR COUNSEL HAVE A DUTY TO ADVISE A DEFENDANT THAT HIS PLEA IN A PENDING CASE MAY HAVE SENTENCE ENHANCING CONSEQUENCES IF THE DEFENDANT COMMITS A NEW CRIME IN THE FUTURE?

Major v. State, id. at 553. The decision of the lower court was rendered on July 18, 2001. Notice to invoke the discretionary review jurisdiction of this Court was timely filed on August 15, 2001 (R. 143).

SUMMARY OF ARGUMENT

The lower court erred, and exceeded its authority, in disregarding or marginalizing this Court's decisions in *Wood v. State* and *Perry v. State* which recognize viability of a postconviction or coram nobis claim that a defendant was not apprised of the possible effects from a plea upon sentencing in other cases. The more than 10 years of jurisprudence from this Court, beginning with *Ginebra*, signify that defendants must be informed, in entering pleas, of consequences which might reasonably flow from a plea, regardless of whether such consequences are labeled "direct" or "collateral." It is salutary, rather than problematic as the lower court concluded, to require that defendants be so informed. To the extent that, as the sentencing structure does presently provide, even a plea to a later occurring offense can have adverse consequences in an earlier occurring, but not yet sentenced, offense, it is only fair that defendants be so apprised in order to render the plea voluntary and knowing. Moreover, as to the possible adverse sentencing consequences in future offenses, so advising defendants can only be salutary, by raising the disincentive to

engage in further criminal conduct. The lower court in this and other cases stood the applicable policy interests in reverse of that which is societally beneficial.

Further, application of *Wood* and *Perry* avoids additional problems, such as where misadvice but not lack of advice may presently provide a basis for relief, inasmuch as a trial court does not necessarily know at the plea colloquy about such misadvice.

Finally, and most importantly, because the defendant in this case was only 16 years of age at the time of the plea, and juveniles typically lack the judgmental capacity that adults have with respect to such proceedings, it is especially crucial that a trial judge so inform of the possible future effects of a present plea, and the defendant herein should receive an evidentiary hearing on his claim.

ARGUMENT

THE LOWER COURT'S DECISION IMPROPERLY DECONSTRUCTED OR BYPASSED THIS COURT'S STATEMENT IN *STATE V. PERRY*, 786 So. 2d 554 (Fla. 2001), THAT A WRIT OF ERROR CORAM NOBIS LIES WHERE THE PETITIONER ASSERTS HE WAS NOT INFORMED HIS PLEA COULD CONSTITUTE A "PRIOR OFFENSE" IN SUBSEQUENT PROCEEDINGS. THE DEFENDANT SHOULD HAVE BEEN SO INFORMED, PARTICULARLY WHERE HE WAS A JUVENILE AT THE TIME OF THE PLEA, AND HE SHOULD RECEIVE AN EVIDENTIARY HEARING ON HIS CLAIM.

A. The Lower Court Improperly Displaced This Court's Decisions with Its Own.

The lower court cast aside this Court's own construction of its decisional law, and applied its (the lower court's) construction in its place. Before proceeding to the merits, it is worth noting that this was jurisprudentially inappropriate. Apart from the fact that, as will be discussed below, this Court's discussion in *Perry* was a correct and

binding construction of *Wood v. State*, 750 So. 2d 592 (Fla. 1999), and was made cognizently and signifies the actual holding of that case, even if the lower court thought this Court was incorrect it was not at liberty to circumvent those decisions by ruling adversely. *Continental Assurance Co. v. Carroll*, 485 So. 2d 406, 409 (Fla. 1986). Even indulging its view that this Court's statement in *Perry* was dictum, that statement came in construing a case factually precisely on point, and, as cogently stated in *Horton v. Unigard Ins. Co.*, 355 So. 2d 154, 155 (Fla. 4th DCA 1978) [*disapproved on other grounds*, *Dressler v. Tubbs*, 435 So. 2d 792, 794 (Fla. 1983)], "dictum from the highest court in this State . . . is no ordinary dictum!" The proper course for the district court to have taken would have been to rule consistently with *Wood* as construed in *Perry* and then to certify the question, not to derogate those decisions to insignificance. *See Continental Assurance Co., id.* at 409.

B. *Perry* and *Wood*; *Major* versus *Bismark*

In *Wood v. State*, similar to what occurred in this case, the defendant entered a plea of no contest to state charges, and upon a subsequent federal offense incurred an enhanced sentence because of the effect of the state plea. *Wood v. State, id.* at 592. Wood filed a pro se petition for writ of error coram nobis, which the circuit court treated as a Rule 3.850 post-conviction motion, which it then held time-barred because filed ten years after the state plea, beyond the rule's two-year time limit. *Id.* at 592-93.

