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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioners statement of the case and fact for the purposes of this brief.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal determined that the case should go back for a guideline sentence to be imposed. This decision was proper.

ARGUMENT
ISSUE

WHEN AN APPROPRIATE OBJECTION TO A HABITUAL OFFENDER SENTENCE IS PRESENTED TO THE TRIAL COURT AND DENIED AND THE DISTRICT COURT OF APPEAL REVERSES AND REMANDS FOR RESENTENCING, MAY THE TRIAL COURT AGAIN IMPOSE A HABITUAL OFFENDER SENTENCE UPON PROPER EVIDENCE BEING PRESENTED BY THE STATE (as stated by petitioner).

In this case, the Second District Court of Appeal has certified conflict with the [First, Fourth and Fifth Districts. Collins v. State, 893 So. 2d 592, 594 \(Fla. 2d DCA 2004\)](#). The point of conflict is whether the State should get a second chance to prove habitual offender status on remand. Questions of law must receive de novo review on appeal. See [Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So. 2d 376 \(Fla. 5th DCA 1998\)](#).

In [Wallace v. State, 835 So. 2d 1281 \(Fla. 2d DCA 2003\)](#), the court held:

"It is the State's responsibility to prove that the defendant qualifies for sentencing as a habitual felony offender." [Rivera v. State, 825 So.2d 500 \(Fla. 2d DCA 2002\)](#). Application of the habitual felony offender statute requires the State to provide the court with: "(1) the date of the current felony offense, (2) the date of the conviction for the last prior felony, and (3) the date that the defendant was released from prison imposed for the last felony conviction." [Lowenthal v. State, 699 So.2d 319, 320 \(Fla. 2d DCA 1997\)](#) (citing [Reynolds v. State, 674 So.2d 180, 180 \(Fla. 2d DCA 1996\)](#)).

The State has the burden of proving these elements during the sentencing hearing. The issue in this case arises when the State fails to meet its burden.

The Second District Court of Appeal has applied two rules to this situation depending on whether objections were made during the sentencing hearing. Where no objection was made, the State is given the opportunity to present evidence to satisfy the habitual offender requirements. [See *Collins v. State*, 893 So. 2d 592, 594](#) (Footnote 2) (Fla. 2d DCA 2004). Where objections were made, however, the court refuses to give the State a second chance to fulfill its burden of proof.

Objections were made in the instant case, and the State should not have multiple opportunities to meet its burden of proof. In Petitioner's brief, he argues that there is "no logical basis" for disallowing the State to establish HFO qualifications on remand. While the cases themselves may not spell out the reasons for the rule, there are several logical reasons that the State should not be given a second chance to fulfill its burden of proof.

First, there are double jeopardy issues implicated. The State had one opportunity to meet its burden of proof. The Defense objected that they failed in that duty. This is essentially a sufficiency issue. During a trial, if the evidence is insufficient the trial court cannot order a new trial to give the State a second chance. Instead, a judgment of acquittal is granted so that double jeopardy rights under

the Florida and United States Constitutions are not violated.

The double Jeopardy clause "guarantees that the State shall not be permitted to make repeated attempts to convict the accused." [United States v. Martin Linen Supply Co., 430 U.S. 564, 569, 97 S.Ct. 1349, 51 L.Ed.2d 642 \(1977\)](#). The same rule should be applied to the sentencing hearing. Where the State fails to meet its burden, no second chance should be given to avoid violations of double jeopardy rights.

Further, requiring the State to meet its burden of proof during sentencing and providing these due process safeguards ensures judicial efficiency and finality. Allowing the State unlimited attempts to meet the burden of proof creates uncertainty and wastes judicial resources. This is similar to departure sentences where a court must provide a valid reason for the departure or impose a guideline sentence if the reason is found to be invalid. See [Shull v. Dugger, 515 So.2d 748 \(Fla.1987\)](#); [Patten v. State, 531 So.2d 203 \(Fla. 2d DCA 1988\)](#).

Finally, on the most fundamental level, allowing the State repeated chances of meeting its burden of proof is just unfair. The Defense does not get unlimited chances to present testimony and evidence for the sentence. The State should be required to fulfill its burden or face the consequences, just as a Defendant must do.

Petitioner ends his argument asserting a quote that "a wrong move by the judge" should not mean "immunity for the

prisoner." In this case, the State was the party who failed to meet its burden. In our system, when a party does not meet its burden, it cannot succeed as a matter of law. That does not offer immunity to a defendant, only justice.

CONCLUSION

Appellant asks this court to affirm the decision of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Charles J. Crist, Jr., Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of March, 2006.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Defender
Tenth Judicial Circuit
(863) 534-4200

TOSHA COHEN
Assistant Public

Florida Bar Number 0022586
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

tjc