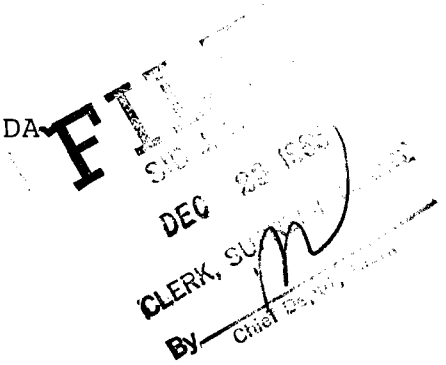
IN THE SUPREME COURT OF FLORIDA



RANDY ASHLEY TILLMAN,

Appellant/Petitioner.

v. CASE NO. 68,041

STATE OF FLORIDA,

Appellee/Respondent.

BRIEF OF PETITIONER ON JURISDICTION

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SUMMARY OF ARGUMENT

The First District Court of Appeal affirmed petitioner's thirty year sentence in a per curiam decision citing Whitehead v. State, 467 So.2d 779 (Fla. 1st DCA 1985). The Whitehead case is presently before this Court. One of the issues which has been briefed on the merits in Whitehead is the question of whether the classification of a defendant as a habitual offender is, in and of itself, a sufficient basis for a departure from the sentencing guidelines. [The First DCA held in Whitehead that it was, and, through its "citation PCA", applied that holding to petitioner]. Principles of equal justice require that, in the event that Whitehead obtains a favorable ruling in this Court as to that issue, relief should also be available for petitioner. Therefore, this Court should exercise its discretionary jurisdiction and accept this case for review on the merits. Jollie v. State, 405 So.2d 418 (Fla. 1981).

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RANDY ASHLEY TILLMAN,	:	
Appellant/Petitioner,	:	
v.	:	CASE NO. 68,041
STATE OF FLORIDA,	:	
Appellee/Respondent.	:	
_____	:	

BRIEF OF PETITIONER ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner, RANDY ASHLEY TILLMAN, was the defendant in the trial court and the appellant in the First District Court of Appeal. He will be referred to in this brief as petitioner. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal, and will be referred to as the state. An Appendix, consisting of a copy of the decision of the First District Court of Appeal and copies of the briefs filed in the District Court, is being filed with this jurisdictional brief.

II STATEMENT OF THE CASE AND FACTS

Petitioner was arrested on the night of February 14, 1984 and charged with attempted sexual battery and simple battery. Probable cause was found to be insufficient on the sexual battery charge, and the state filed an information on February 16, 1984, amending the charges to include burglary of a conveyance with an assault or battery (Count I), attempted kidnapping (Count II),

and attempted robbery (Count III). The case proceeded to trial before acting Circuit Judge Charles McClure and a jury on May 21-22, 1984.

After hearing the evidence[1], the jury returned verdicts finding petitioner not guilty of attempted kidnapping and not guilty of attempted robbery, but guilty (as to Count I) of the lesser included offense of attempted burglary of a conveyance with an assault or battery. The prosecution immediately announced that it would seek to have petitioner sentenced under the habitual offender statute. The recommended range under the sentencing guidelines, taking into consideration appellant's prior record, was $4\frac{1}{2}$ to $5\frac{1}{2}$ years imprisonment. At the sentencing hearing, the prosecutor recommended that petitioner be sentenced to 30 years imprisonment, and argued that the "very specific factual findings" required for classification as a habitual offender provided a "tailor-made reason" to depart from the guidelines. The prosecutor stated that, notwithstanding the jury's verdict, it was his belief that petitioner intended to abduct the victim and commit a sexual battery upon her [see Appendix B, p.9-10]. The state also relied on comments to the same effect made by a Florida State University police officer and by the victim's father [see Appendix B, p.10-11]. Defense counsel argued that, in light of the jury's verdict, a departure from the sentencing guidelines was unwarranted. She contended that it would be an error of fact and law if the trial court were to sentence petitioner "as though this were a sexual battery case" [see Appendix B, p.11-12].

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[1] The evidence presented at trial is set forth at p.2-8 of petitioner's initial brief in the DCA [Appendix B].

The trial court declared petitioner a habitual offender and imposed a sentence of thirty years imprisonment. Defense counsel objected to the habitual offender finding, to the departure from the sentencing guidelines range, and to the extent of the departure.