The First District Court of Appeal affirmed and certified conflict. *Wood v. State*, 698 So. 2d 293 (Fla. 1st DCA 1997). In quashing that decision, this Court held that the rule 3.850 time limits are applicable to writs of error coram nobis, deleted the "in custody" requirement of the rule so both custodial and noncustodial movants could rely on the rule rather than the writ, and stated that defendants adjudicated prior to the opinion "shall have two years from the filing date within which to file claims traditionally cognizable under coram nobis." *Wood*, 750 So. 2d at 595.

Of *Wood*, the *Major* court stated that in footnote 3 this Court "specifically declined to reach any other issue than the question of timeliness. *Major*, 790 2d at 552, referring to *Wood*, 750 So. 2d at 595 note 3. This observation by the lower court is a subtle but important variance in description from what footnote 3 of *Wood* actually signified. In that footnote, this Court stated: "The other issues Wood raises are beyond the scope of the certified conflict and we decline to address them." *Id.* This Court did not, thus, decline to reach any other issue, it only declined to reach other issues raised by Wood. Wood did not himself argue the issue adjudicated by the *Major* court, however. Wood argued two issues in addition to the proposition, rejected by this Court in its decision, that no fixed time limit should apply to coram nobis relief. Wood additionally argued that the lower court should not have decided the case the way it did without first having determined whether the exception to the two-year time limit

contained in rule 3.950 itself [Athe facts ... were unknown ... and (not ascertainable) by... due diligence@] was established, and that Wood should not be deemed to be "in custody" (and therefore subject to rule 3.850) from his 1988 state conviction where he had already completed his state sentence. *See* Petitioner's Initial Brief in *Wood* at 6-8, 9-16.

While, thus, it is correct that this Court did not expressly comment on Wood's actual claim that his plea should be vacated because his lawyer had not told him it could be used against him in a future offense, the reservation in footnote 3 did not indicate a declination to reach the issue either. To the contrary, it is difficult to conceive that this Court would have adjudicated such an important issue, which resulted both in a significant change in law and in a rule amendment, without necessarily and implicitly having passed on the viability of the claim. If the claim was not a viable one, it would have been a very poorly situated case for such significant pronouncement and it is not and should not be imputable that this Court did not know what it was doing. To the contrary, the Petitioner herein submits that this Court indeed viewed the claim as a legitimate one, i.e., as one upon which relief could be granted, and that is why, in *State v. Perry*, in the very context of discussing plea consequences about which a defendant must be sufficiently informed, this Court stated that it "has permitted a writ of error coram nobis where the petitioner asserts he was

not informed his plea could constitute a 'prior offense' in subsequent proceedings. *See Wood v. State*, 750 So. 2d 592 (Fla. 1999)." *State v. Perry*, 786 So. 2d at 557. This Court knew in both *Wood* and *Perry* precisely what it considered and adjudicated.

Indeed, although Wood did not raise the issue, the attorney general *did* in that case, presenting to this Court the precise argument that Wood's own claim involved merely a collateral consequence of the conviction, upon which it argued no relief could be granted, citing to this Court the very third district cases relied upon by the lower court herein. See Respondent's Answer Brief on the Merits in *Wood* at 9-10. Significantly, in its *Wood* footnote 3, this Court stated only that was declining to address the other issues raised by *Wood* himself; it did not state, and did not intend to indicate, that it was declining to address that which the respondent State itself had raised, and which if accepted would necessarily have precluded both any relief and indeed any necessity or appropriateness of adjudicating the case on any other basis. The resolution of *Wood* itself, and the recognition of it in *Perry*, preclude what the lower court did herein.

This was correctly comprehended by the Second District Court of Appeal which, in *Bismark v. State*, ___ So. 2d ___, 26 Fla. L. Weekly D2198 (Fla. 2d DCA September 12, 2001), recognized that *Perry* and *Wood* require the opposite result to that reached in *Major*. That court observed that:

> [T]he passage [in *Perry*] also seems to clarify that the court intended to hold in Wood that failure to advise of future sentence-enhancing consequences may invalidate a plea. While the *Wood* opinion itself was not clear on this point, this interpretation is consistent with the court's decision to remand Wood's petition for further proceedings. Thus, although we are in agreement with prior case law holding that future sentence-enhancing consequences of a conviction are collateral consequences of which a defendant need not be informed, [citations omitted], we believe that the Supreme Court may have implicitly overruled that case law in *Wood* and *Perry*.

Id., 26 Fla. L. Weekly at D2198-99.

Expressing reservations about the number of claims it perceived and the need to alter plea colloquies and plea forms, the second district passed the case directly to this Court. *Id.*

As will be discussed below, it is not merely *Wood* and *Perry* which have overruled the case law represented by the decisions relied upon below, it has indeed been this Court's decisions for more than a decade which have removed the basis for that case law, significantly modifying what a plea colloquy and advice to a defendant therein must entail and significantly impacting the direct-collateral dichotomy.

C. A Significant Alteration in the Law from *Ginebra Onward*; Reasonable Expectancy or Frequency of a Consequence, Coupled with Seriousness or Severity, as Distinct from a Wooden View of Collateral Versus Direct and Automatic.

In its decision, the lower court relied upon a line of cases of several years duration holding that a judge in accepting a plea is under no duty to apprise the defendant of any collateral consequences, and concluding that for a consequence not to be collateral, i.e., to be direct, it must have a "definite, immediate, and largely automatic effect on the range of the defendant's punishment." *State v. Fox*, 659 So. 2d 1324, 1327 (Fla. 3d DCA 1995), *quoting Zambuto v. State*, 413 So. 2d 461, 462 (Fla. 4th DCA 1982). *See also, e.g., Bethune v. State*, 774 So. 2d 4 (Fla. 2d DCA 2000); *Rhodes v. State*, 701 So. 2d 388 (Fla. 3d DCA 1997) (respectively holding neither a defense's counsel's failure to advise, nor a trial court's failure to advise nor even defense counsel's affirmative misadvice, about future effects can provide any basis for relief). These cases characteristically rely upon this Court's decision in *State v. Ginebra*, 511 So. 2d 960 (Fla. 1987), particularly its statement that "the trial court judge is under no duty to inform a defendant of the collateral consequences of his guilty plea," *id.* at 960-61, for their conclusion. However, this Court in *Ginebra* did not either explicitly or implicitly adopt or approve the conceptualization of "collateral" as "a definite, immediate and largely automatic effect on the range of the defendant's punishment" as has been utilized by the lower courts in citing *Ginebra*. As indicated, that framing comes from a lower court decision, *Zambuto*.

This Court referred to "direct consequences" as "only those consequences of

the sentence which the trial court can impose." *Ginebra, id.* at 961. It then held that a "counsel's failure to advise his client of the collateral consequences of deportation does not constitute ineffective assistance of counsel." *Id.* However, saliently, this Court both noted the desirability of informing defendants of the collateral consequences of pleading guilty, *see id.* at 962, quoting *United States v. Campbell*, 778 F.2d 764 (11th Cir. 1985), and began to transform the concept of collateralness itself or the permissibility of bypassing advice about "collateral" circumstances by, in the very wake of *Ginebra*, amending the criminal rules to require advice about deportation consequences. *In re Amendments to Florida Rules of Criminal Procedure*, 536 So. 2d 992 (Fla. 1988). *See State v. DeAbreu*, 613 So. 2d 453 (Fla. 1993), noting that the rule amendments "superseded *Ginebra* to the extent of any inconsistency."

The seminal development of the rule change flowing from *Ginebra*, continuing through *Ashley v. State*, 614 So. 2d 486 (Fla. 1993), and its significant effect on the concept of "collateral" in relation to habitualization, returning to the question of deportation in *Peart v. State*, 756 So. 2d 42 (Fla. 2000), and on into *Wood* and *Perry* as already discussed, significantly modified the concept of collateral in a way preclusive of that which has been employed by the lower courts.

In *Ashley*, in rejecting the proposition that a defendant need only be informed of notice of intent to habitualize prior to sentence as distinct from prior to plea,

wherein the State had argued that habitualization was a collateral, not a direct consequence of the plea, *id.* at 487, this Court held that prior to accepting a plea from a qualifying defendant the trial court "must ascertain that the defendant is aware of the possibility and reasonable consequences of habitualization." *Id.* at 489-90. This was to include that "habitualization may affect the possibility of early release through certain programs", *id.* at 490 note 8, even though, in contrast to that which was stated in *Ginebra*, this was not something the trial court could impose (i.e., the trial court could not itself preclude eligibility, nor did the sentence automatically do so, as distinct from the possibility it might). Further, this Court also recognized the frequency with which habitual offender sentences were being imposed as a factor in its decision. *Ashley, id.* at 489.

Thus, although such programmatic consequences as possible effect on gain time or early release for an habitual offender were collateral, the net effect of *Ginebra* and *Ashley* was to transform that distinction by requiring a defendant be advised of them. *See, e.g., Parker v. State*, 766 So. 2d 1172 (Fla. 1st DCA 2000); *Butler v. State*, 764 So. 2d 794 (Fla. 2d DCA 2000). In *Freels v. State*, 701 So. 2d 1207 (Fla. 1st DCA 1997), it was cogently observed that *Ashley* signified a "transformation of special gain time and early release consequences to equal footing with direct consequences of a plea[,]" *id.* at 1209, and that that could not even "logically be limited to the habitual

offender context." *Id.* (holding that other, nonhabitualizing, sentencing subjecting an inmate to differential loss of gain time required advice to a defendant in entering a plea).

Returning full circle to deportation consequences in *Peart v. State*, this Court, in assessing viability of claims of lack of advice of what was required by the post-*Ginebra* amendments as to deportation, rejected that which the lower court had held. The lower court, inter alia, had concluded that to obtain relief the defendants would have to show a probability of acquittal at trial. *Peart*, 756 So. 2d at 47. Instead, factoring in not certainty or directness of consequence so much as its harshness, this Court held that a mere "threat" of deportation, or the fact a defendant was "deportable", was sufficient to show the requisite prejudice. *Id.* at 48.

These decisions, even before those which followed in *Wood* and in *Perry*, thoroughly transformed the applicable landscape. Collectively, they signify that it is not merely a labeling of direct versus collateral, or definiteness, immediacy, or "automaticness" which determines that of which a defendant must be apprised at a plea, but rather those consequences which, regardless of label, are sufficiently reasonably expectable or possible, or of sufficient impact, i.e., those that matter, that

determine whether advice must be given.[1]

Perry and *Wood* should foreclose any further discussion. *Wood v. State* should be applied as controlling, and the lower court decision should be quashed.

As indicated both by what occurred in this case as well as in other recent cases indicating impact of a state plea in subsequent federal offenses, as well as the prevalence of state recidivist provisions and their ever increasing new emergence, see, e.g., ' 775.082(a), Florida Statutes (2000) [prison releasee re-offender provisions, providing mandatory maximum terms for persons committing or attempting to commit any of several enumerated offenses while in or within three years of release from prison]; ' 775.084(1)(a), (4)(a) [habitual felony offender provisions]; ' 775.084(1)(b), (4)(b) [habitual violent felony offender provisions]; ' 775.084(1)(b), (4)(b) [violent career criminal provisions]; ' 775.084(1)(c), (4)(c) [3-time violent felony offender provisions].

Even the Criminal Punishment Code itself, like the sentencing guidelines

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[1] In *Peart*, at least as to the failure to advise therein involved, this Court appropriately observed that both failure to advise and "affirmative misadvice" should be treated under the same analysis. *Id.* at 46 n. 3.

which preceded it, regularly and necessarily increases the floor of punishment by virtue of prior offenses and ascribed point values. All these provisions indicate the frequency, i.e., reasonable expectancy of past (plea) offenses, on other offense sentences. Therefore, while "deportation ... often is just as harsh as other consequences, if not more so[,] *Peart, id.* at 47-48 n. 5, it is also true that "other consequences," such as the nearly 13-year sentence enhancement which occurred herein, might be more harsh than deportation to some countries. Unquestionably, it is more harsh than the threat alone of deportation, which itself can suffice to show prejudice under *Peart*. It is equally unquestionably far more severe than, for example, failure to advise of a two-year license revocation which was held to require vacature of a plea at the option of the defendant in *Daniels v. State*, 716 So. 2d 827 (Fla. 4th DCA 1998). *See also Whipple v. State*, 789 So. 2d 1132, 1137-38 (Fla. 4th DCA 2001) (holding defendant entitled to plea vacature where although he was advised there would be a driver's license revocation, he was not told it could be a permanent revocation).

Moreover, the lower court was not even correct in stating that a defendant could avoid future consequences by not committing any additional crimes. In point of fact, not only was it fairly recently, i.e., within the past decade, the case that sequential convictions were not even required for habitualization, *State v. Barnes*, 595

So. 2d 22 (Fla. 1992),[2] indeed, even now a plea on a subsequently committed offense can adversely impact a sentence on a prior, not yet tried or sentenced offense. Where a defendant is to be sentenced for an earlier offense, but such sentencing occurs after conviction for a later offense, the later offense although non-scoreable can be used to depart in sentencing for the earlier offense to the extent such offense would have been scoreable if committed "in sequence." *Harris v. State*, 685 So. 2d 1282 (Fla. 1996). There would appear no reason why the same reach back "scoring effect" for such "out of sequence" offenses does not apply under the present Criminal Punishment Code.

