

IN THE SUPREME COURT OF FLORIDA

PAUL MYERS,

Petitioner,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 70,017

FILED

SID J. WHITE

FEB 17 1987

CLERK, SUPREME COURT

By _____
Deputy Clerk

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

ANN COCHEU
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER'S

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	i
I PRELIMINARY STATEMENT	1
II STATEMENT OF THE CASE AND FACTS	2
III ARGUMENT	3
 <u>ISSUE PRESENTED</u>	
<p>THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN <u>MYERS v. STATE</u>, ___ So.2d ___ 12 FLW 102 (Fla. 1st DCA DECEMBER 18, 1986) EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN <u>WHITEHEAD v. STATE</u>, 498 So.2d 863 (Fla. 1986) AND WITH THE THIRD DISTRICT COURT OF APPEAL'S OPINION IN <u>HARRELSON v. STATE</u>, ___ So.2d ___, 12 FLW 192 (Fla. 3d DCA JANUARY 6, 1987).</p>	
IV CONCLUSION	5
CERTIFICATE OF SERVICE	5

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
Harrelson v. State, ___ So.2d ___, 12 FLW 192 (Fla. 3d DCA January 6, 1987)	3
Whitehead v. State, 498 So.2d 863 (Fla. 1986)	2,3
 <u>STATUTES</u>	
Section 775.084, Florida Statutes (1985)	2,4

IN THE SUPREME COURT OF FLORIDA

PAUL MYERS, :
Petitioner, :
v. : CASE NO. 70,017
STATE OF FLORIDA, :
Appellee. :
_____ :

PETITIONER'S BRIEF ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner, as addressed in this brief, was the defendant in the trial court and the appellant before the First District Court of Appeal. Respondent, the State of Florida, was the prosecuting authority in the trial court and the appellee before the First District. All references will be to the appendix, designated by the symbol "A," and followed by the appropriate page number.

II STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of the third degree felony of attempted burglary of a dwelling. The State filed a notice to seek an habitual offender determination. At the sentencing hearing petitioner objected to the admission of judgments and requested the State link them to him with fingerprint evidence. Overruling this, the trial judge placed the burden on petitioner to dispute the PSI report by bringing forth evidence. Further the trial judge declared him to be an habitual offender and sentenced him to the maximum of ten years. The presumptive guidelines sentence recommended 27-40 years (A-2).

The First District Court of Appeal acknowledged this Court's decision in Whitehead v. State, 498 So.2d 863 (Fla. 1986) but did not believe that the case repealed section 775.084, Florida Statutes (1985), the habitual offender statute (A-2).

Petitioner filed a timely Motion for Rehearing in part citing to language in Whitehead that the statute in question was repealed (A-4-6). The District Court denied his motion on January 23, 1987 (A-7). Petitioner filed a timely notice to invoke discretionary jurisdiction (A-8).

III ARGUMENT

ISSUE PRESENTED

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN MYERS v. STATE, ___ So.2d ___, 12 FLW 102 (Fla. 1st DCA DECEMBER 18, 1986) EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN WHITEHEAD v. STATE, 498 So.2d 863 (Fla. 1986) AND WITH THE THIRD DISTRICT COURT OF APPEAL'S OPINION IN HARRELSON v. STATE, ___ So.2d ___, 12 FLW 192 (Fla. 3d DCA JANUARY 6, 1987).

The Third District in Harrelson v. State, ___ So.2d ___, 12 FLW 192 (Fla. 3d DCA January 6, 1987) interpreted this Court's opinion in Whitehead v. State, 498 So.2d 863 (Fla. 1986) to eliminate the habitual offender statute as an alternative to the guidelines sentencing procedure. This Court in Whitehead at 864 opined:

In determining the continued viability of the habitual offender statute in light of the subsequently enacted sentencing guidelines, we recognize that we must attempt to preserve both statutes by reconciling their provisions, if possible. See State v. Digman, 294 So.2d 325 (Fla. 1974). We find that we cannot do so. In order to retain the habitual offender statute, we would have to conclude that either the sentencing guidelines are not applicable to "statutory" habitual offenders (i.e. those defendants whom the state seeks to punish pursuant to the specific provisions of section 775.084, Florida Statutes) or, if applicable, that the habitual offender statute may be used in and of itself as a legitimate reason to depart from the guidelines. We can find no logical support for either proposition.

Further, the Court reasoned:

Although the legislature did not repeal section 775.084 when it adopted the guidelines, we believe the goals of that section are more than adequately met through application of the guidelines. The habitual

offender statute provides an enhanced penalty based on consideration of a defendant's prior criminal record and a factual finding that the defendant poses a danger to society. The guidelines take into account both of these considerations.

. . . .

In short, the objectives and considerations, of the habitual offender statute are fully accommodated by the sentencing guidelines. In light of this, and the clear language of section 921.001(4)(a), we must conclude that section 775.084 cannot be considered as providing an exemption for a guidelines sentence.

Id., at 865.

Because the First District's opinion on its face directly and expressly conflicts with this Court's and the Third District's opinion that section 775.084 is no longer a viable sentencing alternative, this court should accept jurisdiction.

IV CONCLUSION

For the reasons stated, this Court should accept jurisdiction in this cause and quash the decision of the First District Court of Appeal.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



ANN COCHEU
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to the Honorable Robert Butterworth, Attorney General, The Capitol, Tallahassee, Florida, and mailed to Petitioner, Paul Myers, #072083, Post Office Box 1100, Avon Park, Florida, 33825 this 17th day of February, 1987.



ANN COCHEU