IN THE SUPREME COURT OF FLORIDA

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

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

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner, Charles Mapp entered pleas of no contest in two separate Polk County criminal cases with a total of six felony counts and one misdemeanor count (A2). There was no notice of intent to seek habitual offender sentences filed; nor was petitioner ever made aware that he could be sentenced as a habitual offender. At the later sentencing hearing, three victims testified to the extent of their losses (A3-4). When the prosecutor argued to the court that a maximum sentence under the guidelines be imposed, she noted that Mr. Mapp qualified as a habitual felony offender (A2). The court then decided to sentence Mr. Mapp as a habitual felony offender in both cases (A2-3).

At no time during the sentencing proceedings did defense counsel object to imposition of habitual felony offender sentences (A4). Appellate counsel filed a motion pursuant to Fla. R. Crim. P. 3.800(b)(2) asking the trial judge to strike the habitual offender designations on Mr. Mapp's sentences and to resentence him accordingly (A3). The court granted the requested relief, but entered the order after the sixty-day period had expired (A3-4). Consequently, appellate counsel argued in Mr. Mapp's appeal to the Second District that the habitual offender sentences should be vacated and that his Rule 3.800(b)(2) motion preserved the issue for appellate review (A3-4).

The Second District, in an opinion filed September 4, 2009 (see Appendix) held that a habitual offender sentence imposed without notice to the defendant (or request by the prosecution) was not a "sentencing error" within the parameters of Rule 3.800(b)(2) (A4-6). The court held that a contemporaneous objection at the sentencing hearing was necessary to preserve a claim that habitual offender sentences were imposed without notice to the defendant (A6). Mr. Mapp's original habitual offender sentences were affirmed (A7).

Petitioner filed his notice to invoke the discretionary jurisdiction of this Court on October 1, 2009, stating that the decision of the Second District is reviewable under Fla. R. App. P. 9.030(a)(2)(A)(iv); express or direct conflict of decisions on the same question of law.

SUMMARY OF THE ARGUMENT

This decision of the Second District is in express and direct conflict with two decisions from this Court. The decision conflicts with Ashley v. State, 614 So. 2d 486 (Fla. 1993) because it affirms habitual offender sentences which were imposed where the defendant was not told at the time that he entered his nolo pleas that habitualized sentences were possible. The decision also conflicts with this Court's decision in Jackson v. State, 983 So. 2d 562 (Fla. 2008) where improper habitual offender sentencing was specifically mentioned as a sentencing error cognizable under Florida Rule of Criminal Procedure 3.800(b)(2).

ARGUMENT
ISSUE

THE DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THIS COURT IN ASHLEY V. STATE, 614 SO. 2D 486 (FLA. 1993) AND JACKSON V. STATE, 983 SO.2D 562 (FLA. 2008).

In Ashley v. State, 614 So. 2d 486 (Fla. 1993), this Court declared:

> In sum, 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.
> 0. In contravention of this holding,

habitual offender sentences were imposed on Mr. Mapp when the possibility of habitualization was not mentioned during his plea colloquy and the prosecutor gave neither written nor oral notice of intent to habitualize.

The Second District reasoned that a contemporaneous objection at sentencing was necessary to preserve any *Ashley* error for appellate review. Appellate counsel's Rule 3.800(b)(2) motion did not preserve the error because "[it was] not error in the sentencing order but rather in the sentencing process" (A6).

Although the Second District construed this Court's decision in Jackson v. State, 983 So. 2d 562 (Fla. 2008) in a manner to support its decision, a thorough reading of Jackson shows that it

did not intend to limit the scope of Rule 3.800(b)(2) quite so drastically. In the first place, Jackson specifically recognized "claims that the defendant was improperly habitualized" as sentencing errors properly raised via a Rule 3.800(b)(2) motion. 983 So. 2d at 572. The Second District's opinion attempts to distinguish the habitualization error cited as an example in Jackson from the habitualization error in Mr. Mapp's case (A6-7, n.3). However, such a constrained reading of Jackson is not supported by other segments of the Jackson opinion.

Rather, Jackson summarized:

> Thus, as written, rule 3.800(b) is not limited to correcting "illegal" sentences or errors to which the defendant had no opportunity to object. Instead, the rule may be used to correct and preserve for appeal any error in an order entered as a result of the sentencing process – that is, orders related to the sanctions imposed.

4. Imposition of habitual offender sentences following pleas where the defendant was never made aware of the possibility of habitualization constitutes an "error in an order entered as a result of the sentencing process".

Accordingly, the instant decision in Mapp v. State is in express and direct conflict with this Court's decisions in Ashley v. State and Jackson v. State. This Court should exercise its discretionary jurisdiction and grant review to the petitioner, Charles Mapp.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Charles Mapp, Petitioner, respectfully requests this Court to exercise its discretionary jurisdiction to review the decision in his case which conflicts with decisions of this Court.

APPENDIX

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Donna S. Koch, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of October, 2009.

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,

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