IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC10-2425

STATE OF FLORIDA,

Petitioner

vs.

JOHN McMAHON,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

BILL McCOLLUM
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Bureau Chief
West Palm Beach, Florida

JEANINE M. GERMANOWICZ
Assistant Attorney General
Florida Bar No. 0019607
1515 N. Flagler Drive
Suite 900
West Palm Beach, Florida 33401-3432
Telephone: (561) 837-5000
jeanine.germanowicz@myfloridalegal.com
Counsel for Petitioner

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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 and Respondent was the Appellee in the District Court of Appeal for the State of Florida, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix containing the opinion issued by the Fourth District and it may be followed by the appropriate page number for that document.

STATEMENT OF THE CASE AND FACTS[1]

The respondent, John McMahon, 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, 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

[1] All facts are drawn from the opinion of the District Court of Appeal’s opinion in State v. McMahon, --- So.3d ----, 2010 WL 4483433 (Fla. 4th DCA November 10, 2010).

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 petitioner's status as a habitual felony offender. The petitioner accepted the plea, and he was sentenced within the guidelines to eighteen months in prison.

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. Although acknowledging that the record below supported both claims, the District Court of Appeal dismissed, asserting that a sentencing order imposing a legal sentence was not an order appealable by the state and holding that the sentence in this case was "legal" merely because it fell within the sentencing guidelines.

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, however, that Warner was distinguishable because it expressly involved a downward

departure from the guidelines. The District Court did certify conflict with the majority opinion 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.") because it did not discuss whether the sentence was a legal sentence. The District Court noted that Chavez-Mendez also appeared to be factually distinguishable because, as explained in the concurring opinion, the sentence was a downward departure from the sentencing guidelines, but, because the majority opinion itself did not make that distinction, the Fourth District would certify conflict.

This petition followed.

SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction to review the instant case because the opinion of the Court of Appeal of the State of Florida, Fourth District, is certified to be in conflict with the decision of another district court of appeal, State v. Chavez-Mendez, 809 So. 2d 910 (Fla. 5th DCA 2002), on the same point of law.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION TO REVIEW THE DECISION IN THE INSTANT CASE AS THE DECISION IS CERTIFIED TO BE IN CONFLICT

WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

It is well settled that in order to establish conflict jurisdiction, the decision sought to be reviewed must expressly and directly create conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. Article 5, Section 3(b)(3) Fla. Const.; Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). Conflict jurisdiction is properly invoked only when the district court announces a rule of law which conflicts with another court's pronouncement, or when the district 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). "Obviously two cases can not be in conflict if they can be validly distinguished." Morningstar v. State, 405 So. 2d 778, 783 (Fla. 4th DCA 1981), Anstead J. concurring; affirmed, 428 So. 2d 220 (Fla. 1982). See also, Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983).

Petitioner asserts that this Court should accept jurisdiction of this case because the opinion of the District Court of Appeal of the State of Florida, Fourth District, (hereinafter "Fourth District") in State v. McMahon, --- So.3d ----, 2010 WL 4483433 (Fla. 4th DCA November 10, 2010)., is

certified to be in express and direct conflict with a decision of the Fifth District, State v. Chavez-Mendez, 809 So. 2d 910 (Fla. 5th DCA 2002), on the same point of law. As the Fourth District itself noted, the decision of the Fourth District in this case conflicts with the majority opinion in Chavez-Mendez. Contrary to the Fourth District's opinion in this case that the trial court's uninvited initiation of plea negotiations was unappealable by the state, the Chavez-Mendez majority opinion states that "The trial court's initiation of plea negotiations with the defendant was per se reversible error."

The Chavez-Mendez majority opinion cannot be distinguished on the grounds that the sentence was a departure sentence. As the Fourth District properly recognized, a fact included in a concurring or dissenting opinion but not in the majority opinion cannot be the basis for distinguishing a case. This is because the majority may have considered, and intentionally disregarded, that fact in deciding the issue in question. Cf., Greene v. Massey, 384 So. 2d 24, 27 (Fla. 1980) ("An opinion joined in by a majority of the members of the Court constitutes the law of the case. A concurring opinion does not constitute the law of the case nor the basis of the ultimate decision unless concurred in by a majority of the Court.") (citations omitted). Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986)("Conflict between

decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction."); The Florida Bar v. B.J.F., 530 So. 92d 286, 288 (Fla. 1988). Also cf., Jenkins v. State, 385 So.2d 1356 (Fla. 1980)(“the Supreme Court of Florida lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or of the Supreme Court.”). A fact in a concurring opinion cannot be considered because it is not part of the opinion of the court and therefore has no precedential value.

Again, it is clear the two opinions, Chavez-Mendez and McMahon, are in conflict. Furthermore, while State v. Warner, 762 So. 2d 507, 513 (Fla. 2000)(a case in which this Court held 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”) is distinguishable, Warner’s holding lends support to the State’s contention that the underlying point of law is worth addressing.

Therefore, this Court should accept jurisdiction to resolve the certified conflict.

CONCLUSION

In conclusion, the State respectfully requests this Court ACCEPT jurisdiction to review the instant case.

Respectfully submitted,

BILL McCOLLUM
Attorney General
Tallahassee, Florida

_____
CELIA TERENZIO
BUREAU CHIEF
Florida Bar Number 656879

_____
JEANINE M. GERMANOWICZ
Assistant Attorney General
Florida Bar No. 0019607
1515 North Flagler Drive
Ste. 900
West Palm Beach, FL 33401-3432
Telephone: (561) 837-5000
jeanine.germanowicz@myfloridalegal.com
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing “Petitioner’s Brief on Jurisdiction” complete with Appendix 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 December __, 2010.

_____
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.

_____
Of Counsel

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC10-

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 December __, 2010.

_____

Of Counsel

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