IN THE SUPREME COURT OF FLORIDA,

STATE OF FLORIDA,	)	CASE NO. **SC10-2425**
	)	L.T.C. NO. 4D09-1965
Petitioner-Appellant,	)	
	)	
vs.	)	
	)	
JOHN McMAHON,	)	
	)	
Respondent-Appellee.	)	
	)	
	)	

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Appeal from the District Court of Appeal of Florida,
Fourth District.

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INTRODUCTION

Pursuant to Fla. R. App. P. 9.210(a) and (c), Respondent-Appellee, JOHN McMAHON, files this Answer Brief on the Merits. Petitioner-Appellant will be referred to throughout this brief as the petitioner, state or prosecution. Respondent will be referred to as the defendant. All emphasis has been added unless otherwise indicated. The following symbols will be used:

"R" - Pleadings filed as of record

"T" - Transcript of Testimony

"IB" - Initial Brief of the State (DCA)

"AB"- Answer Brief of Defendant (DCA)

"PB"- Petitioner's Brief on the Merits

STATEMENT OF THE CASE AND FACTS

Defendant accepts the facts in the Petitioner's Brief on the Merits as substantially correct and reserves the right to argue additional facts in the argument portion of the instant brief. Defendant notes that when asked by the trial court, the state agreed that the 18th month bottom of the guidelines sentence imposed was a legal sentence. (T 8-9) Moreover, the only objection raised by the state in the trial court was that the trial court did not grant the state's request for a hearing on whether defendant was habitual felony offender qualified.

> MR. HILLSTROM: You honor, for the record, the state would be objecting. We are entitled to a hearing on a HOQ.
>
> THE COURT: Understood. Your objection is noted. I need two separate plea forms.
>
> MR. HILLSTROM: Before you take the plea, the state again would be requesting a hearing on the HOQ. (T 4-5)

SUMMARY OF THE ARGUMENT

I.

The issue presented in the instant case is one of jurisdiction where the state is attempting to appeal from the imposition of a legal sentence. In contrast, in State v. Chaves, 809 So. 2d 910 (Fla. 5th DCA 2002), the state appealed an illegal departure sentence and the issue presented was whether the trial judge reversibly erred in sua sponte entering into plea negotiations offering a sentence of probation in exchange for a plea on nolo contendere. Thus, there is no conflict, factually or legally. This Honorable Court is not bound by the district court's determination of a conflict.

II.

In the trial court the state conceded that the guidelines sentence is legal and thereby is precluded from now arguing that the sentence is illegal. An illegal sentence is "one that imposes punishment or penalty that no judge under the entire body of sentencing statutes and laws could impose under any set of factual circumstances." Williams v. State, 957 So. 2d 600, 602 (Fla. 2007) The 18 month guideline sentence could have been imposed whether or not the court determined that defendant qualified for habitual offender status.

Contrary to the state's and the district court's characterization of the plea negotiations as being initiated by the trial judge, the record reflects otherwise. Defense counsel first apprised the court of the desire to resolve the case that morning. Upon this request by defense counsel, the trial judge then became involved in plea negotiations. The record further reflects that the state did not object on this ground in the trial and has waived this issue.

Any alleged error with respect to this issue and the state's objection to the trial court's failure to hold an habitual offender qualification hearing is an error in the sentencing process and not an error in the actual legal guidelines sentence. State v. F.G., 630 So. 2d 581 (Fla. 3rd DCA 1993), aff'd, 638 So. 2d 515 (Fla. 1994); State v. Riley, 648 So. 2d 825 (Fla. 3rd DCA 2009).

As to the state's suggestion of a loophole, it would be within the province of the legislature, not the courts, to amend statutes which specify the grounds upon which the state has the right to appeal.

Finally, there is no separation of powers issue, which the state is raising for the first on appeal. In State v. Warner, 762 So. 2d 507, 513 (Fla. 2007) this Honorable Court held that once a court gets involved in plea negotiations, it may actively discuss potential sentences and "***the judge may state on the record the length of the sentence***.

ARGUMENT

POINT I.

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN *STATE V. McMAHON* DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN *STATE V. CHAVEZ-MENDEZ* ON THE SAME POINT OF LAW.

Standard of Review

Whether a direct and express conflict exists between decisions of the district courts of appeal is a pure question of law reviewed by this Court *de novo*. This Court does not defer to the district court's determination that conflict exists. Cf. In re Amendments to the Florida Rules of Appellate Procedure , 941 So. 2d 353, 353 (Fla. 2006)(concluding that jurisdictional briefing in cases of certified direct conflict would be beneficial to the Court and amending Fla. R. App. P. 9.120(d) to require jurisdictional briefs in conflict cases).

