5-26

IN THE SUPREME COURT OF FLORIDA

ALBERT HESTER,

Petitioner,

v.

CASE NOS. 70,349 and
70,350

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

ALBERT HESTER,

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v. CASE NOS. 70,349 and 70,350

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner, Albert Hester, was the defendant in the trial court, appellant in the First District Court of Appeal and will be referred to herein by his name or as petitioner. Respondent, the State of Florida, was the prosecuting authority.

By order of this Court, the cases were consolidated. Case 70,349 was BN-252 in the District Court. The record therein consists of five volumes and a supplemental transcript. Volume one is a sequentially numbered collection of pleadings to which reference will be by "R" and the appropriate page number in parentheses. Volumes two through five are transcripts, sequentially numbered to one another but not to the first volume. References will be by "T" and the appropriate page numbers in parentheses.

Case 70,350 was BN-253 in the District Court. The record consists of five volumes, the first of which is a consecutively numbered collection of pleadings to which reference will be by

"R-II" and the appropriate page number. The remaining four volumes of sequentially numbered transcripts will be referenced to as "T-II" and the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND THE FACTS

In 70,349 petitioner was charged by information with attempted first degree murder, armed robbery, and possession of a firearm by a convicted felon (R-5), the latter charge being severed and not a part of this cause (R-58, 60). After a jury trial (T-I-277), petitioner was convicted of attempted second degree murder with a firearm and armed robbery with a firearm (R-69-70).

In 70,350 petitioner was charged by information with three counts of armed robbery, one count of attempted first degree murder, and one count of aggravated assault with a firearm (R-11-75-76). A jury convicted him of attempted robbery with a firearm, attempted second degree murder with a firearm, two counts of armed robbery, and aggravated assault. (R-II-97-102)..

The state had filed a Notice of Intent to Seek Enhanced Penalty as to both cases (R-56, R-II-58), and a hearing was conducted on both May 15, 1985 (T-280, T-II-235). The state called Deputy Donald Pickett of the Jacksonville Sheriff's office as an expert witness in fingerprint identification. He compared the known prints of Hester with those on prior judgments and sentences for a burglary and grand theft in 1979 and a burglary in 1981, finding the prints matched. No other evidence was introduced (T-293-315, T-II-235-71, R-90-98, R-II-108-19). The trial judge ruled petitioner was an habitual offender (T-315, T-II-271).

Although the presumptive guideline range was 22-27 years (R-95, R-II-128), the judge imposed two concurrent life sentences

without parole in 70,349 (R-90-98) and three concurrent life sentences and concurrent thirty and ten year sentences without parole in 70,350 (R-II-120-129). His guideline departure order read:

> 1. As set forth by separate Order, the Defendant has been declared a habitual felony offender by this Court.
> 2. The Defendant is a career criminal and is non-rehabilitative. The Defendant's criminal history contained in the pre-sentence investigation report indicates an escalated pattern of criminality since 1973. The Defendant is currently 24 years old, which indicates prior criminal activity since age 12 years, and contributes through the current offenses by which he stands convicted.

(R-95, R-II-128, 131).

On appeal the First District found a sufficient factual basis for the habitual offender determination, but acknowledged such a reason was improper for guidelines departures. The court also disapproved "career criminal" and "non-rehabilitative" as departure reasons, upholding "escalated pattern of criminality." Because the trial court included the language "any one of the reasons set forth well constitutes clear and convincing reasons for exceeding the recommended guidelines sentence," (R-98, R-II-131), the appellate court affirmed the departure. However it certified the identical question as being one of great public importance:

> Is the Habitual offender statute still operative for the purpose of extending the permissible maximum penalty and imposing a departure sentence beyond the guidelines?

Hester v. State, 12 FLW 741 (Fla. 1st DCA March 11, 1987) and Hester v. State, 12 FLW 744 (Fla. 1st DCA March 11, 1987).

This Court accepted jurisdiction of April 13, 1987.

III SUMMARY OF ARGUMENT

In Issue one petitioner argues this court in Whitehead v. State, 498 So.2d 863 (Fla. 1986), eliminated the habitual offender statute as an alternative sentencing scheme to the sentencing guidelines. Because of that, this Court should answer the certified question in the negative; the habitual offender statute is not available to extend the permissible maximum sentence.