In his order classifying petitioner as a habitual offender, Judge McClure made the required threshhold findings regarding petitioner's prior record, and then, in support of his second-stage finding that extended imprisonment is necessary to protect the public from further criminal activity by the defendant, made the following findings of fact:

> According to the testimony presented at trial, the Defendant approached [redacted] as she was attempting to get some books from the passenger floorboard of her vehicle. The Defendant attempted to enter the vehicle and force Ms. [redacted] into the passenger seat. A struggle ensued. At this time, Drew Cockrell arrived and the Defendant fled to his vehicle. After wrecking his vehicle the Defendant ran from the scene. The Defendant was arrested later that night at his parents' home and admitted that he was the person involved in this incident.
>
> The Defendant contends that his only intention was to steal Ms. [redacted]s vehicle. However, given the facts of this incident and the facts of the Defendant's prior rape conviction, it appears unlikely to this Court that that was the Defendant's true intention. It is this Court's belief that but for the intervention of Drew Cockrell we would be faced with a much more serious charge. Regardless of the Defendant's intentions, it is uncontested that his actions caused extreme emotional trauma to [redacted]. This situation is exacerbated by the fact that [redacted] was an entirely innocent victim, not known to the Defendant, who was going about ordinary, routine business.
>
> It is obvious to this Court that given the Defendant's age and his prior history that there is no likelihood that this Defendant will ever be rehabilitated.

[See Appendix B, p.13-14].

In his order setting forth his reasons for imposing a sentence in excess of the guidelines range, Judge McClure first stated that he had sentenced petitioner as a habitual offender, and specifically incorporated the findings made pursuant to the habitual offender proceeding into his order departing from the guidelines. As additional justification for the departure, the trial court found that the victim had suffered "obvious emotional shock and trauma as a result of the Defendant's actions"; that "[the] Defendant's past history shows a pattern of violent conduct which indicates a serious danger to society"; and that "[the] Defendant has shown by his misdeeds that he is not amenable to rehabilitation."

On appeal, petitioner framed the issue:

> IN SENTENCING APPELLANT AS A HABITUAL OFFENDER, IN DEPARTING FROM THE SENTENCING GUIDELINES, AND IN IMPOSING A SENTENCE OF THIRTY YEARS IMPRISONMENT WITHOUT PAROLE, THE TRIAL COURT IMPROPERLY CONSIDERED SPECULATION AS TO WHAT MIGHT HAVE OCCURRED AND IMPROPERLY DISREGARDED THE JURY'S VERDICT.

[See Appendix B, p.15].

Petitioner summarized his argument as follows:

> Every aspect of the sentencing decision in this case - the decision to declare appellant a habitual offender, the decision to depart from the sentencing guidelines, and the decision to impose a thirty year sentence without parole - was pervasively influenced by the trial court's belief that appellant intended to commit a sexual battery and would have done so but for the intervention of Drew Cockrell. This belief was based purely on speculation, was inconsistent with the jury's verdict, and involved consideration of factors relating to the instant offense for which convictions have not been obtained (and, indeed, for which there was not even probable cause to charge appellant). The consideration of these impermissible factors requires reversal of appellant's sentence, and a remand either for imposition of a guidelines sentence or for resentencing

by a different trial judge.

In support of his position, petitioner relied on such cases as Owen v. State, 441 So.2d 1111 (Fla. 3d DCA 1983) (trial court is not free to disregard the jury's findings, even for the purpose of enhancing a sentence); Fletcher v. State, 457 So.2d 570 (Fla. 5th DCA 1984) (trial court's finding that defendant used or threatened force to accomplish theft was inconsistent with jury's verdict, and was therefore an improper consideration in sentencing); Callaghan v. State, 462 So.2d 832 (Fla. 4th DCA 1984) (trial court's finding, in departing from guidelines, that defendant's action endangered child was an improper consideration, since defendant was acquitted of child abuse by endangerment); Carter v. State, 468 So.2d 276 (Fla. 1st DCA 1985) (trial court's finding, in departing from guidelines, that offense involved threat of great bodily harm was improper and inconsistent with jury's verdict, since defendant had been charged with armed robbery and armed burglary, and convicted on lesser included offenses of simple robbery and simple burglary) [see Appendix B, p.20-21]. For the proposition that the trial court improperly considered his own (and the prosecutor's) speculation as to what petitioner might have done had he not been interrupted, petitioner relied on such cases as Barclay v. State, 470 So.2d 691 (Fla. 1985); Lindsay v. State, 453 So.2d 485 (Fla. 2d DCA 1984); and Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984) [see Appendix B, p.24-27]. Petitioner recognized that several District Courts of Appeal have held that an habitual offender finding is, in and of itself, a valid reason to depart from the sentencing guidelines [see e.g. Brady v. State,

457 So.2d 544 (Fla. 2d DCA 1984); Cuthbert v. State, 459 So.2d 1098 (Fla. 1st DCA 1984)], but pointed out that this presupposes that the habitual offender finding is not itself tainted by the trial court's consideration of improper factors [see Appendix B, p.21-22]. Furthermore, petitioner did not concede the correctness of the decisions which hold that an habitual offender finding is a per se justification for a guidelines departure, and pointed out that those decisions would permit triple consideration of the same factors, i.e. the defendant's prior criminal record [see Appendix B, p.21, n.4].

