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FOURTH JUDICIAL CIRCUIT OF FLORIDA

**FILED**  
J. WHITE  
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PLEASE REPLY TO:

Duval County  
Office

November 14, 1986

The Honorable Parker Lee McDonald  
Justice, Supreme Court of Florida  
Supreme Court Building  
Tallahassee, FL 32301

Re: Proposed Sentencing Guidelines Changes

Dear Justice McDonald:

We have reviewed the recommended changes in the sentencing guidelines which were recently published in the November 1, 1986, edition of the Florida Bar News. We feel it necessary to respond to the proposed changes as they relate to "victim injury" and the relationship between the "Habitual Offender Act" and the sentencing guidelines.

VICTIM INJURY

The "victim injury" proposal would appear to allow multiple scoring of victim injury for a single victim if there are multiple offenses alleged. It is also unclear as to the manner in which victim injury should be scored when there are multiple victims, arising out of a single criminal episode.

For example, in an instance in which a sexual battery occurs during the commission of a burglary, an individual is normally charged with two separate offenses ("burglary with an assault" and "sexual battery"). If there is victim injury resulting from the sexual battery, the proposed changes would appear to allow scoring that injury twice, one time each for the burglary offense and the sexual battery offense.

We feel that victim injury should be scored only once for a victim's injury resulting from a single criminal episode, regardless of the number of offenses for which a defendant is convicted as a result of that episode. Additionally, we feel it would also be appropriate for victim injury to be scored for

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each victim injured during a criminal episode. Therefore, we propose that the changes be amended to read: "Victim injury may be scored for each victim injured during a criminal episode or transaction."

#### HABITUAL OFFENDER STATUS

We have great difficulty with the apparent purpose and intent of the recommended change in the guidelines as they relate to the Habitual Offender Act.

Our experience in the criminal justice system has shown us that a very high percentage of felony offenders have at least one felony conviction or prison sentence release within the previous five years. The case law relating to the Habitual Offender Act shows that there is very little guidance from the appellate courts as to what constitutes a sufficient factual basis to justify imposing an extended term for "protection of the public." Accordingly, trial courts usually base their determination that a defendant qualifies for Habitual Offender treatment solely upon the individual's prior record.

Defendants who fall within even the lowest guidelines ranges typically will satisfy the Habitual Offender Act's criteria as to prior record. If the proposed changes are adopted, they will effectively do away with guidelines for a great number of felony defendants. We cannot believe that such a result is consistent with the original intent and purpose of the guidelines, since a large factor considered in determining presumptive sentencing ranges is prior record.

We agree, for the most part, with the Florida Supreme Court's recent decision in Whitehead v. State of Florida, 11 F.L.W. 553 (October 31, 1986), with regard to its determination that the provisions of the Habitual Offender Act cannot operate as an alternative to guidelines sentencing. The opinion is well reasoned on that point.

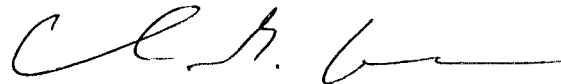
We do take issue, however, to the apparent dictum in Whitehead to the effect that there no longer is reason for the Habitual Offender Act to exist. We believe that the Habitual Offender Act is still viable (and should be utilized) in those instances in which the presumptive guidelines range in a particular case exceeds the total statutory maximums for the offenses charged. In such an instance, an extended term can be

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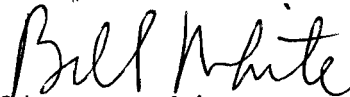
sought under the Act to impose a sentence within the presumptive guidelines range. Such an interpretation would be consistent with both the guidelines system and the Habitual Offender Act, since an individual whose guidelines range exceeds the statutory maximum would, in most instances, almost certainly fall within anyone's interpretation of an individual for whom an extended term is necessary for protection of the public.

We appreciate this opportunity to respond to the proposed guidelines changes.

Sincerely,



Charles G. Cofer  
Circuit Court Coordinator



William P. White  
Chief Assistant Public Defender



Ann E. Finnell  
Circuit Court Coordinator

CGC:sbh