Secondly petitioner argues that should the Court answer the certified question in the affirmative, the sentences should be reversed and remanded. The trial court failed to articulate any specific facts to justify the habitual offender determination.

Additionally petitioner challenges the "boiler plate" language used by the sentencing judge that he would have departed from the recommended guidelines sentence for any one of the reasons given. The inclusion of such language in a departure order is contrary to the ideal that a trial judge will conscientiously weigh all relevant factors in determining an appropriate sentence.

IV ARGUMENT

ISSUE I

IS THE HABITUAL OFFENDER STATUTE STILL OPERATIVE FOR THE PURPOSE OF EXTENDING THE PERMISSIBLE MAXIMUM PENALTY AND IMPOSING A DEPARTURE SENTENCE BEYOND THE GUIDELINES?

This Court concluded that the habitual offender statute cannot be used as a basis for departure from a recommended guidelines sentence nor can it be utilized as an alternative to guidelines sentencing. In Whitehead v. State, 498 So.2d 863, 864-65 (Fla. 1986), this Court 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. The habitual offender statute was originally enacted as a scheme to impose an enhanced sanction upon those defendants who had committed other crimes in the past and posed a danger to society in the future thereby evincing an increased need for a lengthier term of incarceration.
>
> * * * *
>
> Section 921.011(4)(a), Florida Statutes (1985), requires that:
>
> > The guidelines shall be applied to all felonies, except capital felonies and life felonies, committed prior to

> October 1, 1983, for which sentencing occurs after such date when the defendant affirmatively selects to be sentenced pursuant to the provisions of this act. [Emphasis added].

This language is explicit and unambiguous. The only exceptions to the sentencing guidelines scheme are capital felonies and offenses committed prior to October 1, 1983 in which the defendant does not affirmatively select to be sentenced under the guidelines. The statute does not exempt defendants sentenced under the habitual offender statute.

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 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 exception for a guidelines sentence.

[Footnote omitted]

The Court further noted:

> that the habitual offender statue was enacted when parole was available. Under the guidelines, however, prisoners are not eligible for release on parole. See section 921.001(8), Florida Statutes (1985). If we permitted application of the enhanced penalties available under the habitual offender statute to sentences without parole, "statutory" habitual offenders would receive sentences which are harsher than those the legislature originally envisioned in enacting

> the habitual offender statute. Moreover, such sentences would be disproportionately harsh when compared to the sentences of other offenders who have committed similar crimes and have similar criminal records but were not subjected to habitual offender proceedings. Such a result would be contrary to the explicit purpose of the sentencing guidelines which is "to eliminate unwarranted variation in the sentencing process." See Fla. R. Crim. P. 3.701(b).

Id. at 866.

Since Whitehead was issued, this Court has repeatedly reaffirmed its holding. E.g. Payne v. State, 498 So.2d 413 (Fla. 1986); Crapps v. State, 498 So.2d 415 (Fla. 1986); State v. Vicknair, 498 So.2d 416 (Fla. 1986); Ferguson v. State, 498 So.2d 867 (Fla. 1986); State v. Moultrie, 12 FLW 98 (Fla. February 5, 1987); State v. Teague, 12 FLW 116 (Fla. February 26, 1987); Massard v. State, 12 FLW 150 (Fla. March 26, 1987).

Four of the five District Courts of Appeal have had no difficulty in understanding the plain meaning of Whitehead. "The habitual offender statute appears no longer available as a sentencing tool" and "cannot be preserved in the context of the sentencing scheme provided by the guidelines." Duval v. State, 500 So.2d 570, 571 (Fla. 2d DCA 1986). The statute was "effectively subsumed by the sentencing guidelines," Smith v. State, 12 FLW 710, 711 (Fla. 2d DCA March 3, 1987) and is "not an alternative to guidelines sentencing." Whipple v. State, 12 FLW 762 (Fla. 2d DCA March 13, 1987); Harrelson v. State, 499 So.2d 939 (Fla. 3d DCA 1987); Jones v. State, 501 So.2d 178, 179 (Fla. 4th DCA 1987). The "legislature's adoption of the guidelines effectively superseded section 775.084," which now "cannot be

