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IN THE SUPREME COURT OF FLORIDA

HORACE LEE HOLMES,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

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CASE NO. 70,269

PETITIONER'S BRIEF ON THE MERITS

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HORACE LEE HOLMES, :
Petitioner, :
v. : CASE NO. 70,269
STATE OF FLORIDA, :
Respondent. :

PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Horace Lee Holmes was the defendant in the trial court and appellant before the District Court of Appeal, First District. He will be referred to in this brief as "petitioner," "defendant," or by his proper name. Reference to Volume I of the record on appeal, containing the pleadings and orders filed in this cause, will be by use of the symbol "R" followed by the appropriate page number in parentheses. Reference to Volumes II, III, and IV of the record on appeal, containing transcripts, will be by use of the symbol "T" followed by the appropriate page number in parentheses. Filed simultaneously with this brief is an appendix containing a copy of the opinion issued by the lower tribunal in this case, Holmes v. State, 502 So.2d 1302 (Fla. 1st DCA 1987), as well as other matters pertinent to the case, which will be referred to in this brief by the symbol "A" followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

By information it was alleged that petitioner, on November 2, 1985, committed the offense of burglary of a structure, contrary to Section 810.02, Florida Statutes (1985), a third degree felony punishable by no more than five years in prison (R-1-2). Petitioner was convicted as charged by a jury (R-24).

At sentencing, the trial court found petitioner to be a habitual felony offender, thus increasing petitioner's exposure from five to ten years. Petitioner was adjudged guilty and sentenced to ten years in prison, with 132 days credit. This ten year sentence exceeded the recommended guidelines sentence of 4-1/2 to 5-1/2 years (R-64-72).

Notice of taking an appeal to the District Court of Appeal, First District, was timely filed (R-74), petitioner was adjudged insolvent (R-73), and the Public Defender of the Second Judicial Circuit was designated to handle this appeal.

On February 23, 1987, the District Court of Appeal, First District, ruled that under Whitehead v. State, 498 So.2d 863 (Fla. 1986), basing the departure on the defendant's having been classified a habitual felony offender was invalid. The court also ruled that the trial court erred in deeming petitioner a habitual felony offender because the trial court had failed to make certain findings mandated by the statute. The appellate court went on to opine, however, that on resentencing petitioner could receive up to the 5-1/2 year guidelines recommended limit if the trial court could make the findings

required by the habitual felony offender statute, and in that event petitioner could also receive a sentence of up to ten years if the trial court could recite clear and convincing reasons for departure with respect to factors other than those required for habitual felony offender treatment (A-1-2).

Notice to invoke the discretionary jurisdiction of this Court was timely filed March 25, 1987 (A-3). By order dated June 25, 1987, this Court entered an order accepting jurisdiction (A-4).

III SUMMARY OF ARGUMENT

Petitioner argues that this Court in Whitehead, supra, eliminated the habitual felony offender statute as an alternative sentencing scheme to the sentencing guidelines. This Court should therefore rule that the habitual felony offender statute is not available to extend the sentence past the statutory maximum applicable without regard to the habitual felony offender statute.

IV ARGUMENT

ISSUE PRESENTED

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

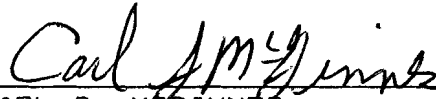
The issue presented in this appeal is identical to Issue I in the case of Myers v. State, Case No. 70,017. The merit brief filed in Myers is included in the appendix to this brief (A-5-27). The undersigned agrees fully with the arguments made and authorities cited in that brief. Accordingly, petitioner incorporates by reference as if fully set out herein the argument made in Issue I of Petitioner's Brief on the Merits filed in Myers v. State, Case No. 70,017 (A-13-19).

V CONCLUSION

Petitioner requests this Court to quash the opinion below to the extent it recognized any viability of the habitual offender statute, and remand the cause to the trial court with directions to resentence petitioner to no more than five years in prison.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits has been furnished by hand delivery to Mr. Gregory C. Costas, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Horace Lee Holmes, #034474, Post Office Box 158, Lowell, Florida, 32662, this 16th day of July, 1987.



CARL S. MCGINNES