Thus, the lower court both analyzed the issue erroneously and framed it too narrowly. In terms of both expectancy and prevalency of effect, or, alternatively put, in terms of frequency and severity of effect, defense counsel or the trial court should inform a defendant entering a plea of guilty or no contest that that plea may be used to enhance punishment for any crime, whether committed in the future or already committed if not yet sentenced. The point is not, as the lower court put it in skewing

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[2] This Court stated therein that it was bound to apply the plain terms of the statute notwithstanding the awareness that "[t]he sequential conviction requirement provides a basic, underlying reasonable justification for the imposition of the habitual sentence," *Barnes, id.* at 24. The sequential conviction requirement was reinstituted after *Barnes*, chapter 93-406 ' ' 2, 44, Laws of Fla. However, just as it had been in the four years prior to *Barnes*, such logic or rationality of provision could, intentionally or unintentionally, at any time be dropped by the legislature.

the question, whether a defendant must be advised "what penalty he can expect to receive for crimes not yet committed, *Major*, 790 2d at 551-52, it is simply that he should be told that a present plea might impact sentencing in other cases to his detriment.

Nor did the lower court, building on its earlier decision in *Rhodes v. State*, 701 So. 2d at 389, which had analyzed the matter to conclude that such advice would encourage recidivism, correctly assess the policy implications. While requiring the advice stated above is only fair in relation to possible use of a present plea on sentencing for offenses previously committed, as a matter of deterrence it is salutary to advise a defendant of the possible increase in penalty for any future offenses stemming from the present plea. If anything, that advice should raise, not decrease, the disincentive to engage in future offenses.

Further, additional salutary effects arise as a result of the frequent distinction between non-advice as to certain matters and mis-advice as to them. For example, although it has been held that there is no requirement in general (i.e., other than in the *Ashley* context) to inform a defendant about gain time, *Simmons v. State*, 611 So. 2d 1250, 1252-53 (Fla. 2d DCA 1992), or to inform about the possibility of involuntary commitment as a sexually violent predator, *e.g., Watrous v. State*, 793 So. 2d 6 (Fla. 2d DCA 2001), it has relatedly been held that affirmative mis-advice in such areas can

provide a basis for relief, i.e., can require vacature of a plea. *Turner v. State*, 689 So. 2d 1107 (Fla. 2d DCA 1997); *Roberti v. State*, 782 So. 2d 919 (Fla. 2d DCA 2001), respectively.

This dichotomy, i.e., the difference in outcome between non-advice and mis-advice, has been applied to the instant type of claim by *Smith v. State*, 784 So. 2d 460 (Fla. 4th DCA 2000), although another decision has certified conflict with it. *Russell v. State*, 788 So. 2d 1009 (Fla. 2d DCA 2001). But mis-advice is characteristically not brought to light in plea colloquies, as indicated by the frequency with which claims as to a variety of areas of information arise on post-conviction motion. Thus, while the lower court herein as well as that in *Bismark* was concerned about the effect in a number of cases which have raised the issue, amending plea colloquy requirements to require advice about effects from sentencing potentially increasing other case sentences will shut off the problem as to any pleas arising thereafter, and, additionally, have the salutary effects discussed above.

Finally, particularly in a case such as this, where the defendant was only 16 at the time of the plea, is the duty to advise of possible consequences in other cases important. "Adolescents seem to discount the future more than adults do, and to weigh more heavily short-term consequences of decisions. . . . Adolescents may be less likely than adults to contemplate the meaning of a consequence that will have an

impact ten or fifteen years into the future [citation omitted]." Elizabeth L. Scott, *Criminal Responsibility in Adolescence, in Youth on Trial* 291, 305 (Thomas Russo & Robert G. Schwartz eds., Univ. of Chicago Press 2000). It is particularly important, notwithstanding that the legislature has seen fit to treat juveniles as adults by virtue of acts charged, that the distinction not be lost that adolescents are not, especially with respect to court proceedings, necessarily of the same judgmental capacity as adults. Through the plea colloquy process, trial courts should particularly make sure that juveniles prosecuted as adults understand the full range of consequences of that to which they are pleading.

CONCLUSION

Wherefore, on the basis of *Perry* and *Wood*, and the antecedent case law, the decision of the lower court should be quashed and the cause remanded to require an evidentiary hearing on the defendant's claim.

Respectfully submitted,

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BY:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by facsimile and by hand to Regine Monestime, Assistant Attorney General, the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on November 2, 2001.

_____

BRUCE A. ROSENTHAL
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the font used in this brief is 14 point proportionately spaced Times New Roman.

_____

BRUCE A. ROSENTHAL
Assistant Public Defender