considered as providing an exemption for a guidelines sentence." Roseman v. State, 497 So.2d 986 (Fla. 5th DCA 1986). Accord e.g. Randall v. State, 497 So.2d 1326 (Fla. 4th DCA 1986); Albritton v. State, 497 So.2d 1329 (Fla. 4th DCA 1986); Canty v. State, 497 So.2d 1330 (Fla. 4th DCA 1986); Robinson v. State, 497 So.2d 1335 (Fla. 4th DCA 1986); Morganti v. State, 498 So.2d 557 (Fla. 4th DCA 1986); Neeley v. State, 498 So.2d 690 (Fla. 5th DCA 1986); Dugues v. State, 499 So.2d 7 (Fla. 4th DCA 1986); Fleming v. State, 499 So.2d 38 (Fla. 2d DCA 1986); Gonzalez v. State, 499 So.2d 50 (Fla. 3d DCA 1986); Paschall v. State, 501 So.2d 1370 (Fla. 2d DCA 1987).

Initially the First District Court of Appeal acknowledged Whitehead.

> The Florida Supreme Court has recently held that habitual offender status does not provide an exemption to guidelines sentencing nor is it an adequate reason to depart from the recommended sentence.

Hill v. State, 498 So.2d 544, 545 (Fla. 1st DCA 1986). Further, "the objectives and considerations of the habitual offender statute are fully accommodated by the sentencing guidelines."Strong v. State, 498 So.2d 653 (Fla. 1st DCA 1986). Accord Sharp v. State, 497 So.2d 736 (Fla. 1st DCA 1986); Smith v. State, 499 So.2d 912 (Fla. 1st DCA 1986); Watson v. State, 11 FLW 2504 (Fla. 1st DCA Dsc.2 1986); Bell v. State, 11 FLW 2554 (Fla. 1st DCA December 8, 1986) [on rehearing after per curiam affirmance of November 3, 1986]; Johnson v. State, 12 FLW 713 (Fla. 1st DCA March 5, 1987).

However the First District recently has sought to recede from the clear meaning of Whitehead. Compare Walker v. State, 499 So.2d 884, 886 (Fla. 1st DCA 1986) ["the habitual offender statute does not provide an alternative to sentencing under the guidelines."] with Myers v. State, 499 So.2d 895, 898 (Fla. 1st DCA 1986) ["In our opinion, Whitehead does not repeal section 775.084."][1] Winters v. State, 500 So.2d 303, 305 (Fla. 1st DCA 1986) [affirming the increase of a third degree felony maximum sentence from five to ten years by use of the habitual offender determination and certifying the question: Is the habitual offender statute still an effective basis on which to exceed the statutory maximum as long as the sentence imposed does not exceed the guidelines recommendation?][2] and Holmes v. State, 502 So.2d 1302 (Fla. 1st DCA 1987) [permitting the increase in maximum allowable sentence from five to ten years on a third degree felony due to a habitual offender finding];[3] and Avery v. State, 12 FLW 999 (Fla. 1st DCA April 10, 1987):

> [B]ecause of the questionable vitality of the habitual offender statute in light of some of the language in Whitehead, we certify the following question as being one of great public importance: Does a trial court retain the authority to classify and sentence a defendant as a habitual offender,

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[1]Currently appellant is seeking discretionary review under Case No. 70,017.

[2]This question is currently pending in this Court under Case No. 70,164.

[3]Appellant has sought discretionary review under Case No. 70,269.

following the adoption of guidelines sentencing?]

Cf. Rasul v. State, 12 FLW 1065 (Fla. 2d DCA April 15, 1987) ["It now appears that the supreme court has considered and rejected the suggestion that the habitual offender act can be utilized [where] the permitted guidelines range exceeds the statutory maximum."]

Recently this Court has rejected suggestions it recede from Whitehead. In Florida Rules of Criminal Procedure re Sentencing Guidelines (Rules 3.701 and 3.988) 12 FLW 162, 164 (Fla. April 2, 1987), the Court declined "to revise committee note to rule 3.701(d)(11) as t relates to the Habitual Offender Act" which would revive the language in the committee note 3.701(d)(10) ["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"], specifically rejected by Whitehead.

Based on the foregoing cases and authority, petitioner concludes the certified question should be answered, "No." This Court should reverse petitioner's sentences and remand for resentencing under the guidelines process in which the statutory maximums are not extended by the habitual offender statute.

ISSUE II

THE TRIAL COURT ERRED IN SENTENCING PETITIONER AS A HABITUAL OFFENDER BECAUSE THERE WERE NO SPECIFIC FACTUAL FINDINGS PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT THE EXTENDED SENTENCE WAS NECESSARY FOR THE PROTECTION OF THE PUBLIC AND EVEN IF THAT STANDARD WERE MET, IT CONFLICTS WITH THE HIGHER STANDARD FOR DEPARTURES SET FORTH IN STATE V. MISCHLER[4]

Assuming arguendo, that the Court answers the certified question in the affirmative, petitioner contends that the sentencing orders adjudging him to be a habitual offender failed to make the specific factual findings mandated by the statute, let alone being proven beyond a reasonable doubt.

Section 775.084, Florida Statutes (1985) authorizes extended terms of imprisonment for habitual felony offenders where "it is necessary for the protection of the public to sentence the defendant to an extended term." Pursuant to section 775.084(3)(d):

> Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.

Case law requires that the court find the extended sentence necessary for the protection of the public from further criminal

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[4]Once this Court acquires jurisdiction, it has the authority to consider the entire case on the merits. Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982); Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977). See also Bell v. State, 394 So.2d 979, 980 (Fla. 1981); Zirin v. Charles Pfizer and Co., 128 So.2d 594 (Fla. 1961).

activity and that this finding include the underlying facts and circumstances which the trial judge relied on in making that finding. E.g. Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979); Eutsey v. State, 383 So.2d 219 (Fla. 1980). The trial judge must further "make specific findings of fact as to why it is necessary for the protection of the public to sentence appellant to an extended term." [Emphasis by the Court]. Holt v. State, 472 So.2d 551 (Fla. 1st DCA 1985). Bare, conclusory findings are insufficient under section 775.084. Walker v. State, 465 So.2d 452 (Fla. 1985). There must be specific findings other than prior record or a general statement that the public must be protected. Bogan v. State, 489 So.2d 157 (Fla. 2d DCA 1986); Watson v. State, 492 So.2d 831 (Fla. 5th DCA 1986); Dean v. State, 493 So.2d 1114 (Fla. 1st DCA 1986); Brown v. State, 497 So.2d 887 (Fla. 5th DCA 1986); Avery v. State, supra.

Petitioner argues that state offered no evidence on which the court could make a specific finding that the protection of the public required that he be sentenced to an enhanced penalty. Admittedly the state's evidence at the May 15, 1986, hearing did reveal that Hester had a prior record. Since he did not contest that the convictions were more than five years prior to this sentencing or that he received a pardon to this sentencing or that he received a pardon or post-conviction relief, those elements were established. However, to adjudge a person as a habitual felony offender, those four threshold criteria had to be established. See Mangram v. State, 392 So.2d 596 (Fla. 1st DCA 1981).

Petitioner contends that these enhanced sentences must be reversed because of failure to meet the second prong of section 775.084, the specifics - the whys to conclude it was necessary for the protection of the public.

At best the trial judge held that because Hester had a felony record he should be deemed an habitual offender. In reversing defendant's extended sentence, the Fourth District Court of Appeal stated:

> It is quite clear that not every subsequent felony offender must automatically be sentenced as a recidivist under section 775.084, Florida Statutes 1975. A subsequent felony offender may be sentenced as a recidivist only if the court makes various findings in accordance with section 775.084. Such findings must be based upon some evidence.

Chukes v. State, 334 So.2d 289, 290 (Fla. 4th DCA 1976). The court further noted that to justify an extended sentence, the trial judge must "make findings of fact supported by the record which justify such sentenced." Id. at 291.

Merely relying on petitioner's prior record, speculating that he will continue in criminal activity, does not seem to meet the 'specific' test. See Fleming v. State, 480 So.2d 715 (Fla. 2d DCA 1986); Weston v. State, 452 So.2d 95, 96 (Fla. 1st DCA 1984), Accord Scott v. State, 446 So.2d 261 (Fla. 2d DCA 1984); Cavallaro v. State, 420 So.2d 927 (Fla. 2d DCA 1982); Watson v. State, supra; Williams v. State, 492 So.2d 1388 (Fla. 1st DCA 1986).

In Adams v. State, supra at 59, the First District held the trial court's findings were "insufficient on their fact to show

that the public requires Adams' extended imprisonment for its protection against this further criminal activity," despite being convicted of armed robbery in 1971, violating parole by possessing and using heroin, and being arrested for two other crimes. Similarly, in Scott v. State, 423 So.2d 986 (Fla. 3d DCA 1982), the court held the state's findings that the enhanced sentence was "necessary for the protection of society" to be "woefully short of what is required by statute," and ordered resentencing. Accord, Mangram v. State, supra.

Unlike the situation in Myers v. State, supra, and Winters v. State, supra, the 22-27 year presumptive guidelines score did not exceed the statutory maximum. Instead the trial court used the habitual offender reclassification to exceed the guidelines and impose a life sentence without parole, the very danger noted in Whitehead v. State, supra at 866 as quoted in Issue I, supra at 8-9.

Because petitioner's sentences constitute a guidelines departure, the reasons used must be proven beyond a reasonable doubt. State v. Mischler, 488 So.2d 523 (Fla. 1986). However, reasons supporting a habitual offender finding need only meet the "preponderance of the evidence." Section 775.084(3)(d), Florida Statutes (1985). The standards then for a guidelines departure and a habitual offender determination are irreconcilably inconsistent.

The sentencing guidelines commission recommended a retreat from both Whitehead v. State, supra, and State v. Mischler, supra. This Court specifically rejected the invitation to reduce

the level of proof for a departure to a "mere preponderance" and to include habitual offender as a departure reason. Florida Rules of Criminal Procedure re Sentencing Guidelines (rules 3.701 and 3.988), supra at 163, 164. Clearly this Court did not intend for the habitual offender statute to survive the guidelines as a sentencing scheme.

Under section 921.011(4)(a), Florida Statutes (1985), the guidelines provide an omnibus sentencing scheme which applies to all felonies except capital offenses and precludes parole. There is no rational basis to allow reasons which ordinarily would not meet the required burden of proof under the guidelines to be used for habitualization. This creates an equal protection violation in that prisoners sentenced under the guidelines are afforded more protection in the form of a higher burden of proof than prisoners sentenced under the habitual offender statute. See U.S. Constitution, Amendment XIV; Florida Constitution, Article I, section 2.

Additionally, there is no parole from guidelines sentences, yet the habitual offender scheme contemplated the effect of parole practices on the sentences inmates actually served. Petitioner received a sentence extended by the habitual offender statute, in excess of the guidelines, but without the ameliorating effect of parole contemplated by the statute.

Petitioner submits that the habitual offender status in both cases should be vacated and the causes remanded for resentencing under the guidelines.

ISSUE III

THE TRIAL COURT'S STATEMENT AT THE TIME OF DEPARTURE FROM THE SENTENCING GUIDELINES THAT IT WOULD DEPART FOR ANY ONE OF THE REASONS GIVEN, REGARDLESS OF WHETHER BOTH VALID AND INVALID REASONS ARE FOUND ON REVIEW, DOES NOT SATISFY THE STANDARD IN ALBRITTON V. STATE.

The First District disapproved of five of the six reasons given by the trial judge for departure, upholding only "escalating pattern of criminality." Since the trial judge included the language:

> This Court finds that any one of the reasons set forth well constitutes clear and convincing reasons for exceeding the recommended guidelines sentence[.,.]

(R-98, R-II-131)

and further stated orally

> I would have a difficult time sleeping and feeling [sic] I would be derelict in my duties to the people of Duval County and the State of Florida to allow Mr. Hester to be on the streets for any length of time whatsoever. . . he constitutes a clear and present danger to everybody on the streets as far as I'm concerned[.,.]..[5]

[T-314-15]

the District Court was "persuaded beyond a reasonable doubt that the trial court would impose the same sentence if any of the above six reasons were found to be valid." Hester v. State, 12 FLW at 742. The Court cited to Albritton v. State, 476 So.2d 158

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[5]This statement, however referred to the habitual offender determination, not the guidelines departure.

(Fla. 1985), presumably applying the test established by this Court:

> [W]hen a departure sentence is grounded on both valid and invalid reasons . . . the sentence should be reversed and the case remanded for resentencing unless the state is able to show beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence.

Id. at 160.

Subsequent to Albritton, this court held in State v.Mischler, supra, that the inclusion of one of three prohibited categories for departure would cause reversible error:

> "A reason which is prohibited by the guidelines themselves can never be used to justify departure. Santiago v. State, 478 So.2d (Fla. 1985). Factors already taken into account in calculating the guidelines score can never support departure. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). A court cannot use an inherent component of the crime in question to justify departure."

Id. at 525.

In Rousseau v. State, 489 So.2d 828 (Fla. 1st DCA 1986), the First District Court of Appeal held that State v. Mischler, applied together with Albritton, called for an automatic reversal if one of the prohibited categories was involved.[6] Since the habitual offender status was disapproved as a Hendrix violation,

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[6] Rousseau v. State is presently pending in this Court, Case No. 68,973, sub nom. State v. Rousseau.

Whitehead v. State, supra at 866, petitioner argues that his sentences must be reversed for resentencing.

Petitioner acknowledges that his Court has approved "escalating pattern of criminality" as a valid departure reasons. See Keys v. State, 500 So.2d 134 (Fla. 1986). However, petitioner believes that such a reason does violate Hendrix v. State, supra, prohibiting use of prior criminal records factored into guidelines calculations as reasons to depart. Such "double dipping" was disallowed in habitual offender determination. Whitehead v. State, supra at 866. It should similarly be inappropriate for "escalating pattern of criminality."

Assuming arguendo, that such a reason will be upheld in the instant cases, petitioner contends the District Court misapplied Albritton v. State, supra, and State v. Mischler, supra. The "boiler plate" language that the trial court would depart for any one reason has been disapproved by this Court, and should be disallowed sub judice.

As part of the package of revisions to the guidelines rules submitted by the guidelines commission to this Court in 1985, to be ratified by the legislature in 1986, was the following:

> "Expand the committee note to (d)(11) by the addition of the following sentence:
>
> 'Where deemed appropriate, the sentencing courts may include the following language within the written statement of articulating the reasons for departure: if one or more of the foregoing reasons for departure are determined, upon appellate review, to be impermissible, it would still be the decision of this Court to depart from the guidelines recommended sentence, upon the basis of the remaining permissible reason or reasons,

> and to impose the same sentence herein announced.'"
>
> The Florida Bar re "Rules of Criminal Procedure" (Sent3Sentencing Guidelines 3.701, 3.988), 482 So.2d 311, 312 (Fla. 1985).

This Court very appropriately noted the inherent danger of approving such language:

> "There is too great a temptation to include this phraseology in all departure sentences and we do not believe it appropriate to approve boiler plate language. The trial judge must conscientiously weigh relevant factors in imposing sentences; in most instances an improper inclusion of an erroneous factor effects an objective determination of an appropriate sentence."

Id. at footnote.

The observation made by this Court in 1985 is still valid today. In Casteel v. State, 498 So.2d 1249 (Fla. 1986), this Court reiterated the "harmless error" burden the state must carry under the Albritton decision in upholding a departure where one or more reasons are found to be invalid, and attempted to give some guidance to the appellate courts in this regard.

In the latest recommendations from the guidelines commission, it suggested where multiple reasons to support a departure are given, the sentence should be upheld where at least one clear and convincing reason is upheld on appeal. This Court reaffirmed the Albritton test that the departure may be sustained only if it is clear beyond a reasonable doubt that the invalid reasons would not and did not affect the sentence. Florida Rules of Criminal Procedure re Sentencing Guidelines (rules 3.701 and

3.988, supra at 163. The Court further noted it was the better practice to require resentencing.

At present the First District has thrice certified the question does a trial court's statement made at sentencing that it would depart for any one of the reasons given satisfy the Albritton standard?[7] Although such question was not certified in the instant case, the District Court affirmed the departure due to the trial court "boiler plate" language.

If criminal defendants sentenced under the guidelines are to have any meaningful review this practice must be disapproved. To do otherwise would effectively overrule Albritton v. State, supra, and to encourage a "cart before the horse" methodology. That is, a trial judge would be tempted to decide upon the question of departure and then enumerate as many reasons as possible without conscientiously weighing and evaluating each of the purported reasons. An inclusion of "boiler plate language" would tell the appellate courts, "Don't bother scrutinizing my reasons, because even if you reverse me, the defendant will get the same sentence." Such a result would be an easy solution to the District Court's dislike of the guidelines, but would result in a mockery of appellate review.[8]

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[7] Graffis v. State, Case No. 69,800; Reichman v. State, Case No. 69,801; and Van Tassell v. State, Case No. 69,871.

[8] Judge Nimmons of the First District noted that 17% of the total opinions written by appellate Courts in early 1986 were guidelines opinions. Williams v. State, 484 So.2d 71 N.1 (Fla.

(Footnote Continued)

It is hard to imagine that this Court would sanction a principle which would completely fly in the face of the careful and considered analytical approach which this Court has mandated in Albritton, Mischler, and Casteel. That is undoubtedly, however, what will happen if this Court automatically allows the boiler plate language. If a trial court lists 100 reasons for departure, 99 of which are determined to be invalid on review in the district court of appeal, the inclusion of the above language would assure an affirmance.

It must be presumed that trial judges will "conscientiously weigh relevant factors in imposing sentences," and it must be presumed that "an improper inclusion of an erroneous factor effects an objective determination of an appropriate sentence."

Theoretically a trial judge could conscientiously weigh all relevant factors and still determine that he would depart based upon any one reason. The problem is, as this Court had noted, the temptation is just too great to include such a "catch all" statement in any departure sentence, and the results on effective appellate review of departure sentences would be disastrous.

(Footnote Continued)
1st DCA 1986). Judge Upchurch of the Fifth District expressed similar displeasure, noting that the Courts had filed 750 guidelines opinions. Bullock v. State, 492 So.2d 857 (Fla. 5th DCA 1986). Similarly the District Courts were unhappy with the Albritton test and continued to certify the same question and criticize the test. See e.g. Ochoa v. State, 476 So.2d 1348 (Fla. 2d DCA 1985); Nixon v. State, 494 So.2d 222 (Fla. 1st DCA 1986).

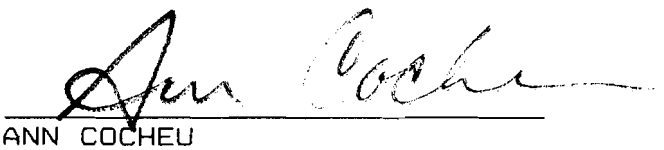
Petitioner concludes his sentences should be reversed and remanded for resentencing.

V CONCLUSION

Wherefore petitioner urges this Court to answer the certified question in the negative and not permit the use of the habitual offender status to extend maximum sentences; he requests a resentencing pursuant to the guidelines without consideration of the habitual offender statute; and he asks this Court to reject the trial court's use of "boiler plate" language.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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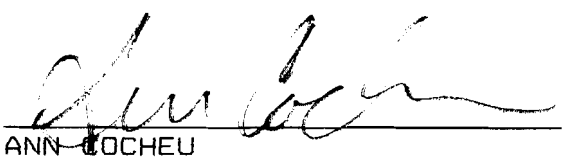
CERTIFICATE OF SERVICE

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, Albert Hester, #069208, Cross City Correctional Institution, Post Office Box 1500, Cross City, Florida, 32628, on this 15 day of ~~April~~ May 1987.



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