IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC10-2425

STATE OF FLORIDA,

Petitioner

vs.

JOHN McMAHON,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and Respondent was the defendant. Petitioner was the Appellant in the District Court of Appeal for the State of Florida, Fourth District, and Respondent was the Appellee. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

In this brief, the symbol "IB" will be used to denote the Initial Brief filed by the State of Florida in the appeal to the Fourth District; the symbol “AB” will be used to denote the

Answer Brief filed by Respondent in the appellate proceeding below, and the symbol “R” will be used to denote the Record on Appeal; these symbols may be followed by the volume and page number for that document, where appropriate. Thus page 2 of volume I of the record on appeal will be denoted as follows: (RI 2).

STATEMENT OF THE CASE AND FACTS

The respondent, John McMahon, was charged with possession of cocaine, and possession of drug paraphernalia in one case and grand theft in another case. (RII 24, 48) The state filed a notice of intent to seek a habitual felony offender sentence. (RII 50, RI 3) During a hearing, the parties discussed the fact that Respondent’s prior criminal history included many drug offenses and a couple of property crimes and he scored a minimum sentence of eighteen months on his scoresheet. (RI 4) The trial court, without invitation from either the state or the respondent, initiated a plea dialog when the trial court advised the respondent, “You can have the bottom of the guidelines today. I won't habitualize him if he wants that today. If [he] doesn't, he takes his chances down the road.” (RI 4) Defense counsel stated, “He is happy to take it.” (RI 4)

The state objected, arguing that it was entitled to a hearing on the petitioner’s status as a habitual felony

offender. (RI 4) The judge responded that he understood and noted the objection for the record, stating:

> I said it before, for record purposes, my understanding of the law is whether I find him to be a habitual offender is discretionary with the court, even if you put on sufficient evidence to indicate he is a habitual offender, it would still be discretionary with the court. And as I have indicated, if Mr. McMahon wants to enter his plea here today, I would exercise my discretion and sentence him as a regular offender, not as a habitual offender.

(RI 5)

The judge then proceeded with a change of plea hearing. (RI 5) The judge noted that Respondent faced a maximum sentence of fifteen years in prison followed by 364 days in jail if sentenced as a habitual offender and a minimum sentence of eighteen months in prison if not sentenced as a habitual offender. (RI 7-8) The judge stated that if Respondent entered a plea today to all of the charges, he would sentence Respondent to the bottom of the guidelines. (RI 8) Respondent accepted the judge's offer and pled no contest as charged in both cases. (RII 29, 51; RI 6-16) As promised, the judge sentenced Respondent within the guidelines to an overall sentence of eighteen months in prison. (RII 31-36, 53-60, RI 16-18)

The state appealed the sentencing order, arguing that the sentence was unlawful or illegal because the trial court improperly initiated plea negotiations with the defendant, John

McMahon, and also improperly refused to conduct a hearing on the defendant's habitual felony offender status over the state's objection. (IB) Although acknowledging that the record below supported both claims, the District Court of Appeal dismissed the appeal, asserting as to both claims that 1) a sentencing order imposing a legal sentence was not an order appealable by the state and 2) the sentence in this case was "legal" merely because it fell within the sentencing guidelines. State v. McMahon, 47 So. 3d 368 (Fla. 4th DCA 2010).

In their analysis of the issue of the trial court's engaging in improper plea negotiations, the District Court acknowledged tension with this Court's decision in State v. Warner, 762 So. 2d 507, 513 (Fla. 2000), wherein this Court admonished that a "trial court must not initiate a plea dialogue; rather, at its discretion, it may (but is not required to) participate in such discussions upon request of a party." The District Court reasoned that Warner was distinguishable because it expressly involved a downward departure from the guidelines. Instead, the District Court certified conflict with the majority opinion in another similar case, State v. Chaves-Mendez, 809 So.2d 910, 910-11 (Fla. 5th DCA 2002) because it stated that "[t]he trial court's initiation of plea negotiations with the defendant was per se reversible error." Id. The District Court stated that, in contrast to Warner, Chaves-Mendez

could not be distinguished on the grounds it was a departure sentence.[1]

Similarly, in their analysis of the issue of the trial court's failure to conduct a hearing on the defendant's habitual felony offender status, the District Court concluded that it lacked subject matter jurisdiction to consider the issue. The District Court relied on its own opinion in State v. Hewitt, 21 So. 3d 914 (Fla. 4th DCA 2009), in ruling this issue was not an appealable issue because the appellee's sentence fell within the sentencing guidelines and, so, was a "legal" sentence.

After the District Court dismissed the State's appeal, this petition for review ensued. This Court granted jurisdiction on the merits and briefing on the merits now follows.

SUMMARY OF THE ARGUMENT

It is clear that the trial court erred in engaging in improper plea negotiations without an invitation from either

[1] The District Court acknowledged that the concurring opinion in Chaves-Mendez suggested that the case might have been factually distinguishable in the same way that Warner was; the sentence was a downward departure from the sentencing guidelines. However, because the majority opinion did not acknowledge this potential distinction, the Fourth District certified conflict with Chaves-Mendez on this issue.

party. The trial court erred by not holding a hearing regarding Petitioner's habitual offender status. The trial court erred by not making written findings that a habitual offender sentence was not necessary for the protection of the public. Finally, the appellate court erred in finding that these errors were not appealable or otherwise reviewable and relying on this to dismiss the State's appeal. The appellate court's opinion must be quashed and the cause remanded with directions that the State's appeal be reinstated, Petitioner's sentences be reversed, and further proceedings be had in accordance with this Court's opinion.

