IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner,	)	
vs.	)	CASE NO. 68,536
CHARLES VICKNAIR, Respondent.	)	

RESPONDENT'S BRIEF ON THE MERITS

INITIAL BRIEF OF APPELLANT

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Petitioner,)
vs.) CASE NO. 68,536
CHARLES VICKNAIR,)
Respondent.)

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as set forth in Petitioner's brief on the merits.

SUMMARY OF ARGUMENT

Petitioner attacks the use of an habitual offender finding to justify a departure from the guidelines. Since this Court has previously ruled that a defendant's prior criminal record cannot be used twice, once on the scoresheet and again as a reason for departure, it follows that the prior record also cannot be used a third time, to support an habitual offender finding as a reason for departure from the guidelines. This Court must vacate that reason for departure and remand for resentening.

ARGUMENT

THIS COURT MUST HOLD THAT A FINDING OF HABITUAL OFFENDER STATUS DOES NOT CONSTITUTE, IN AND OF ITSELF, A CLEAR AND CONVINCING REASON FOR DEPARTMENT FROM THE GUIDELINES.

This issue has also recently been certified to this Court by the Second District in Ferguson v. State, 481 So.2d 924 (Fla. 2d DCA 1985), pending, Case No. 68,146, and is also before this Court in Payne v. State, 480 So.2d 202 (Fla. 1st DCA 1985), pending, Case No. 68,180. It is petitioner's contention that a finding of a habitual offender status cannot, in and of itself, be used as a reason for departure from the guidelines.

The relationship between habitual offender and guidelines sentencing was confused from the inception of the guidelines. Florida Rule of Criminal Procedure 3.701 does not say how Section 775.084, Florida Statutes, proceedings affect a recommended guideline sentence. A "comment" to the committee note to Rule 3.701(d)(10) seemed to equate enhancements of the maximum sentence under Section 775.084 with reclassification of the degree of the offense under Section 775.087 (use of a weapon or firearm) and 775.084, Florida Statutes (wearing a mask). This comment proved to be erroneous because habitual offender enhancements were not reclassifications of the degree of the offense. See, e.g., Hall v. State, 483 So.2d 549 (Fla. 1st DCA 1986), and the cases cited therein. See also the amendment to Florida Rule of Criminal Procedure 3.701(d)(10) as contained in The Florida Bar: Amendments to Rules of Criminal Procedure, 468

So.2d 220, 225 (Fla. 1985). Thus, it is now clearly this Court's intent to require clear and convincing reasons for departure in addition to a habitual offender finding. That finding provides a greater maximum sentence, but does not constitute an automatic reason for departure.

Still to be answered then is what effect should be given an enhancement order when considering a guidelines sentence. The practice used in this case, of commingling the habitual offender and departure orders, automatically makes the habitual offender finding a basis for deviation. No rule or statute allows that kind of automatic aggravation of a guidelines sentence and it should not be allowed. The issues are not the same.

In Eutsey v. State, 383 So.2d 219, 223 (Fla. 1980), this Court said:

> The purpose of the habitual offender act is to allow enhanced penalties for those defendants who meet objective guidelines indicating recidivism.

The guidelines, on the other hand, have as their purpose:

> To eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-and-offender-related-criteria and in defining their relative importance in the sentencing decision.

Florida Rule of Criminal Procedure 3.701(b). Among the principles embodied in the guidelines is the rule that "the severity of the sanction should increase with the length and nature of the offender's criminal history." Florida Rule of

Criminal Procedure, 3.701(b)(4). The objective of the guidelines, therefore, is uniformity in sentencing offenders who commit similar crimes and whose criminal histories are similar. By incorporating increasingly severe sanctions as the number and the seriousness of the offenses increases, the guideline structure takes recidivism into account. Being essentially redundant, the habitual offender statute should not be used to allow a second enhancement for past offenses already counted in guideline scoring. The only exception to this position would be where the recommended guideline sentence is greater than the statutory maximum for the particular crime; in that case, the habitual offender statute could be used to increase the statutory maximum. However, that is the <u>only</u> situation which would jsutify the implementation of the habitual offender statute.

The habitual offender statute, moreover, was enacted when parole was available. Now persons who are sentenced under the guidelines are not eligible for release on parole. Section 921.001(8), Florida Statutes. The length of a guideline sentence is intended to reflect the time to be served, shortened only by gain time. <u>Id</u>.; Florida Rule of Criminal Procedure, 3.701(b)(5). By applying the enhanced penalties available under the habitual offender statute to sentences without parole, habitual offenders will be given sentences which are disproportionately harsh when compared with other offenders who have committed similar crimes and who have similar criminal histories, but who were not subjected to habitual offender proceedings. In addition, if an

order finding a defendant to be an habitual offender is automatically a clear and convincing reason for departure, the avowed prupose of sentencing uniformity will be thwarted. Habitual offenders, sentenced without either the restraint of the guidelines or the leveling effects of parole, will be a separate class of offender sentenced without regard to guidelines criteria.

The trial judge here improperly merged what are two distinct proceedings. Under the habitual offender statute, the question is whether the maximum statutory penalty could be enlarged. Deviation from the guidelines is quite a different inquiry, being whether there are clear and convincing reasons for departure from a sentence within the guidelines range, in which criminal history has already been taken into consideration. This process did not advance the valid guidelines goal of uniformity, but instead produced a sentence out of proportion to the guidelines.

In Hendrix v. State, 475 So.2d 1218, 1220 (Fla. 1985), this Court held:

> To allow the trial judge to depart from the guidelines based upon a factor which has already been weighted in arriving at a presumptive sentence would in effect be counting the convictions twice which is contrary to the spirit and intent of the guidelines. Accord, State v. Brusven, 327 N.W.2d 591 (Minn. 1982); State v. Erickson, 313 N.W.2d 16 (minn. 1981); State v. Barnes, 313 N.W.2d 1 (Minn. 1981). We agree with the First District Court of Appeal in that "[w]e find a lack of logic in considering a factor to be an aggravation allowing departure from the guidelines when the

> same factor is included in the guidelines for purposes of furthering the goal of uniformity." Burch v. State, 462 So.2d 548,549 (Fla. 1st DCA 1985).

Although Hendrix was not an habitual offender case, its holding has been so applied by the Fifth District, since habitual offender status is largely based upon a defendant's prior record:

> Under the habitual offender act (§775.084, Fla. Stat.), a defendant's prior convictions and current conviction are the sole necessary factual basis for the determination that the defendant is an habitual offender under section 775.084(1) and (2). The only additional requirement is a finding by the trial court (by a preponderance of the evidence) that it is necessary for the protection of the public to sentence the defendant to an extended term. §775.084(3), Fla. Stat. Therefore, this finding can be but a conclusion based solely on the defendant's prior record and current conviction. When this is the case, the finding under Section 775.084(3) that the defendant is an habitual offender is not a sufficient ground for departure under Hendrix.[2]
>
> 2. In cases where the sentencing judge has departed for reasons similar to the determining factors under the habitual offender act (though not under that act), those reasons have been found to be impermissible under Hendrix. See, e.g., Fowler v. State, 482 So.2d 602 (Fla. 5th DCA 1986) (the fact that trial court was compelled, "for the protection of society," to institutionalize defendant for a term in excess of that provided by the guidelines is insubstantial reason because Hendrix so holds); Casteel v. State, 481 So.2d 72 (Fla. 1st DCA 1986) ("reason ... that defendant's pattern of conduct renders him a continuing threat to the community" is factually based on defendant's

> prior convictions and on the current conviction and is improper basis for a departure.); Pilgrim v. State, 480 so.2d 688 (Fla. 5th DCA 1986) (finding that defendant "has shown by his actions that he is inherently dangerous to society and, unless put away from society for a sufficient period of time, will continue in his pattern of criminal conduct ..." is not clear and convincing reason for departure).

Vicknair v. State, 483 So.2d 896 (Fla. 5th DCA 1985). See also Moultrie v. State, 11 FLW 913 (Fla. 5th DCA April 17, 1986) and Bouthner v. State, No. 85-1455 (Fla. 5th DCA May 8, 1986). The First District in Payne v. State, 480 So.2d 202 (Fla. 1st DCA 1985) and the Second District in Ferguson, supra, and Fleming v. State, 480 So.2d 715 (Fla. 2d DCA 1986) have disagreed with this most logical extension of Hendrix.

One more problem needs to be addressed, that of the different standards of proof involved in the interplay between the guidelines and the habitual offender statutes. This Court held in State v. Mischler, 11 FLW 139, 140 (Fla. April 3, 1986):

> Accordingly, "clear and convincing reasons" require that the facts supporting the reasons be credible and proven beyond a reasonable doubt. The reasons themselves must be of such weight as to produce in the mind of the judge a firm belief for conviction, without hesitancy, that departure is warranted.

The habitual offender statute, on the other hand, provides only a lesser standard of proof:

> Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence ...

Section 775.084(3)(d), Florida Statutes. Again, the separate statutory sentencing schemes are in conflict. The sentencing judge relied upon the preponderance standard. His reliance on that standard, which is not as heavy as the reasonable doubt standard, causes his findings to fail the Mischler reasonable doubt test. This Court, even if it rejects the bulk of Petitioner's argument and holds that the declaration of a habitual offender status is, in and of itself, sufficient to justify departure, must reverse this departure sentence because it does not satisfy Mischler.

CONCLUSION

Based upon the foregoing cases, authorities and policies, Appellant respectfully requests that this Honorable Court affirm the District Court's opinion, answer the certified question in the negative, and remand for resentencing.

Respectfully submitted,

JAMES B. GIBSON
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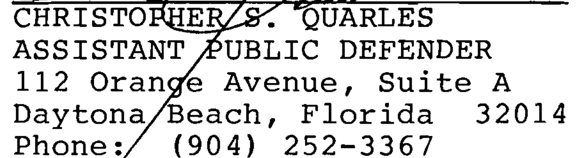
SEVENTH JUDICIAL CIRCUIT



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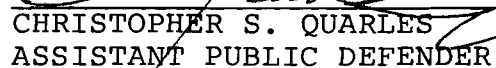
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered to the Honorable Jim Smith, Attorney General, 125 Ridgewood Ave., Daytona Beach, FL 32104, by hand in his basket at the Fifth District Court of Appeal, and a copy mailed to Charles Vicknair, #096886, Apalachee Correctional Institute, P.O. Box 699, Sneads, FL 32460, on this 22nd day of May, 1986.



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