Argument

This Honorable Court has authority pursuant to Article V, Section 3(b)(3) of the Florida Constitution to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another District Court on the same question of law. As noted by the state in its jurisdictional brief, conflict

jurisdiction is vested in this Honorable Court only when the district court announces a rule of law which conflicts with another court's pronouncement or when the court applies a rule of law to produce a different result in a case which involves substantially the same facts of another case. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). (PB - 4)

In State v. Chavez-Mendez 809 So. 2d 910 (Fla. 5th DCA 2002), the Fifth District held that "The trail court's initiation of plea negotiations with the defendant was *per se* reversible error." In contrast, the issue and pronouncement of the Fourth District in the case at bar was the lack of jurisdiction where the sentence imposed sought to be appealed by the state is a legal sentence. Clearly, the pronouncements by the courts in each of these case involved different issues. Moreover, the facts are not substantially similar. The sentence imposed in the instant case was a legal guidelines sentence which was acknowledged by the state on the record. Conversely, in the Chaves-Mendez case, the downward departure sentence of probation imposed was an illegal sentence not supported by valid reasons for departure as reflected by the concurring opinion. Moreover, even in the majority opinion it is clear that the sentence of probation was an illegal downward departure sentence as evidenced by the footnote explaining that the only lawful sentence for capital sexual battery (for which, inter alia, defendant was

charged and pled to) is life imprisonment with a minimum mandatory of twenty-five years. 809 So. 2d at 911, FN 3. Clearly, no such minimum mandatory sentence was required in the case at bar. The question of law presented in the instant case was one of subject matter jurisdiction. The issue of law presented in the Chaves-Mendez case was the initiation of plea negotiations by the trial court. Thus, there is no direct and express conflict between the opinion in the present case and the Chaves-Mendez case.

POINT II.

THE DISTRICT COURT CORRECTLY HELD THAT THE SENTENCE IMPOSED BY THE TRIAL COURT WAS WITHIN THE SENTENCING GUIDELINES AND LEGAL; THUS, THE SENTENCE WAS NOT APPEALABLE BY THE STATE.

Standard of Review

The legality of a sentence is reviewed under the de novo standard. Willard v. State, 22 So. 3d 864 (Fla. 4th DCA 2009).

Argument

(a)

The state acknowledges that its right to appeal is granted by statute. (PB 8) With respect to sentencing issues, the state has the right to appeal only an illegal sentence or a sentence imposed below the lowest permissible sentence established by the Criminal Punishment Code under chapter 921. Section 924.07(1)(e) and (i), Fla. Stat; See also, Fla. R. App. P. 9.140(c)(1). The record reflects that the state agreed that 18 months was the defendant's lowest permissible sentence under the guidelines. (T 4) Moreover, when specifically asked by the court was the 18 month sentence a legal sentence, the state conceded that it was a legal sentence:

THE COURT: And state, I'm doing this over your objection?

MS. BERMAN: Yes, Your Honor.

THE COURT: ***It is nonetheless a legal sentence?***

MS. BERMAN: ***Yes, Your Honor***. (T 8-9)

Thus, the state is precluded from arguing the legality of the sentence.

Nevertheless, the state on appeal argues that the sentence in the instant case is illegal in that the district court read the statutory definition of illegal sentence very narrowly. (PB 9) In support of this argument, the state claims that the court in State v. McMahon, 47 So. 3d 368 (Fla. 4th DCA 2010) held that sentences are illegal only when they depart downwardly from the guidelines. (PB 9) There is no such holding in the opinion.

The state suggests that one must look to the case law to provide guidance as to how a sentence is defined as "illegal". (PB 10) Accordingly, the state then proceeds to cite to various cases in which the court failed to impose either the statutorily required minimum mandatory sentence, mandatory fines, and/or a probationary period upon withholding sentence as examples of illegal sentences. None of those cases are applicable to the case at bar; there is no statutorily mandated minimum sentence for third degree felony theft or possession of cocaine. Sections 812.014(2)(c)1.and 893.13(6)(a), Fla. Stat.

With respect to the definition of an illegal sentence, the state has overlooked this Honorable Court's decision in Williams v. State, 957 So. 2d 600, 602 (Fla. 2007) defining an illegal sentence as "one that imposes punishment or penalty that no judge under the entire body of sentencing statutes and laws could impose under any set of factual circumstances." In the case at bar the judge could have imposed the 18 month sentence regardless if he found that defendant: (a) qualified as a habitual offender and declared him so, (b) did not qualify as a habitual or (c) qualified as a habitual but declined to so declare him. Thus, under the *Williams* definition there is in no way that the challenged sentence can be considered illegal.

(b)

The state further contends that the district erred in finding that the court's entry into plea negotiations was not appealable. The state failed to preserve this issue. To properly preserve an issue for appellate review, a litigant must make a timely, contemporaneous objection and must state a legal ground for that objection; for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection. Harrell v. State, 894 So. 2d 935 (Fla. 2005). As noted by defendant in his answer brief in the district court of appeal, the state in the trial court only objected to trial court's denial of its request

to hold a hearing to determine whether defendant was qualified as a habitual felony offender. (T 4, 5,16, AB 4)

In addition, although the state and the district court in the McMahon opinion characterized the plea negotiations as being improperly initiated by the trial court, the record clearly reflects otherwise. In State v. Warner, 762 So. 2d 507, 513 (Fla. 2007), this Honorable Court held that a trial court may participate in plea discussions *upon request of a party*. At a docket sounding in the instant case, defense counsel first raised the possibility of the case being resolved. At that point the court made inquiry of the state as to defendant's prior record and what he scored under the guidelines. Thereafter, the court then became involved in a plea discussion.

> THE COURT: . . . . What are you doing on Mr. McMahon?
>
> MS. BERMAN: (the state) Your honor may I approach.
>
> THE COURT: Yes.
>
> MS. BERMAN: On the new case, the state's notice of HOQ.
>
> THE COURT: Okay. Well.

MR. LEWIS: (defense counsel) ***We are very hopeful to resolve this case this morning.***

THE COURT: That might be a good idea, if you did.

MR. LEWIS: This is what I'm thinking. He scores 18 months at the bottom. These cases, Judge, are I think a one rock case or something, Cocaine case, and the grand theft case is he had somebody else in the car who picked up an old power washer that I seriously doubt was worth over two hundred dollars.

THE COURT: State, what are you looking for? What kind of priors does he have?

MR. LEWIS: He has a lot of drug priors and a couple of property crimes.

MS. BERMAN: Cocaine possession, burglary of dwelling, grand theft, grand theft, possess hydrocodone, fraud.

THE COURT: Scores 18 months?

MR. HILLSTROM: (the state) On the bottom.

THE COURT: You can have the bottom of the guidelines today. I won't habitualize him if he wants that today. If doesn't, he takes his chances down the road.

MR. LEWIS: He is happy to take it.

THE COURT: All right. Get a plea form.

MR. HILLSTROM: Your Honor, for the record, the state would be objecting. We are entitled to a hearing on a HOQ.

THE COURT: Understood, your objection is noted. . . .(T 3-5)

The above colloquy evidences defense counsels desire to resolve the case and ensuing request for the trial court to participate in plea discussions. In essence, defendant was advising the court that he would consider tendering an open plea. The trial court did not simply on its own initiative state on the record the length of sentence he would impose upon the defendant if he wanted to enter a plea. In contrast, in State v. Chavez-Mendez, 809 So. 2d 910 (Fla. 5th DCA 2002), relied upon by the petitioner, the trial judge when the case was called for trial, *sua sponte* initiated plea negotiations with the defendant. Without a request from any party, the judge offered defendant probation in exchange for his no contest plea to the charges of capital sexual battery and lewd and lascivious molestation. As noted by the Fifth District in a footnote "the only sentence that can be imposed for a conviction on capital sexual battery is life imprisonment with a minimum mandatory of twenty five years." Id. at 911, fn. 3.

Assuming arguendo the trial court initiated plea negotiations, any error at most was an error in the sentencing process, not the sentence order which was legal and non-appealable. This Honorable Court, as well as the district courts, make a distinction between an error in the sentencing process and an illegal sentence. For

example, in Jackson v. State, 983 So. 2d 562 (Fla. 2008), the defendant filed a Motion to Correct Sentencing Error pursuant to Fla. R. Crim. P. 3.800(b)(2) in which she challenged her 5 year sentence for aggravated battery. She alleged her sentence was illegal because she was deprived of her right to counsel during a portion of the sentence hearing. This Honorable Court held: "a 'sentencing error' that can be preserved under rule 3.800(b)(2) is an error in the sentence itself – not any error that might conceivably occur during a sentencing hearing." 983 So. 2d at 573. This Honorable Court further concluded:

> 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. A claim of denial of counsel at sentencing, however, is an error in the sentencing process, *not* an error in the sentencing order. 983 So. 2d at 574.

Similarly, the Third District in State v. F.G., 630 So. 2d 581 (Fla. 3rd DCA 1993) made the same distinction between an error in the sentencing process and an erroneous or illegal sentence. The state attempted to appeal final disposition orders in juvenile delinquency proceedings on the ground that alleged procedural errors (failure to order and receive a pre-disposition report) leading up to the entry of the orders rendered the dispositions "illegal" for purposes of a state appeal. The Third District held that the claim of procedural error does not render the disposition illegal, and, therefore, the appeals should be dismissed. This Honorable Court

agreed and adopted the opinion of the Third District. State v. F.G., 638 So. 2d 515 (Fla. 1994).

Likewise, when presented with the same issue raised by the state herein regarding an alleged improper initiation of plea negotiations by the court and imposition of a legal sentence, the Fourth District in State v. Figuero, 728 So. 2d 787 (Fla. 4th DCA 1999), citing to F.G. as authority, dismissed the appeal for the reason that any error alleged was in the sentencing process, not the legal sentence imposed. Most recently, in Pifer v. State, 36 Fla. L. Weekly D634 (Fla. 2nd DCA March 25, 2011) defendant appealed the denial of his motion to correct sentencing error on the ground that upon remand he was resentenced by a successor judge without a showing that a substitution of judges was necessary. The district court, in affirming the denial, concluded that the resentencing by a successor judge without a showing of necessity, if error at all, was an error in the sentencing process.

As to any victim impact, such impact was virtually non–existent. Of course, in the possession of cocaine case resulting from trace residue in a glass pipe found on defendant's person, there is no victim. With regard to the third degree felony theft case, the item stolen was a power washer. A reading of the arrest affidavit (R 47) reflects that the defendant and a co-defendant along with the washer were

apprehended 8 minutes after the theft and the washer was immediately returned to its owner.

(c)

The failure to hold a hearing on defendant's qualification as a habitual offender is simply a procedural error in the sentencing process and does not render a legal sentence within statutory limits illegal. The state's position has been soundly rejected in State v. Riley, 648 So. 2d 825 (Fla. 3rd DCA 1995) and State v. Hewit, 21 So. 3d 914 (Fla. 4th DCA 2009).

> The state agues that the absence of mandatory findings renders the sentence illegal . . . . We disagree. The sentence imposed on defendant is one which is within statutory limits and is therefore a legal sentence. *See State v. F.G.,* 630 So. 2d 581, 583 (Fla. 3d DCA 1993), *opinion adopted*, *State v.F.G.,* 638 so. 2d 515 (Fla. 1994). The findings sought by the state would memorialize the fact that the defendant qualifies as a habitual offender, but the trial court had already made the decision to sentence defendant under the guidelines, not as a habitual offender. There is no basis for vacating the guidelines sentence, which is a legal and permissible sentence one. [Citation omitted]. 648 So. 2d at 826.

Again, there is no merit to the victim impact argument. Neither was defendant's potential status as a habitual offender ignored. To the contrary, the trial judge stated that even if defendant qualified as a habitual offender, he would not designate him as such. The trial court thereby indicated that it was not necessary for the protection of the public.

Finally, there is no discernible benefit from requiring HFO findings in this case. The court could and ***would*** impose the same sentence upon remand. The court stated on the record that even if defendant qualified for habitual offender status, the court would not so designate him.

(d)

The state suggests that there is a loophole which this Honorable Court should not permit to stand. (PB 23-25) This argument has no merit. First, the judge did not initiate the plea negotiations in this case. Second, the judge stated for the record that he would not habitualize the defendant even if he so qualified. Thus, he determined that it was not necessary for the public protection to declare defendant an habitual offender. Finally, it would be within the province of the legislature, not the courts, to amend statutes which specify the grounds upon which the state has the right to appeal.

(e)

Notwithstanding any argument to the contrary, there is no separation of powers issue presented herein. Any such issue is waived as the state until now has failed to raise this issue. Moreover, in Warner v. State, supra, at 514 this Honorable Court held that once a court gets involved in plea negotiations, it may actively discuss potential sentences. This Court further concluded that "***the judge may state on the record the length of the sentence*** which on the basis of information then available to the judge appears to be appropriate for the charged offense." Id. [Emphasis added.]

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent-appellee, JOHN McMAHON, respectfully requests that this Honorable Court decline to accept jurisdiction to review this case or, in the alternative, affirm the opinion of the Fourth District Court of Appeal in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished to the Office of the Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401, this 12th day of April, 2011.

_____

ALAN T. LIPSON

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS complies with the font requirements of Fla. R. App. 9.210(a)(2).

_____

ALAN T. LIPSON