ARGUMENT

I. STANDARD OF REVIEW

The same standard of review applies to both the improper plea negotiation issue and the habitual offender issue. Sentencing errors resulting in illegal sentences are reviewed de novo. Jackson v. State, 925 So. 2d 1168, 1170 n.1 (Fla. 4th DCA 2006). Issues presenting a legal question are reviewed de novo as well. See Sanders v. State, 35 So. 3d 864, 868 (Fla. 2010).

II. THE APPELLATE COURT ERRED IN DISMISSING THE STATE'S APPEAL OF THE TRIAL COURT'S ERRORS ON THE GROUNDS THEY WERE UNAPPEALABLE BY THE STATE.

In the instant case, the District Court of Appeal, Fourth District, (hereinafter "Fourth District"), readily and

regretfully admitted that the trial court committed a number of serious errors in the instant case but the appellate court concluded that these errors were not appealable. State v. McMahon, 47 So. 3d 368 (Fla. 4th DCA 2010). The District Court acknowledged that the State may appeal an illegal sentence or a sentence imposed below the lowest permissible sentence established by the Criminal Punishment Code. § 924.07(1)(i), Fla. Stat., referencing §§ 921.001 et seq., Fla. Stat.; also see, Fla R. App. P. 9.140(c)(1).[2] However, the court reasoned

[2] § **924.07, Fla. Stat. "Appeal by state":**

> (1) The state may appeal from:
> (a) An order dismissing an indictment or information or any count thereof or dismissing an affidavit charging the commission of a criminal offense, the violation of probation, the violation of community control, or the violation of any supervised correctional release.
> (b) An order granting a new trial.
> (c) An order arresting judgment.
> (d) A ruling on a question of law when the defendant is convicted and appeals from the judgment. Once the state's cross-appeal is instituted, the appellate court shall review and rule upon the question raised by the state regardless of the disposition of the defendant's appeal.
> (e) The sentence, on the ground that it is illegal.
> (f) A judgment discharging a prisoner on habeas corpus.
> (g) An order adjudicating a defendant insane under the Florida Rules of Criminal Procedure.
> (h) All other pretrial orders, except that it may not take more than one appeal under this subsection in any case.

(i) A sentence imposed below the lowest permissible sentence established by the Criminal Punishment Code under chapter 921.
(j) A ruling granting a motion for judgment of acquittal after a jury verdict.
(k) An order denying restitution under s. 775.089.
(l) An order or ruling suppressing evidence or evidence in limine at trial.
(m) An order withholding adjudication of guilt in violation of s. 775.08435.

(2) An appeal under this section must embody all assignments of error in each pretrial order that the state seeks to have reviewed. The state shall pay all costs of the appeal except for the defendant's attorney's fee.

Fla. R. App. P. 9.140(c) "Appeals by the State":

(1) Appeals Permitted. The state may appeal an order
(A) dismissing an indictment or information or any count thereof or dismissing an affidavit charging the commission of a criminal offense, the violation of probation, the violation of community control, or the violation of any supervised correctional release;
(B) suppressing before trial confessions, admissions, or evidence obtained by search and seizure;
(C) granting a new trial;
(D) arresting judgment;
(E) granting a motion for judgment of acquittal after a jury verdict;
(F) discharging a defendant under Florida Rule of Criminal Procedure 3.191;
(G) discharging a prisoner on habeas corpus;
(H) finding a defendant incompetent or insane;
(I) finding a defendant mentally retarded under Florida Rule of Criminal Procedure 3.203;
(J) granting relief under Florida Rule of Criminal Procedure 3.853;
(K) ruling on a question of law if a convicted defendant appeals the judgment of conviction;
(L) withholding adjudication of guilt in violation of general law;

that the sentence in this case was “legal” because it fell within the sentencing guidelines and was therefore unappealable. McMahon, 47 So. 3d at 368.

Certainly, the State's right to appeal in a criminal case must be expressly conferred by statute. Exposito v. State, 891 So. 2d 525 (Fla. 2004). This is because the State's right to appeal is not a matter of right and is purely statutory. State v. MacLeod, 600 So. 2d 1096 (Fla. 1992); State v. M.K., 786 So. 2d 24 (Fla. 1st DCA 2001).

Thus, the State’s right to appeal is dependent on the meaning of the statute (or rule) purporting to authorize the

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(M) imposing an unlawful or illegal sentence or imposing a sentence outside the range permitted by the sentencing guidelines;
(N) imposing a sentence outside the range recommended by the sentencing guidelines;
(O) denying restitution; or
(P) as otherwise provided by general law for final orders.

(2) Non-Final Orders. The state as provided by general law may appeal to the circuit court non-final orders rendered in the county court.

(3) Commencement. The state shall file the notice prescribed by rule 9.110(d) with the clerk of the lower tribunal within 15 days of rendition of the order to be reviewed; provided that in an appeal by the state under rule 9.140(c)(1)(K), the state's notice of cross-appeal shall be filed within 10 days of service of defendant's notice or service of an order on a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2). Copies shall be served on the defendant and the attorney of record. An appeal by the state shall stay further proceedings in the lower tribunal only by order of the lower tribunal.

appeal; in this case, Section 924.07, Florida Statutes, and Rule 9.140(c), Florida Rules of Criminal Procedure. State v. Allen, 743 So. 2d 532, 534 (Fla. 1st DCA 1997); Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773, 774 (Fla. 1996). Section 924.07 and Rule 9.140(c) set forth "strictly limited and carefully crafted exceptions designed to provide appellate review to the state in criminal cases where such is needed as a matter of policy and where it does not offend against constitutional principles." State v. Creighton, 469 So. 2d 735, 740 (Fla. 1985), receded from on other grounds, Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773, 774 (Fla. 1996). This statute (and rule) granting the right to appeal from a particular type of order is one that confers a means to enforce a right or redress an injury; as such, it is remedial. Allen, 743 So. 2d at 535. Remedial statutes must be construed liberally to advance the intended remedy. Id.

The Fourth District in this case read the definition of an illegal sentence very narrowly. The appellate court reasoned that the sentence was legal because it fell within the sentencing guidelines and was not a downward departure. McMahon, 47 So. 3d at 369. The Fourth District's definition of illegal sentence was too narrow because it did not consider the other ways in which a sentence might be "illegal."

A. CONTRARY TO THE FOURTH DISTRICT'S OPINION IN THIS CASE, SENTENCES ARE NOT ILLEGAL ONLY WHEN THEY DEPART DOWNWARDLY FROM THE GUIDELINES.

The statute does not define what is meant by "illegal" sentences. Thus, one must look to a variety of case law to provide guidance as to how a sentence is defined as "illegal" for purposes of Section 924.07 and Rule 9.140(c). For example, in State v. Fulton, 878 So. 2d 485 (Fla. 1st DCA 2003), the court made it clear that a sentence is illegal if it does not impose a minimum punishment required by law. Similarly, a sentence is illegal if the court fails to impose a mandatory minimum sentence. See, State v. Waldron, 835 So. 2d 1217 (Fla. 5th DCA 2003)(the appellate court granted the State appellate relief from a sentence which failed to impose the minimum punishment required by the 10-20-Life statute); State v. Row, 478 So. 2d 430 (Fla. 5th DCA 1985)(the appellate court granted relief to the State on the grounds that the sentence did not impose the three year mandatory minimum term for trafficking in cocaine); Thompson v. State, 542 So. 2d 1049 (Fla. 3d DCA 1989)(State successfully appealed trial court's failure to impose mandatory minimum fine for trafficking). And, in State v. Smith, 470 So. 2d 764 (Fla. 5th DCA 1985), approved 485 So. 2d 1284 (Fla. 1986), the court granted the State relief from a sentence imposed within the guidelines on the grounds that the guidelines were not legally applicable to the offense in question. Moreover, in

State v. Sylvio, 846 So. 2d 1271 (Fla. 4th DCA 2003), the Fourth District found that the trial court's imposition of a withhold of sentence without also ordering probation was not authorized by law and must be reversed.

Clearly, the definition of an "illegal" sentence is much broader than the definition recognized by the Fourth District in the instant case. The State submits that the Fourth District erred in not construing the meaning of an "illegal" sentence more broadly given the foregoing caselaw and the fact that Section 924.07 is, as previously stated, a remedial statute. The phrase "an illegal sentence" must be read liberally enough in order to uphold the State's right to due process and the public's interest in ensuring that dangerous habitual offenders are sentenced to longer terms in prison for the protection of the public. Consequently, the Fourth District's opinion must be quashed.

B. THE TRIAL COURT ERRED BY INJECTING ITSELF INTO PLEA NEGOTIATIONS WITHOUT INVITATION FROM EITHER PARTY; THE FOURTH DISTRICT ERRED IN FINDING THIS ISSUE NOT TO BE APPEALABLE.

As the Fourth District recognized in the instant case, the trial court erred by injecting itself into plea negotiations without invitation from either party, offering Respondent a sentence over the State's objections, and imposing said sentence also over the State's objections. State v. McMahon, 47 So. 3d

368 (Fla. 4th DCA 2010), citing State v. Warner, 762 So. 2d 507, 513 (Fla. 2000). See also Tilghman v. Culver, 99 So. 2d 282, 286 (Fla. 1957), cert. den., 356 U.S. 953 (1958); and State v. Chaves-Mendez, 809 So. 2d 910 (Fla. 5th DCA 2002). In Warner, 762 So. 2d at 513, this Court admonished that a "trial court **must** not initiate a plea dialogue; rather, at its discretion, it may (but is not required to) participate in such discussions upon request of a party." (Emphasis added).

This Court further directed that, after the judge becomes (properly) involved in plea negotiations:

> [t]he court may consider pre-plea victim input and a pre-plea presentence investigation report prior to suggesting any sentence; however if victim input will not be received until a later time, the judge must make it clear on the record that the court is required to and will consider any victim input which is offered pursuant to section 921.143, Florida Statutes, prior to making a final determination regarding an appropriate sentence. Cf. Gitto, 731 So.2d at 692[3] (observing that due process requires victim input to be provided at a meaningful time and opining that "it is not a meaningful time to hear the victim after the court has pre-determined the sentence in order to get a plea agreement"). Consideration of such pre-plea input will not limit the prosecutor's right to introduce additional facts at appropriate points, nor preclude the court's later consideration of presentence victim input which it is required to consider, a presentence investigation report, or other applicable sources of information prior to sentence imposition.

