IN THE SUPREME COURT OF FLORIDA

PAUL MYERS,

Petitioner,

v. CASE NO. 70,017

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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PETITIONER'S REPLY BRIEF ON THE MERITS

PRELIMINARY STATEMENT, STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Petitioner files the brief in reply to the brief of respondent, as to Issue I. Petitioner relies upon the recitations at pages 1-3 in his initial brief. Petitioner relies on the argument in his initial brief, pages 11-16, as to Issue II. In replying to Issue I, petitioner has attached hereto as an appendix some correspondence from the Jacksonville Public Defender, since respondent has been permitted to inject non-record materials into its brief.

ARGUMENT

ISSUE I

THE HABITUAL OFFENDER STATUTE IS NOT OPERATIVE FOR THE PURPOSE OF EXTENDING THE PERMISSIBLE MAXIMUM PENALTY.

Petitioner has seized upon a letter written by three assistant public defenders in Jacksonville to the Chief Justice of this Court as evidence that Whitehead v. State, 498 So.2d 863 (Fla. 1986) has not implicitly repealed the habitual offender statute as it relates to a sentence imposed under the sentencing guidelines. Respondent has not realized that there is a difference between politics and the law. Petitioner will seek to show that there is a difference.

As evidenced by the letter from William P. White to the undersigned, dated August 5, 1987, attached hereto as an appendix, the decision to write the Chief Justice on November 14, 1986, was a political rather than a legal one. Mr. White and his staff were concerned that the Legislature would react to this Court's Whitehead decision by repealing the guidelines, which, in the view of many lawyers representing defendants on the trial level, would be a step backward because the guidelines generally make a particular defendant's sentence more predictable.[1] Mr. White and his staff were concerned that the

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[1]Appellate lawyers who represent defendants who receive departure sentences do not share the view of their trial brethren.

Legislature would heed the call of Jacksonville State Attorney Ed Austin and abolish the guidelines.

Mr. White advocated the survival of the habitual offender statute in a limited setting as a compromise position to satisfy the Legislature and appease those who wanted to trash the guidelines. Those members of this Court who have observed the legislative process across the street undoubtedly quickly realized, if they did not know already, that the process is a highly political one. Bills are passed through compromise. One legislator's opinion rarely is reflected in the final bill which becomes law. Rather, it reflects the collective view of all of the members and frequently results from compromise and political horse-trading.

It is difficult to understand why respondent would call such attention to, and rely so heavily upon, a political letter written by three lowly assistant public defenders, who are not even elected officials.[2] Perhaps the undersigned should write a letter to the Tallahassee Democrat and give his opinion that the death penalty has no place in our enlightened society. Then that expression of political opinion could be cited in this Court as highly persuasive authority in the next capital

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[2]The cover letter from assistant state attorney Larry Kaden to former assistant attorney general Ray Marky is even more offensive, for it was Mr. Kaden who opined in Atty. Gen. Opin. 84-5 that the guidelines were procedural rather than substantive, a view unanimously rejected in Miller v. Florida, # 86-5344 (U.S. June 9, 1987).

appeal, and this Court would be so swayed by it so as to declare the death penalty to be unconstitutional. The undersigned wishes it were so but thinks not.

Certainly Mr. White's and his colleagues' political arguments were not intended to become transformed into a legal position which would hurt the interests of one of their clients.[3] The role of a lawyer in representing a client in court is a legal matter, not a political one. The same should be true of this Court. In short, the politically-motivated letter, which unfortunately has been placed before this Court, should not have an adverse effect upon the question of law pending before this Court.

Turning to the Legal issue, this Court will recall that the guidelines Commission proposed that the following language be added to the committee note to Fla. R. Crim. P. 3.701 (d)(11):

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

In reviewing this proposal and in submitting the revisions to the Legislature, this Court flatly rejected it. Florida Rules of Criminal Procedure, etc., 12 FLW 162, 164 (Fla. April 2,

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[3]Actually, two defendants, who were represented by the Jacksonville Public Defender at their sentencing hearings, are presently pending before this Court on the same question of law as that presented in the instant case. See, Holmes v. State, # 70,269 and Winters v. State, # 70,164.

1987),[4] although Justice Grimes thought it had some merit. Id. at 168-69.

The Legislature has met since the Whitehead opinion was issued and saw no reason to overrule it. This is the first year that the Legislature has gone beyond the recommended revisions suggested by this Court and has enacted rule changes which were not proposed by the Commission or by this Court. Ch. 87-110, sec. 2, Laws of Florida (defining the scope of appellate review of departure sentences; stating that departure may be based upon excessive physical or emotional trauma; and codifying the "escalating pattern of criminal conduct" as a reason for departure). Thus, if the Legislature was concerned about the effect of Whitehead, it could have added another section to Ch. 87-110 to say that the habitual offender statute has survived the adoption of the guidelines. The Legislature did no such thing, wisely realizing that this Court has the last word in determining what statutes are so repugnant to each other so as to require this Court to find existing one to be repealed by implication by the later enactment.

It seems obvious that Whitehead did exactly that, especially when one reads Justice Overton's concurring opinion. As pointed out in the initial brief, at page 6, this Court has adhered to Whitehead in at least seven subsequent decisions. Petitioner believes that the Whitehead decision is sound,

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[4]See also the subsequent opinion dated June 29, 1987.

because it recognizes the conflicting policies underlying both the habitual offender statute and the guidelines cannot be reconciled, as much as one tries to do so. The habitual offender statute has been pronounced dead by this Court and should not be resurrected under any circumstances.

CONCLUSION

Based upon the foregoing arguments, as well as those presented in the initial brief, petitioner requests that this Court reverse his habitual offender declaration and his sentence and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. William A. Hatch, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Paul Myers, #072083, Post Office Box 1100, Avon Park, Florida, 33825, this 21 day of August, 1987.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER