IN THE SUPREME COURT OF FLORIDA

PAUL MYERS,

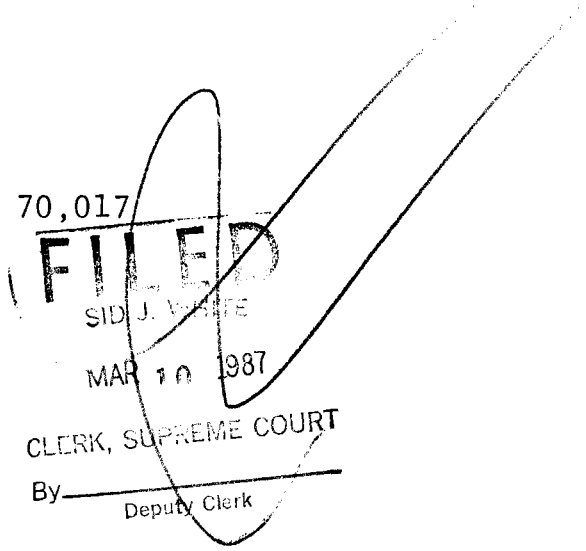
Petitioner,

v. CASE NO. 70,017

STATE OF FLORIDA,

Respondent.

_____/



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

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Statement of the Case and Facts as stated on page two of Petitioner's Jurisdictional Brief, although said statement is in complete. The Respondent also adopts the facts stated in the lower courts' opinion as reported in 12 F.L.W. at 102, a copy of which is attached hereto as Respondent's Appendix A.

SUMMARY OF ARGUMENT

The decision rendered by the District Court of Appeal, First District, is not in direct and express convlict with this Court's decision in Whitehead v. State, 498 So.2d 863 (Fla. 1986) or the decision rendered by the Third District Court of Appeal in Harrelson v. State, 12 F.L.W. 192 (Fla. 3rd DCA Jan. 6, 1987) on the same point of law and therefore this Court is without jurisdiction.

THE DECISION RENDERED BY THE LOWER TRIBUNAL IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THIS COURT'S DECISION IN WHITEHEAD V. STATE, 498 So.2d 863 (Fla. 1986) OR THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN HARRELSON V. STATE, 12 F.L.W. 192 (Fla. 3rd DCA, Jan. 6, 1987) ON THE SAME POINT OF LAW AND THEREFORE THIS COURT LACKS JURISDICTION UNDER ARTICLE V, SEC. 3(b)(3)

The Petitioner contends that the lower tribunal's decision is in conflict with this Court's decision in Whitehead, supra, because this Court rendered Sec. 775.084, Fla. Stat. legally unenforceable.

The Respondent submits this is incorrect. The question of law decided by this Court in Whitehead was whether a trial judge could depart from a recommended guidelines sentence simply because the defendant was determined to be an habitual offender, and held it could not.

The District Court in the case sub judice held that the Habitual Offender Act could be employed to increase the maximum sentence authorized by law so that the recommended guidelines sentence called for on the basis of the Petitioner's prior record could in fact be imposed! Indeed, the lower tribunal said:

> Here, Myers' sentencing scoresheet recommended a 27-40 year convictions. Notwithstanding this, Myers was convicted of a third degree felony and according to Section 775.082, Florida Statutes in excess of five years. This is the statutory maximum allowed by the legislature unless a finding is made pursuant to Section 775.084 of habitual offender status, in which case

> a sentence of ten years is the maximum allowed. Myers was sentenced to ten years. As the trial court herein utilized the habitual offender statute the term of imprisonment recommended by the sentencing guidelines, we find no conflict with Whitehead.

12 F.L.W. at 104.

In no way did the lower tribunal use the Habitual Offender Act as an alternative to a guidelines sentence.

In Whitehead this Court said:

> [W]e cannot agree with the district court when it finds that habitual offender status is an adequate reason to depart from the recommended guidelines sentence. To the contrary, we hold that section 775.084 cannot operate as an alternative to guidelines sentencing because of the clear directives of section 921.01(4)(a). Nor can the habitual offender status remain viable as a reason for departure in light of our decision in Hendrix.
>
> Because the trial court used the habitual offender statute as its reasons for departing from the guidelines in sentencing Whitehead, we must remand with directions to the district court to return the matter to the trial court for resentencing in accordance with this opinion.

Nothing in the majority opinion even pretends to hold that the Habitual Offender Act has been repealed or has no legal operation within the Sentencing Guidelines Act. Only Justice Overton in his dissent concluded that was the effect of the majority opinion, and, of course, conflict jurisdiction may not be predicated on a dissenting opinion. Reaves v. State, 485 So.2d 829 (Fla. 1986).

Lastly, the Guidelines Act iself recognizes the interrelationship of the Habitual Offender Act in Rule 3.701 (d)(10) and the Committee Note thereto which provides:

> (d)(10) If any offender is convicted under an enhancement statute, the reclassified degree should be used as the basis for scoring the primary offense in the appropriate category. If the offender is sentenced under section 775.084 (habitual offender), the maximum allowable sentence is increased as provided by the operation of that statute. If the sentence is imposed departs from the recommended sentence, the provisions of paragraph (d)(11) shall apply.

It is absurd to suggest that the Habitual Offender Act has been repealed by the Guidelines Act specifically refers to it by direct reference thereto. Indeed, the result reached below is so clearly correct that no other logical conclusion could be reached.

The case of Harrelson, supra, consists of one simple paragraph and doesn't even speak to the question of law decided by the lower tribunal.

CONCLUSION

The question of law decided by the lower tribunal is distinctly different from the legal issue decided by this Court in Whitehead and therefore there can be no conflict between the two decisions. Accordingly, this Court is without jurisdiction to review this cause and the petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been forwarded by hand delivery to Ann Cocheu, Assistant Public Defender, Second Judicial Circuit, Post Office Box 671, Tallahassee, Florida 32302, on this 9th day of March, 1987.

Raymond L. Marky

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