W00A

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 68,945
	)	
PHILLIP MOULTRIE,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF THE ARGUMENT

Respondent was sentenced as an habitual offender, and this was given by the judge as his reason for departing from the guidelines, without a State v. Jackson written statement. As this Court has recently recognized in Whitehead v. State, habitual offender sentencing is not a valid reason to depart from the guidelines. This case exemplifies why it is not. The only basis for Respondent's being sentenced as an habitual offender was his prior criminal record, already factored into his guidelines score and sentence. The judge's finding that it was necessary for the protection of the public to so sentence Moultrie was a restatement of that record. There were no particularized facts specific to him which could be referred to by the judge as reasons why the public needed to be protected from Moultrie, beyond the bare prior record. Even the district court's opinion accepted that his departure sentence as an habitual offender was not based on reasons which, independent of criminal record, justified a departure sentence.

The habitual offender statute is incompatible with the guidelines system. Respondent should be resentenced within the guidelines range.

ARGUMENT

A FINDING OF HABITUAL FELONY OFFENDER STATUS IS NOT A CLEAR AND CONVINCING REASON FOR DEPARTURE FROM THE RECOMMENDED GUIDELINES SENTENCE.

The second page of November 1, 1986 Florida Bar News contains a report of the recommended changes in the sentencing guidelines being proposed by the Sentencing Guidelines Commission. The final proposed change is:

> Sentencing under provisions of the Habitual Offender Act (Ch. 775.084) are (sic) not subject to and need not conform to the guidelines.

This of course implies that presently such sentencing is subject to and must confirm with the guidelines, an implication just confirmed by this Court in Whitehead v. State, 11 FLW 553 (Fla. October 30, 1986). In his briefs in this case in the Fifth District Court of Appeal (See Appendix), Respondent argued that this case exemplified the impossibility of reconciling the guidelines system and the habitual offender scheme, and the use of the latter to circumvent the former. Respondent continues to maintain this argument, and its corollary that a finding of habitual offender status cannot be a clear and convincing reason for departure from the recommended guidelines sentence. Whitehead confirms that argument.

An examination of the record in this case shows that

the trial judge sentenced Moultrie as an habitual offender based solely on his prior record, and on a general statement of the judge's opinion that Moultrie was a professional burglar and a thief (R336). There was no statement beyond this of particular facts and circumstances to justify the second-stage determination that it was necessary for the protection of the public to sentence Moultrie as an habitual offender. Since its decision in this case, the Fifth District Court of Appeal has shown more concern for such particularity. Watson v. State, 492 So.2d 831 (Fla. 5th DCA 1986); Brown v. State, 11 FLW 2049 (Fla. 5th DCA September 25, 1986). There is nothing in the record beyond Moultrie's criminal record and current conviction that could provide a factual basis for the trial judge's opinion that Moultrie was a professional burglar and a thief, therefore nothing other than that record to provide an independent clear and convincing reason to depart from the guideline sentence. This was recognized by the Fifth District Court of Appeal opinion in this case. The logic of such recognition leads to the conclusion which this Court made in Whitehead: the guidelines system does not permit a departure based on the habitual offender statute which is specifically premised on consideration of the prior criminal record of a defendant.

While amendments to the guidelines are considered procedural in nature, Wilkerson v. State, 494 So.2d 210 (Fla. 1986), Respondent does not agree with Petitioner that the guidelines system itself is only procedural (Brief of Petitioner, Page 5). The legislature has decided to share its authority over the

substantive law of defining crimes and determining their punishment with this Court, Section 921.001, Florida Statutes (1982), so that the sentencing guidelines system is at least a substance and procedure hybrid, hardly an uncommon phenomenon in a legal system founded on such a constitutional hybrid.

It is not surprising that the State is forced to embrace contradictory positions - although the guidelines must apply to all sentences, the guidelines are not applicable to habitual offender sentences (Brief of Petitioner, Pages 4-5). This Court in Whitehead has accepted that there is only one way to disentangle that knot - accept the fact that the habitual offender scheme cannot be reconciled with the guidelines. No more obvious example of this can be found than the use of the habitual offender scheme to circumvent the guidelines. While the dissent in Whitehead makes the reasonable point that it is possible to construe the two statutes in a way that would allow the habitual offender statute to be used as a ground to depart from a guidelines sentence when based on a "protection of the public" finding, this could be accommodated into the guidelines system without another separate sentencing statute.

However, such a finding would have to pass muster under the "clear and convincing" standard: that the facts supporting the finding must be credible and proven beyond a reasonable doubt; that the reason is not prohibited by the guidelines themselves (factors relating to prior arrests without conviction; factors relating to the instant offenses for which convictions have not been obtained); that factors already taken into account

in calculating the guidelines score can never support departure (prior criminal convictions, victim injury, legal status, more severe punishment for multiple offenses of a particular kind, use of a weapon); that an inherent component of the crime in question cannot be used to justify departure. State v. Mischler, 488 So.2d 523 (Fla. 1986); Scurry v. State, 489 So.2d 25 (Fla. 1986). This case is an example of a finding that cannot pass the test. It is based exclusively on Moultrie's prior criminal convictions per se. The judge does not refer to specific facts particular to Moultrie that show why the judge is justified in his opinion that Moultrie is a "professional burglar", and one is left to conclude that the judge's finding is merely a restatement of the bare criminal record.

In any case, the guidelines system itself accommodates commission of the same offenses by having a multiplier provision. Unless an appeals court carefully scrutinizes the "protection of the public" finding, the habitual offender statute lends itself to the abuse of circumventing the guidelines, with sentences disproportionately harsh on offenders coming before a judge who uses the habitual offender statute when compared to sentences on other offenders with similar or the same crimes and records but not declared habitual offenders. Whitehead.

In this case, the appeals court said that Moultrie's adjudication was sufficient under the habitual felony offender statute, but not based on reasons independent of his criminal record that would justify a departure sentence. Respondent maintains that his adjudication was not sufficient even under the

habitual felony offender statute, because there was nothing beyond the bare criminal record to justify a "protection of the public" finding. This Court has recognized in Whitehead that the only way to avoid the use of the habitual offender statute to "double-dip" on criminal record, contrary to Hendrix v. State, 475 So.2d 1218 (Fla. 1985), is to stay with the guidelines system alone, and accept the obvious repeal of the habitual offender statute by implication.

Petitioner would keep it alive by reinterpreting "habitual offender" to include the "timing of offenses" and "escalating pattern" (Brief of Petitioner, Page 7). Again, as with "protection of the public", both can be accommodated within the guidelines system and invoked as reasons to depart, provided they are genuinely clear and convincing reasons and not another restatement of prior convictions, and not yet another attempt to circumvent the guidelines - for example with "egregious circumstances" indicating escalation, Echevarria v. State, 492 So.2d 1146 (Fla. 3d DCA 1986); but not by stretching the "timing of offenses" from minutes, days and months after a previous offense, Simmons v. State, 11 FLW 2252 (Fla. 2d DCA October 24, 1986).

Of course, if the recommended change, to insulate the habitual offender act from the sentencing guidelines, is accepted, the State will be satisfied. This argument, however, will remain the same, only now the obvious corollary will be to repeal the guidelines system. If the constitutionally dubious amendment of the guidelines by Chapter 86-273 Subsection (5), Laws of Florida, which removes the extent of departure from appellate

review, is followed by the revival of the habitual offender statute, the guidelines will become a dead letter.

CONCLUSION

BASED UPON the argument made and authorities cited herein, Respondent asks this Honorable Court to confirm its decision in Whitehead, determine that sentencing under the habitual offender act is subject to the guidelines, and cannot be used as a reason to depart, and remand this cause to the District Court of Appeal with directions to return it to the trial court for resentencing within the guidelines range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, in his basket at the Fifth District Court of Appeal; and mailed to Phillip Moultrie, Inmate No. 322694, DeSoto Correctional Institute, Post Office Drawer 1072, Arcadia, Florida 33821, on this 6th day of November, 1986.

Michael L. O'Neill

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