Warner, 762 So. 2d at 514.

[3] State v. Gitto, 731 So. 2d 686 (Fla. 5th DCA 1998), disapproved by Warner v. State, 762 So. 2d 507 (Fla. 2000),quashed by Silas v. State, 781 So. 2d 1082 (Fla. 2001).

Here, the trial court initiated plea negotiations without invitation, and refused to hear from the prosecutor regarding additional facts pertinent to sentencing such as whether the defendant qualified as a habitual offender, and did not consider any potential victim input. It is beyond peradventure that the trial court blatantly flouted the dictates of Warner and, consequently, erred in the instant case.

The District Court in the case at bar stated, however, that the issue was not appealable because the sentence imposed herein was not a downward departure:

> Although it is improper for a trial court to initiate a plea discussion, neither Florida Rule of Appellate Procedure 9.140(c) nor Section 924.07, Florida Statutes (2009), authorizes the state to appeal court-initiated plea agreements. Further, this Court held in State v. Figueroa, 728 So. 2d 787 (Fla. 4th DCA 1999) that the state could not appeal a sentencing order imposing a legal sentence after the trial court advised the defendant that it would withhold adjudication of guilt and place the defendant on probation if the defendant pled guilty to the crimes charged. Id. at 787. This court determined that a trial court's initiation of plea discussions does not render an otherwise legal sentence "illegal" for purposes of state appeal under Florida Rule of Appellate Procedure 9.140(c) or section 924.07. Id. at 788; see also State v. Hewitt, 702 So. 2d 633, 634-35 (Fla. 1st DCA 1997)(holding that the state does not have the right to appeal a sentencing order that imposes a legal sentence that does not constitute a downward departure even though the trial court initiated its own plea agreement with the defendant).

McMahon, 47 So.3d at 368.

The Fourth District concluded in the instant case, that the facts of Warner could be distinguished from the instant case because Warner was given a downward departure sentence and McMahon was not. As the District Court further acknowledged in the instant case, its conclusion that the trial court's actions were unappealable by the state was in direct conflict with Chaves-Mendez on this point of law.

In Chaves-Mendez, the Fifth District stated that "[t]he trial court's initiation of plea negotiations with the defendant was per se reversible error." Chaves-Mendez, 809 So. 2d at 910. The court reversed the sentence and remanded for further proceedings. Id. See also State v. Faulk, 840 So. 2d 319 (Fla. 5th DCA 2003).

It is true that, as the Fourth District pointed out, Warner did not explicitly overrule the Fourth District's opinion in State v. Figueroa, 728 So. 2d 787 (Fla. 4th DCA 1999),[4] which involved a downward departure. However, by the same token, this Court in Warner did not explicitly state that it intended other cases to be distinguishable based on whether or not they involved a downward departure. The State submits that, as the

[4] As previously explained, in Figueroa, the Fourth District held that the state could not appeal a sentencing order imposing a legal sentence after the trial court advised the defendant that it would withhold adjudication of guilt and place the defendant on probation if the defendant pled guilty to the crimes charged. Figueroa, 728 So. 2d at 787.

Chaves-Mendez court implicitly recognized, the State's and a victim's interest in due process and a fair trial[5] mandates a broader interpretation of Warner and of the meaning of an "illegal" or "unlawful" sentence.

To not consider the instant case as one in which the sentence was illegally imposed and was therefore illegal is to render Warner meaningless. Without some mechanism to challenge the trial court's conduct, the trial court will improperly be permitted to do an end-run around Warner. Furthermore, the trial court's conduct is not unique to the instant case; the situation has already happened on a substantial number of occasions, as in McMahon, Chaves-Mendez, Faulk, Figueroa, Hewitt, State v. Hohl, 431 So. 2d 707 (Fla. 2d DCA 1983), and Warner itself. The trial court should not be allowed to flout either the spirit or the letter of the law in this manner.

C. THE TRIAL COURT ERRED BY NOT HOLDING A HABITUALIZATION HEARING, AND BY NOT MAKING THE FINDINGS REQUIRED BY THE

[5] Warner, 762 So. at 514, suggesting why it is improper for the trial court to initiate plea negotiations and offer a predetermined sentence, cited Gitto, 731 So. 2d at 692, favorably for the proposition that due process requires victim input to be provided at a meaningful time and opining that it is not a meaningful time to hear the victim after the court has pre-determined the sentence in order to get a plea agreement; Section 921.143, Florida Statutes, requires the court to permit the victim to make a statement. Further, Warner, again suggesting another reason why it was inappropriate for the trial judge to initiate plea negotiations and offer a predetermined sentence, noted that the prosecutor was entitled to introduce additional facts relevant to sentencing. Id.

STATUTE; THE APPELLATE COURT ERRED IN DISMISSING THE STATE'S APPEAL OF THIS ERROR ON THE GROUNDS IT WAS UNAPPEALABLE BY THE STATE.

As for the trial court's deliberate refusal to hold a hearing at which the State could present evidence of the defendant's habitual offender status and the trial court's failure to make the appropriate findings regarding whether the defendant qualified as a habitual offender and whether a habitual offender sentence was not necessary for the protection of the public, this, too, was blatant error. Section 775.084, Florida Statutes (2008), requires that a trial court "shall" hold a hearing to determine the defendant's habitual offender status and, if the defendant qualifies as a habitual felony offender, "must" sentence the defendant as a habitual felony offender unless the court finds such sentence is not necessary for the protection of the public.[6] The statute further requires

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[6] Section 775.084, Florida Statutes (2008), reads, in pertinent part:

> (3)(a) In a separate proceeding, **the court shall** determine if the defendant is a habitual felony offender or a habitual violent felony offender. The procedure shall be as follows:
>
> > 1. The court shall obtain and consider a presentence investigation prior to the imposition of a sentence as a habitual felony offender or a habitual violent felony offender.
> >
> > 2. Written notice shall be served on the defendant and the defendant's attorney a

the trial court to file with the court, and provide to the Office of Economic and Demographic Research of the Legislature, written reasons for the decision that such sentence is not

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> sufficient time prior to the entry of a plea or prior to the imposition of sentence in order to allow the preparation of a submission on behalf of the defendant.
>
> * * *
>
> 6. For an offense committed on or after October 1, 1995, **if the state attorney pursues a habitual felony offender sanction or a habitual violent felony offender sanction against the defendant and the court, in a separate proceeding pursuant to this paragraph, determines that the defendant meets the criteria under subsection (1) for imposing such sanction, the court must sentence the defendant as a habitual felony offender** or a habitual violent felony offender, subject to imprisonment pursuant to this section **unless the court finds that such sentence is not necessary for the protection of the public. If the court finds that it is not necessary for the protection of the public to sentence the defendant as a habitual felony offender or a habitual violent felony offender, the court shall provide written reasons**; a written transcript of orally stated reasons is permissible, if filed by the court within 7 days after the date of sentencing. Each month, the court shall submit to the Office of Economic and Demographic Research of the Legislature the written reasons or transcripts in each case in which the court determines not to sentence a defendant as a habitual felony offender or a habitual violent felony offender as provided in this subparagraph.

(Emphasis added).

necessary for the protection of the public. See also Sampson v. State, 832 So. 2d 251, 253 (Fla. 2d DCA 2002) (section 775.084(3)(a)6 mandates a habitual offender sentence if the defendant meets the criminal record criteria set forth in the statute unless trial court provides valid written reasons why a habitual offender sentence is not necessary to protect the public).

As this Court explained in Mack v. State. 823 So. 2d 746, 750 (Fla. 2002), and King v. State, 681 So. 2d 1136, 1138-39 (Fla. 1996), a sentencing judge **must** determine whether a defendant qualifies as a habitual offender; this determination is **ministerial** rather than discretionary. Given this clear statutory mandate, the appellate court erred in finding the trial court's egregious disregard of its statutory duty not to be appealable.

When it enacted the habitual felony offender statute, Section 775.084, Florida Statutes, the legislature intended that once a defendant had twice been convicted with sanctions the third conviction would be enhanced. McCall v. State, 862 So. 2d 807, 808 (Fla. 2d DCA 2003). The legislature explained in the Preamble to Chapter 2002-210, Laws of Florida (2002), that:

> in 1999 the Legislature adopted chapter 99-188, Laws of Florida, with the primary motivation of reducing crime in this state and to protect the public from violent criminals through the adoption of enhanced and mandatory sentences for violent and repeat offenders,

> for persons involved in drug-related crimes, committing aggravated battery or aggravated assault on law enforcement personnel or the elderly, and for persons committing criminal acts while in prison or while having escaped from prison….

It is quite clear that a large, if not the overriding, part of the legislature's concern was for the protection of the public. § 775.084(3)(a)(6), Fla. Stat. Therefore, in determining whether the sentence in this case constituted an illegal sentence remedied upon appeal, this Court should also consider that the right of the general public to be protected from crime would be subverted if a defendant's potential status as a habitual offender could willfully be ignored in sentencing.

In this vein, it is well worth noting that this Court, in Warner, 762 So. 2d at 514, citing with favor, Gitto, 731 So. 2d at 692, suggested another reason why the judge's actions in initiating plea negotiations and offering a predetermined sentence were so improper; due process required victim input to be provided at a meaningful time and not after the court had already pre-determined the sentence in order to get a plea agreement. In this case, the judge did not even bother to ask if there was a victim involved, much less make provision to get the victim's input. Clearly, the victims of crime have a right to due process which must also be considered in determining whether the instant issue is appealable. Cf, State v. Allen, 743 So. 2d 532 (Fla. 1st DCA 1997).

Allen involved the question of whether the State had the right to appeal an order that partially granted and partially denied restitution. The court noted in Allen that the preamble to the restitution statute stated that "the Legislature intends to ensure that all victims of crime are treated with dignity, respect, and sensitivity and that the rights of victims of crime are **honored and protected by law enforcement agencies, prosecutors, and judges in a vigorous manner….**" Allen, 743 So. 2d at 534, citing § 775.089, Fla. Stat. (Emphasis added). In finding the order to be appealable, the Allen court reasoned that the rights of crime victims to be compensated for their losses would be subverted if the State were not permitted to appeal both complete and partial denials of restitution orders. Similar to Allen, the rights of crime victims to give their input on sentencing and to be protected from habitual offenders, would be subverted if the State were not permitted to appeal the trial court's initiation of plea negotiations and the trial court's refusal to hold a habitual offender hearing and make the requisite findings.

In State v. Collins, 985 So. 2d 985, 993 (Fla. 2008), Justice Pariente issued a significant statement in her concurring opinion. In Collins, the State conceded on appeal that the evidence below was insufficient to establish, as required for habitual offender sentencing, that the prior

convictions occurred at separate sentencing proceedings. However, the State requested the case be remanded to the trial court to allow the State a second opportunity to prove the required timing for habitual offender sentencing. This Court held "that the Double Jeopardy Clause did not preclude granting the State a second opportunity to demonstrate that Collins [met] the criteria for habitualization."

Justice Pariente concurred. Collins, 985 So. 2d at 994-996 (Pariente, J., concurring). Her concurrence provided the required fourth vote to form a majority. United States v. Brenton-Farley, 607 F.3d 1294, 1339 (11th Cir. 2010) (explaining that when a concurring opinion provides the necessary vote to form a majority, that concurring opinion becomes the opinion of the Court to the extent of agreement with main plurality opinion, citing Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 994, 51 L.Ed.2d 260 (1977)). Justice Pariente observed that, although double jeopardy concerns prohibit the State from getting a second bite at the apple after it has failed to prove an essential element of a crime during the guilt phase, these same concerns do not bar the State from attempting to prove a prior conviction at a resentencing proceeding. Collins, 985 So.2d at 994-996 (Pariente, J., concurring). Notably, Justice Pariente found that **society's interest in having a habitual offender sentence imposed where the defendant**

meets the criteria outweighs the defendant's interest in finality. Collins, 985 So. 2d at 996. (emphasis added).

It should further be considered that, while it is not the equivalent of the defendant's constitutional right to due process, the State itself also has a right to due process and a fair trial. This certainly encompasses the right to request a habitual offender hearing and to present evidence of the defendant's criminal conduct and habitual offender status at this hearing. After all, as this Court stated in Steinhorst v. State, 412 So. 2d 332 (Fla. 1982), "Just as the defendant has the constitutional right to present witnesses in his behalf, the people of the state, acting through the state attorney, have the inherent sovereign prerogative to present evidence of the defendant's criminal conduct. It is the duty of the state attorney to carry out this prerogative of the people. Art. V, s 17, Fla.Const. ; § 27.04, Fla. Stat. (1979)." See also, State v. Baldwin, 978 So. 2d 807 (Fla. 1st DCA 2008) (State's right to a fair trial includes the right to call witnesses); State v. Gerry, 855 So. 2d 157, 161 (Fla. 5th DCA 2003) acknowledging that both defense and the State have the right to a fair trial and this encompasses the due process right to call witnesses).

In fact, this Court, in Warner, 762 So. 2d at 514, suggested another reason why it was so inappropriate for the trial judge to initiate plea negotiations and offer a

predetermined sentence when it noted that the prosecutor was entitled to introduce additional facts relevant to sentencing prior to imposition of sentence. Similarly, in State v. Epps, 592 So. 2d 1233 (Fla. 5th DCA 1992), the appellate court reversed the trial court's granting of a motion to dismiss without first giving the State a chance to demur or to refute the facts stated in the motion. Significantly, the court stated: "Under the rule **the state is entitled to have its say** and was not afforded that due process here." Id.

In the instant case, the trial court erred by failing to hold a hearing on the matter of habitualization where the State could present evidence of same, by failing to determine whether the defendant qualified as a habitual offender, and by failing to make and file and transmit the necessary written findings required to impose a non-habitual offender sentence. Notably, the judge's end run around the statue permitted him to avoid submitting to the Legislature written reasons why such a sentence was not necessary for the protection of the public. By doing so, the trial court deliberately flouted the law. The trial court should not be allowed to do so with impunity simply because the appellate court considers the matter unappealable.

D. THIS COURT SHOULD NOT PERMIT THE INSTANT LOOPHOLE TO STAND.

As matters stand in the Fourth District, it appears that any court can ignore the Warner mandate not to initiate plea negotiations, as well as the entire habitual offender statute, with impunity merely by imposing a sentence at the bottom of the guidelines. This is a loophole which must be closed. In Dunbar v. State, 46 So. 3d 81 (Fla. 5th DCA 2010) (en banc), the trial court failed to orally pronounce the required 10-year mandatory minimum on the robbery with a firearm count but the minimum mandatory was included in the written sentence and judgment. The Fifth District, in an en banc decision, held that double jeopardy did not preclude resentencing to include a minimum mandatory sentence. The en banc court reasoned that the oral sentence was subject to correction because it was illegal because it did not include the statutorily required minimum mandatory. The Fifth District observed, en banc, that **any contrary holding would "create a potential loophole which could allow a trial court to avoid the imposition of a mandatory minimum sentence by simply failing to announce the mandatory minimum provision at sentencing."** Also cf. State v. Scanes, 973 So. 2d 659, 661 (Fla. 3d DCA 2008) (where the trial court imposed an "illegal" three year minimum mandatory rather than the ten year statutorily required minimum mandatory, the appellate court remanded to the trial court to either withdraw the plea or impose the correct minimum mandatory); Harroll v.

State, 960 So. 2d 797 (Fla. 3d DCA 2007), review denied, 966 So. 2d 966 (Fla. 2007). Therefore, this Court should close the loophole by granting the State an avenue of relief.

