

TABLE OF CONTENTS

	<u>PAGE</u>
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	
<u>Question Presented:</u>	
IS THE DETERMINATION OF A DEFENDANT AS A HABITUAL FELONY OFFENDER PURSUANT TO SECTION 775.084 A SUFFICIENT REASON FOR DEPARTURE FROM THE RECOMMENDED RANGE OF THE SENTENCING GUIDELINES?	3
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

	<u>PAGE</u>
<u>Savoie v. State,</u> 422 So.2d 312 (Fla. 1982)	6
<u>White v. State,</u> No. 85-316 (Fla. 2nd DCA, January 8, 1986)[11 FLW 174]	7
<u>Whitehead v. State,</u> No. 67,053 (Fla. October 30, 1986)[11 FLW 553]	4,5,6

OTHER AUTHORITIES

Fla. Stat. §775.084(4)(a)	4,5
Fla. Stat. §812.13(2)(a)	3
<u>Florida Rules of Criminal Procedure Re: Sentencing Guidelines</u> <u>3.701 and 3.988, Case No. 69,411 (Fla., petition filed</u> <u>October 1, 1986)</u>	3

PRELIMINARY STATEMENT

This case is before the Florida Supreme Court on discretionary review of the decision of the Second District Court of Appeal on the basis of a question certified to be of great public importance. In this brief, the parties will be referred to by their proper names or as they stand before this Court. The letter "R" will be used to designate a reference to the record on appeal. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as presented by Petitioner in his brief except where specifically pointed out in Argument.

SUMMARY OF THE ARGUMENT

The facts of this case do not present the question certified by the Second District Court of Appeal. On that basis, the Court should refuse to answer the certified question and decline to accept jurisdiction of this case.

Alternatively, if jurisdiction is accepted, the Court should reconsider its recent decision holding that the sentencing guidelines, by implication, repeal the habitual offender statute. The two may be reconciled as intended by the Guidelines Commission. On that basis, the decision of the Second District should be approved.

ARGUMENT

Question Certified

IS THE DETERMINATION OF A DEFENDANT
AS A HABITUAL FELONY OFFENDER PURSUANT
TO SECTION 775.084 A SUFFICIENT REASON
FOR DEPARTURE FROM THE RECOMMENDED
RANGE OF THE SENTENCING GUIDELINES?

The State first contends that this Court should decline to accept this case to answer the certified question on the ground that the facts of this case do not fairly present that question for determination. In the Second District Court of Appeal, Petitioner did not attack the trial court's findings which formed the basis for the enhanced habitual offender sentence. The only issue raised there was whether determination of a defendant as a habitual felony offender is a valid reason for departure from the sentencing guidelines. Accordingly, the Second District's decision was confined to answering that issue.

What has been overlooked until now by both parties and by both the trial and appellate courts, is that the offenses for which Appellant was convicted (R. 50), first-degree felonies punishable by life imprisonment under Fla. Stat. §812.13(2)(a), could not be the subject of an enhanced sentence pursuant

to the habitual offender statute, Fla. Stat. §775.084(4)(a). A sentence already punishable by life imprisonment cannot be further enhanced or extended under that statute. Accordingly, this case does not factually present the question certified. The State, therefore, submits that this Court does not have jurisdiction to answer a certified question not fairly presented by the record and factually at issue.

Should the Court accept jurisdiction, however, and reach the merits of Petitioner's claim, Respondent contends that the certified question should be answered in the affirmative. The State is aware of this Court's recent decision in Whitehead v. State, No. 67,053 (Fla. October 30, 1986)[11FLW 553], but strongly urges the Court to reconsider its holding in that case. The Sentencing Guidelines Commission's recommended amendment to Committee Note (d)(11) clearly indicates that the Commission's intent with respect to the operation of the guidelines and the habitual offender statute is contrary to that expressed by this Court in Whitehead. Florida Rules of Criminal Procedure Re: Sentencing Guidelines 3.701 and 3.988, Case No. 69,411 (Fla., petition filed October 1, 1986).

As Justice Overton points out in his dissenting opinion, the guidelines and the habitual offender statute may be reconciled and read together. Objective consideration of the existence of a defendant's prior record by scoresheet computation does not take into account the type of subjective criteria considered in concluding that an enhanced sentence is necessary for the protection of the public.

Perhaps more importantly, Whitehead ignores an important function of the habitual offender statute and an easier reconciliation of that statute with the guidelines. Wholesale repeal of the habitual offender statute by implication would preclude a trial court from enhancing a sentence to permit the statutory maximum to conform to the guidelines presumptive range. That is, where the statutory maximum sentence is less than the presumptive range, but for the decision in Whitehead, the trial judge could enhance the statutory maximum for the offense under §775.084(4)(a) and impose a higher sentence within the presumptive range in conformity with the guidelines. As it stands, Whitehead not only frustrates clear legislative intent to raise the statutory maximum for offenses under circumstances enumerated in §775.084, but ignores basic principles of statutory construction. If it is the intention of our legislature to

repeal or modify the habitual offender statute in the wake of sentencing guidelines, as it was that of the Minnesota legislature as noted in the Whitehead decision, then it should be that governmental body's responsibility. Until such time, the habitual offender statute and the guidelines should be read together and both given effect as intended by the Guidelines Commission as evidenced by its proposed amendments now being considered by this Court. On that basis, the opinion of the Second District Court of Appeal should be approved.

In addition to the certified question, Petitioner also asserts that the trial court's findings are inadequate to support the conclusion that sentencing under the habitual offender statute was necessary for the protection of the public. This Court has held that once it has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process. Savoie v. State, 422 So.2d 312 (Fla. 1982). Here, however, this claim was not presented to the Second District on direct appeal and is, therefore, not properly before this Court.

Even if this Court does find this additional claim properly preserved, a review of the record reveals that Petitioner's prior criminal record was analyzed in terms of Petitioner's pattern of behavior over a period of years. The trial court

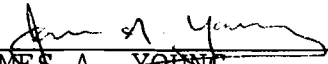
found a continuous pattern of crimes committed by Petitioner with the exception of the period of time in which he was in the Florida State Prison system, and that enhancement was, therefore, necessary to protect the public. (R. 70-73). The trial court made sufficient findings to support its conclusion that sentencing under the habitual offender statute was necessary to protect the public. White v. State, No. 85-316 (Fla. 2nd DCA, January 8, 1986)[11 FLW 174].

CONCLUSION

Based on the foregoing reasons, arguments and authorities, Respondent respectfully requests that this Court decline to accept jurisdiction in this case and alternatively to answer the certified question in the affirmative approving the opinion of the Second District Court of Appeal.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

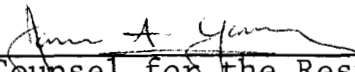


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to ALLYN GIAMBALVO, Assistant Public Defender, Criminal Court Building, 5100 - 144th Avenue North, Clearwater, Florida 33520 on this 18th day of November, 1986.



Of Counsel for the Respondent