On October 2, 1985, the First District Court of Appeal affirmed appellant's thirty year sentence in a decision which reads in its entirety, "AFFIRMED". See Whitehead v. State, 467 So.2d 779 (Fla. 1st DCA 1985)". Whitehead holds, inter alia, that a trial court's classification of a defendant as an habitual offender is, in and of itself, a clear and convincing reason for a guidelines departure. On October 17, 1985, petitioner filed a motion for rehearing, motion to certify question, and motion to stay mandate, in which he pointed out that the Whitehead case is currently before the Florida Supreme Court, and that the issue in Whitehead concerning the per se sufficiency of an habitual offender finding to justify a guidelines departure has been briefed on the merits. Petitioner further called the District Court's attention to the intervening Florida Supreme Court decisions of Hendrix v. State, ___ So.2d ___ (Fla. 1985) (10 F.L.W. 425) and Albritton v. State, ___ So.2d ___ (Fla. 1985) (10 F.L.W. 426). Petitioner asked the District Court to either certify the question

of whether an habitual offender finding is in and of itself a clear and convincing reason to depart from the sentencing guidelines, or, in the alternative, to stay the mandate pending the decision of the Florida Supreme Court in Whitehead. See Jollie v. State, 405 So.2d 418, 420-21 (Fla. 1981).

In an order issued November 12, 1985, petitioner's motions for rehearing, to certify question, and to stay mandate were denied without opinion. Notice to invoke this Court's discretionary jurisdiction was filed on December 12, 1985. Jurisdiction was invoked pursuant to Jollie v. State, supra.

III ARGUMENT

ISSUE PRESENTED

THIS COURT SHOULD ACCEPT JURISDICTION OF THIS APPEAL PURSUANT TO JOLLIE v. STATE, 405 So.2d 418 (Fla. 1981), SINCE THE DECISION OF THE DISTRICT COURT OF APPEAL IS A "CITATION PCA" AFFIRMING PETITIONER'S SENTENCE ON THE PRECEDENT OF WHITEHEAD v. STATE, 467 So.2d 779 (Fla. 1st DCA 1985), AND SINCE THE WHITEHEAD CASE IS PRESENTLY BEFORE THIS COURT.

On October 2, 1985, this Court affirmed petitioner's thirty year sentence without opinion, citing Whitehead v. State, 467 So.2d 779 (Fla. 1st DCA 1985). Whitehead holds, inter alia, that a trial court's classification of a defendant as a habitual offender, as defined in Fla.Stat. §775.084(1)(a), is, in and of itself, a clear and convincing reason for departure from the sentencing guidelines. [This is the issue upon which Whitehead is relevant to the instant appeal][2]. This Court in Whitehead also held

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[2] Petitioner, of course, does not concede the correctness of the DCA's conclusion that this case is controlled by Whitehead, since in the instant case the reasons given in support of the habitual offender finding were themselves improper [see Appendix B, p.15-33].

that when a defendant whose crime was committed prior to the effective date of the sentencing guidelines affirmatively elects to be sentenced under the guidelines, the record need not show that the defendant knowingly and intelligently waived his right to parole eligibility. The latter issue was certified to the Florida Supreme Court as a question of great public importance. In his brief on the merits in this Court, Whitehead argued both the certified question and the question of whether a habitual offender finding may be used as the sole justification for aggravating a sentence beyond the guidelines range [see Appendix E, p.20-25]. In its answer brief, the state asked this Court to decline to consider the issue which had not been certified, but recognized that once the jurisdiction of the Supreme Court has properly been invoked, the Court has the discretion to consider the entire case on the merits. See Bould v. Touchette, 349 So.2d 181, 1183 (Fla. 1977); Trushin v. State, 425 So.2d 1126 (Fla. 1982) [see Appendix F. p.13]. The Whitehead case has not yet been decided by this Court.

In light of this Court's recent decisions in Hendrix v. State, ___ So.2d ___ (Fla. 1985) (case no. 65,928, opinion filed August 29, 1985) (10 F.L.W. 425) (holding that prior criminal convictions may not be considered as a reason for departure, where the defendant's prior criminal record has already been taken into account in computing the presumptive sentence under the guidelines) and Albritton v. State, ___ So.2d ___ (Fla. 1985) (case no. 66,169, opinion filed August 29, 1985) (10 F.L.W. 426) (holding, inter alia, that a departure sentence is subject to appellate review

to determine whether the reasons given justify the extent of the departure, as well as the decision to depart), there would appear to be at least a reasonable likelihood that this Court will disapprove the District Court's holding in Whitehead that an habitual offender finding is per se a clear and convincing reason to depart from the guidelines. In that event, principles of equal justice would require that petitioner be afforded relief as well. See Jollie v. State, 405 So.2d 418, 420-21 (Fla. 1981).

IV CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, petitioner respectfully requests that this Court, in the exercise of its discretionary jurisdiction, accept this case for full review on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Wallace E. Allbritton, The Capitol, Tallahassee, Florida, 32302, this 23 day of December, 1985.

Steven L Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender