IN THE SUPREME COURT OF FLORIDA

CHARLES MAPP, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC09-1838

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of Case and Facts presented by Petitioner for purposes of this Petition.

SUMMARY OF THE ARGUMENT

Contrary to Petitioner's assertion, the decision in this case does not directly and expressly conflict with *Ashley v. State*, 614 So. 2d 486 (Fla. 1993) and *Jackson v. State*, 983 So. 2d 562 (Fla. 2008).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT OR OF THIS COURT; THEREFORE, THIS COURT SHOULD NOT GRANT DISCRETIONARY REVIEW.

The jurisdiction of this Court is limited to a narrow class of cases enumerated in the Florida Constitution. For example, this Court may review any decision of a district court of appeal that "expressly and directly conflicts with the decision of another district court of appeal, or with the Supreme Court on the same question of law." Fla. Const. Art. V, §3(b)(3). The issue of the Court's jurisdiction is a "threshold matter that must be addressed" before the Court can reach the merits of the issue. *In Re Holder*, 945 So. 2d 1130, 1134 (Fla. 2006).

The rationale for limiting this Court's jurisdiction is the recognition that district courts "are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy." *Jenkins v. State*, 385 So. 2d 1356, 1358 (Fla. 1980).

As this Court explained in *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988), the state constitution creates two separate concepts regarding this Court's discretionary review.

The first concept is the broad general grant of subject-matter jurisdiction. The second more limited concept is a constitutional command as to how this Court may exercise its discretion in accepting jurisdiction. 530 So. 2d at 288.

In order for this Court to exercise its discretionary jurisdiction based on *express or direct* conflict, the conflict must appear on the face of the allegedly conflicting opinions. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). The standard is direct and express conflict; not misapplication of the law. *See Knowles v. State*, 848 So. 2d 1055, 1059 (Fla. 2003)(Wells, J. dissenting)(neither the concept nor words "misapplication jurisdiction" appear in Article V, Sec. 3(b), Fla. Const.) In order for a misapplication of the law to provide review jurisdiction, the misapplication must result in direct and express conflict with the decision of another district or this Court.

Contrary to Petitioner's assertion, the decision in *Mapp* does not directly and expressly conflict with either *Jackson v. State*, 983 So. 2d 562 (Fla. 2008) or *Ashley v. State,* 614 So. 2d 486 (Fla. 1993). In *Jackson,* this Court, in clarifying the definition of a "sentencing error" for purposes of rule 3.800, Fla. R. Crim. P., stated:

> Although quoted above, the definition of 'sentencing error' in the Court Commentary to rule 3.800 bears repeating:

> '[S]entencing errors include harmful errors in orders entered as a result of the sentencing process. This includes errors in orders of probation, orders of community control, cost and restitution orders, as well as errors within the sentence itself.' Fla. R. Civ. (sic) P. 3.800 court cmt. The commentary thus explains that rule 3.800(b) is intended to permit defendants to bring to the trial court's attention errors in sentence-related *orders*, not any error in the sentencing process.

Id. at 572. (emphasis in original). This Court further explained that

> rule 3.800(b) was intended to 'authorize the filing of a motion to correct a defendant's sentence'. . . We have never held that *any* error that happens to occur in the sentencing context constitutes a 'sentencing error' under the rule. Instead, errors we have recognized as 'sentencing errors' are those apparent in *orders* entered as a result of the sentencing process.

Id. (emphasis in original).

This Court went on to list examples of sentencing errors subject to the rule which included claims that the defendant was improperly habitualized, *citing Brannon v. State*, 850 So. 2d 452, 454 (Fla. 2003). *Id*. However, the concern in *Brannon* was "whether a habitual offender sentence is authorized for a particular offense and whether a habitual offender sentence may be imposed initially upon violation of probation. 850 So. 2d at 457. *See also State v. McKnight*, 764 So. 2d 574 (Fla. 2000)(noting the habitual offender sentence imposed was

expressly prohibited by statute).

That type of sentencing error is to be distinguished from procedural errors, such as present in *Mapp* with the lack of written notice of intent to seek habitualization, which arose during the sentencing hearing and where trial counsel had an opportunity to object. This Court explained:

> In many circumstances, however, defendants do not have the opportunity to object or otherwise address the trial court before the sentencing order is entered. For example, where the written sentence deviates from an oral pronouncement, the defendant has no reason to object at the sentencing; only when the sentencing order issues does the defendant notice the discrepancy. . . In contrast, defendants do have the opportunity to object to many errors that occur during the sentencing process-for example, the introduction of evidence at sentencing. The rule was never intended to allow a defendant (or defense counsel) to sit silent in the face of a procedural error in the sentenc-ing process and then, if unhappy with the result, file a motion under rule 3.800(b). To the contrary, such a practice undermines the goal of addressing errors at the earliest opportunity.

983 So. 2d at 573.

This distinction was carried forth by the Second District Court in this case. Consistent with the *Jackson* analysis, the Second District concluded that the State's failure to give Mr. Mapp prior written notice of its intent to seek habitualization was not the type of sentencing error contemplated by rule 3.800(b), because it was not an error in the sentencing order

itself but an error in the sentencing process which Mr. Mapp had an opportunity to object to at the sentencing hearing when habitualization was first proposed. His failure to do so waived the issue.

This analysis explains why this case is also not in conflict with *Ashley v. State,* 614 So. 2d 486 (Fla. 1993). *Ashley* held that "the State shall serve notice on the defendant either before he enters a plea of guilty or *nolo contendere*, or, in the event he enters a plea of not guilty and submits to trial, prior to the imposition of sentence," 614 So. 2d at 490. However, it appears that type of procedural error can be waived upon failure to raise a contemporaneous objection. *See e.g., Ortiz v. State*, 9 So. 3d 774 (Fla. 4th DCA 2009)(Statutory requirement of presentence investigation (PSI) prior to imposition of a habitual felony offender sentence can be waived, as can all of the procedural rights under the statute. § 775.084(3)(a)); *Jefferson v. State*, 571 So. 2d 70 (Fla. 1st DCA 1990); *cf. Vann v. State,* 970 So. 2d 878 (Fla. 2d DCA 2007)(Defendant failed to preserve issue for appeal that trial court erred in imposing habitual felony offender sentence since state did not serve its written HFO notice until after defendant entered his plea to drug offenses, where defendant did not object at sentencing, nor did he file a motion to correct sentence). Failure to give prior written notice is a procedural

requirement under § 775.084(3)(a).

While this Court found that Mr. Ashley's failure to object to the lack of notice at trial did not waive "a purely legal sentencing issue," Mr. Ashley was given no written notice of intent to habitualize prior to acceptance of his plea and was not told of the possibility or consequences of habitualization at the plea colloquy itself. In fact, habitualization was never mentioned and the entire discussion at the colloquy focused on the guidelines. *Id*. at 490. This Court cited its decision in *Massey v. State*, 609 So. 2d 598 (Fla. 1992), which also held that the State's failure to strictly comply with the statute requiring that notice of the state's intention to seek habitual offender sentencing be served upon defendant may be reviewed under a harmless error analysis. *Id.*

When the Second District noted that Mr. Mapp did not dispute that he qualified as an HFO, it concluded that concession was not germane to the issues the appeal addressed *citing Massey v. State*, 589 So. 2d 336 (Fla. 5th DCA 1991), *rev. granted* 609 So. 2d 598 (Fla. 1992) (FN 1), noted above. Appellant had an opportunity to object when the State orally suggested before sentence was imposed that Mr. Mapp qualified as an HFO and failed to do so waiving the procedural requirement.

Petitioner has failed to establish a basis upon which this Court can exercise its discretionary jurisdiction.

CONCLUSION

Respondent respectfully requests that this Court deny jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Douglas S. Connor, Assistant Public Defender, Office of the Public Defender, P.O. Box 9000 – Drawer PD, Bartow, Florida 33831 this 29TH day of October, 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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APPENDIX

1. Opinion of the Second District in *Mapp v. State*, 34 Fla. L. Weekly D1828 (Fla. 2d DCA Sept. 4, 2009).