E. TO DO OTHERWISE CREATES A SEPARATION OF POWERS ISSUE.

In fact, to do otherwise in the instant situation creates a separation of powers issue. First, absent a defendant's offering an open plea to the trial court, the State Attorney clearly has the right to decide whether to engage in plea negotiations and to determine what, if any, sentence to offer in light of the facts of the case (which obviously may not yet be fully known to the judge). See, e.g., Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 807, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987). Second, the State Attorney has the right to submit evidence of the defendant's criminal conduct and to decide what evidence should be submitted. Steinhorst, 412 So. 2d at 332 (the people of the State, through the State Attorney, have the inherent sovereign prerogative to present evidence of the defendant's criminal conduct). Third, the Legislature has the power to prescribe punishment for criminal offenses and the power to require that the habitual offender issue be heard and ruled upon prior to sentencing. State v. Coban, 520 So. 2d 40, 41 (Fla. 1988) (explaining that the "plenary power of the legislature to prescribe punishment for criminal offenses cannot

be abrogated by the courts in the guise of fashioning an equitable sentence outside the statutory provisions."); State v. Cotton, 769 So. 2d 345 (Fla. 2000) (rejecting a separation of powers challenge to the minimum mandatory sentencing contained in the PRR statute); Woods v. State, 740 So. 2d 20 (Fla. 1st DCA 1999) (rejecting a separation of powers challenge to the minimum mandatory sentencing contained in the PRR statute because "the plenary power to prescribe the punishment for criminal offenses lies with the legislature, not the courts.").

A trial court, by doing an end run around Warner and/or the habitual offender statute, can sentence a defendant to a non-habitual offender sentence, even where a habitual offender sentence is clearly warranted, thereby ignoring the legislatively mandated sentence, exposing the public to the dangers of a habitual offender without even making the requisite findings on the record, and avoiding the duty to report the failure to impose a habitual offender sentence to the Legislature. Cf. D'Alessandro v. Shearer, 360 So. 2d 774, 775 (Fla. 1978) (issuing a mandamus requiring trial court to impose the three-year minimum mandatory penalties for a firearm where the trial court refused to impose the mandatory sentence because "he believed them to be unconstitutional" despite his awareness of a Florida Supreme Court decision upholding the statute against constitutional attack).

In sum, the trial court erred in engaging in improper plea negotiations without an invitation from either party. The trial court erred by not holding a hearing regarding Petitioner's habitual offender status. The trial court erred by not making written findings that a habitual offender sentence was not necessary for the protection of the public. The appellate court erred in finding that these errors were not appealable or otherwise reviewable. This Court should issue an opinion finding that the trial court's errors are reviewable, quashing the appellate court's opinion otherwise, and instructing all trial courts that trial courts cannot ignore the law because it does not appear to them either convenient or desirable. The cause must be remanded with directions that Petitioner's sentences must be reversed and further proceedings must be had in accordance with this Court's decision.

CONCLUSION

In conclusion, the State respectfully requests this Court ACCEPT jurisdiction to review the instant case, REVERSE the appellate court's opinion insofar as it found the instant issue unappealable, and DIRECT that the trial court's order sentencing the defendant be reversed and the cause be remanded for further proceedings in accordance with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Initial Brief on the Merits" has been furnished by courier and e-mail to: Alan T. Lipson, Esquire, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 Third Street, West Palm Beach, FL 33401 and ALipson@pd15.state.fl.us on March 30, 2011.

_____
Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Administrative Order of this Court dated July 13, 1998, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type.

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Of Counsel

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC10-2425

STATE OF FLORIDA,

Petitioner,

vs.

JOHN McMAHON,

Respondent.

APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing “Appendix to Petitioner’s Brief on Jurisdiction” complete with a copy of the opinion under review has been furnished by courier to: Alan T. Lipson, Esquire, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 Third Street, West Palm Beach, FL 33401 on March 30, 2011.

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Of Counsel

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,
Fourth District.
STATE of Florida, Appellant,
v.
John McMAHON, Appellee.

No. 4D09-1965.
Nov. 10, **2010**.

Background: After trial court initiated plea discussions, defendant pled guilty in the Seventeenth Judicial Circuit Court, Broward County, Matthew I. Destry, J., to possession of cocaine, possession of drug paraphernalia, and grand theft, and was sentenced to 18 months in prison. State appealed.

Holdings: The District Court of Appeal, Peter D. Blanc, Associate Judge, held that:
(1) State could not appeal sentence even though trial court improperly initiated plea negotiations, and
(2) trial court's refusal to conduct a hearing on defendant's habitual felony offender status did not enable State to appeal.

Appeal dismissed.

West Headnotes

[1] KeyCite Citing References for this Headnote

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases

Once the trial court has been invited to participate in plea discussions, it may actively discuss potential sentences and comment on proposed plea agreements.

[2] KeyCite Citing References for this Headnote

110 Criminal Law
110XXIV Review
110XXIV(D) Right of Review
110k1024 Right of Prosecution to Review
110k1024(9) k. Nature or Grade of Offense and Extent of Penalty. Most Cited Cases

State could not appeal 18-month sentence imposed on defendant who pled guilty to possession of cocaine, possession of drug paraphernalia, and grand theft, even though trial court improperly initiated plea negotiations with defendant; sentence was a legal sentence within the sentencing guidelines that was not rendered illegal by trial court's initiation of plea discussions. West's F.S.A. § 924.07; West's F.S.A. R.App.P.Rule 9.140(c) .

[3] KeyCite Citing References for this Headnote

110 Criminal Law
110XXIV Review
110XXIV(D) Right of Review
110k1024 Right of Prosecution to Review
110k1024(9) k. Nature or Grade of Offense and Extent of Penalty. Most Cited Cases

Trial court's refusal to conduct a hearing on defendant's habitual felony offender status, over State's objection, did not enable State to appeal legal 18-month sentence imposed after defendant pled guilty to possession of cocaine, possession of drug paraphernalia, and grand theft.

Bill McCollum, Attorney General, Tallahassee, and Jeanine M. Germanowicz, Assistant Attorney General, West Palm Beach, for appellant.

Carey Haughwout, Public Defender, and Alan T. Lipson, Assistant Public Defender, West Palm Beach, for appellee.

BLANC, PETER D., Associate Judge.

***1** The state appeals a sentencing order imposing a legal sentence and argues that the trial court improperly initiated plea negotiations with the defendant, John McMahon, and also refused to conduct a hearing on the defendant's habitual felony offender status over the state's objection. Although the record below supports both claims, we dismiss, finding that a sentencing order imposing a legal sentence is not an order appealable by the state.

The defendant was charged with possession of cocaine, possession of drug paraphernalia, and grand theft. The state filed a notice of intent to seek a habitual felony offender sentence. During a hearing, the trial court advised the defendant, "You can have the bottom of the guidelines today. I won't habitualize him if he wants that today. If [he] doesn't, he takes his chances down the road." The state objected, arguing that it was entitled to a hearing on the defendant's status as a habitual felony offender. The defendant accepted the plea, and he was sentenced within the guidelines to eighteen months in prison.

[1] The Florida Supreme Court has admonished that a "trial court must not initiate a plea dialogue; rather, at its discretion, it may (but is not required to) participate in such discussions upon request of a party." *State v. Warner*, 762 So.2d 507, 513 (Fla.2000). Once the trial court has been invited to participate, it may "actively discuss potential sentences and comment on proposed plea agreements." *Id.* at 514. Although it is improper for a trial court to initiate a plea discussion, neither Florida Rule of Appellate Procedure 9.140(c) nor section 924.07, Florida Statutes (2009), authorizes the state to appeal court-initiated plea agreements. Further, this court held in *State v. Figueroa*, 728 So.2d 787 (Fla. 4th DCA 1999), that the state could not appeal a sentencing order imposing a legal sentence after the trial court advised the defendant that it would withhold adjudication of guilt and place the defendant on probation if the defendant pled guilty to the crimes charged. *Id.* at 787. This court determined that a trial court's initiation of plea discussions does not render an otherwise legal sentence "illegal" for purposes of a state appeal under Florida Rule of Appellate Procedure 9.140(c) or section 924.07. *Id.* at 788; *see also* *State v. Hewitt*, 702 So.2d 633, 634-35 (Fla. 1st DCA 1997) (holding that the state does not have the right to appeal a sentencing order that imposes a legal sentence that does not constitute a downward departure even though the trial court initiated its own plea agreement with the defendant).

[2] In the instant case, the trial court initiated plea discussions with the defendant without invitation of either party and over the state's objection that it was entitled to a hearing on the defendant's status as a habitual felony offender. Although the court-initiated plea negotiation was improper under the standard espoused in *Warner*, the sentence of eighteen months in prison was within the sentencing guidelines and ultimately a legal sentence. Thus, the sentencing order is not appealable by the state according to this court's holding in *Figueroa*.[FN1] We acknowledge that the Fifth District reached a contrary conclusion in *State v. Chaves-Mendez*, 809 So.2d 910, 910-11 (Fla. 5th DCA 2002) ("The trial court's initiation of plea negotiations with the defendant was *per se* reversible error."). The majority opinion in *Chaves-Mendez* does not discuss whether the sentence was a legal sentence; however, the concurring opinion explains that the sentence was a downward departure from the sentencing guidelines. *Id.* Although *Chaves-Mendez* appears to be factually distinguishable from the instant case because it dealt with a downward departure sentence, the opinion itself did not make that distinction, so we certify conflict with the majority's decision.

***2** [3] We also conclude that the trial court's failure to conduct a hearing on the defendant's habitual felony offender status is not an appealable issue for the state. In *State v. Hewitt*, 21 So.3d 914 (Fla. 4th DCA 2009), this court recently held that it lacked subject matter jurisdiction to review a trial court's failure to conduct a hearing or make written or oral findings on the defendant's habitual felony offender status because the sentence ultimately imposed was a legal sentence. As discussed above, the sentence imposed by the trial court in the instant case was within the sentencing guidelines and, therefore, legal. Accordingly, the sentencing order is not appealable by the state, and this appeal must be dismissed.

Dismissed.

TAYLOR and CIKLIN, JJ., concur.

FN1. We recognize the tension between the holdings in *Warner* and *Figueroa*. *Warner* stands for the proposition that the trial court should never initiate plea discussions without invitation by the parties. However, unlike *Figueroa* and the instant case, the sentence in *Warner* was a downward departure from the guidelines. *Warner* did not overrule *Figueroa* presumably because the sentence in *Figueroa* was not a downward departure. Thus, *Figueroa* is still applicable to the state's appeal of a court-initiated plea imposing a guidelines sentence.

Fla.App. 4 Dist., **2010**.
State v. **McMahon**
--- So.3d ----, 2010 WL 4483433 (Fla.App. 4 Dist.), 35 Fla. L. Weekly D2486